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New York Supreme Court

Appellate Division—First Department

TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner-Appellant-Cross-Respondent-Respondent,

-against-

WN PARTNER, LLC, NINE SPORTS HOLDING, LLC and WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Respondents-Respondents-Cross-Appellants-Appellants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICUS CURIAE* E. LEO MILONAS, ESQ. IN SUPPORT OF RESPONDENTS

DAVID G. KEYKO
PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, New York 10036
(212) 858-1000
eleo.milonas@pillsburylaw.com
david.keyko@pillsburylaw.com

Attorneys for Amicus Curiae E. Leo Milonas, Esq.

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-and-

THE OFFICE OF COMMISSIONER OF BASEBALL and
THE COMMISSIONER OF MAJOR LEAGUE BASEBALL,

Respondents-Respondents-Cross-Appellants,

-and-

THE BALTIMORE ORIOLES BASEBALL CLUB and
BALTIMORE ORIOLES LIMITED PARTNERSHIP, in its capacity
as Managing Partner of TCR Sports Broadcasting Holding, LLP,

Nominal Respondents-Appellants-Cross-Respondents-Respondents.

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INTEREST OF AMICUS CURIAE

Amicus curiae E. Leo Milonas, Esq.[1] has been deeply involved in the alternative dispute resolution process and the interface between that process and the courts for almost five decades. This involvement spans the twenty-six years that he was a judge—Mr. Milonas was a trial judge, appellate judge, and Chief Administrative Judge of the State of New York—and his time in private practice. Mr. Milonas has participated in hundreds of individual arbitrations and mediations. He is a panel member of the American Arbitration Association and CPR Institute for Dispute Resolution. He also has looked at alternative dispute resolutions from a policy standpoint. As President of the Association of the Bar of the City of New York, he oversaw various committees that were tasked with improving the alternative dispute resolution process. Since 1999, he has been a member of the Pre-Argument Conference Program, Appellate Division First Department, which handles the mediation of cases that are before the First Department on appeal. In 2013, he became and continues to be a member of the Chief Judge's Commercial Division Advisory Council, which has looked at the use of alternative dispute resolution by the Commercial Division Courts. He has been a member, since 2010, of the Chief Judge's Task Force to Expand Access to Civil Legal Services, which has considered

[1] Partial funding for this submission was provided by three sports leagues that share the view of *amicus* as set forth in this brief. None of the funders is affiliated with any of the Responders, nor is a client of Pillsbury Winthrop Shaw Pittman LLP.

how to provide counsel for use in alternative dispute resolution. For fifteen years, he has served on the board of The Fund for Modern Courts, which is dedicated to improve the New York legal system. He also has served, since 2000, on the Governor's Departmental Judicial Screening Committee, First Judicial Department, and the New York State Commission on Judicial Nomination.

Mr. Milonas has a very strong interest in the current case because of the issue it raises about courts' power to modify parties' agreements to arbitrate. How this question is resolved will substantially impact the integrity of arbitration agreements, the willingness of parties to agree to arbitration, and their decision about whether to choose a specialized arbitral forum and to arbitrate in New York.

ARGUMENT

COURTS CANNOT FORCE PARTIES TO ARBITRATE BEFORE A DIFFERENT ARBITRAL FORUM THAT THE ONE TO WHICH THE PARTIES CONTRACTUALLY AGREED

Amicus submits this memorandum of law to address an important legal issue raised by this appeal: Do the courts have the power to force the parties to arbitrate before an arbitral forum other than the one to which the parties agreed? Supreme Court ruled that it did not. Amicus urges this Court to affirm that ruling. Were New York courts able to order parties to arbitrate before a body that is not the one to which they contractually agreed, this would not only deprive parties of their right to contract, but also would discourage parties from agreeing to arbitrate their future differences—and if they did so, choosing New York law to govern their contract and New York as

the situs for their arbitration. Parties are entitled to decide whether to arbitrate. To be able to exercise that right, parties have to be able to select the body before which the arbitration will be held—including specialized, inside-industry panels with relevant expertise, but also often with inherent preferences, relationships and interests.

Not surprisingly, the Federal Arbitration Act (the "FAA"), which the parties all concur applies here, does not afford courts the power to order the parties to arbitrate before a different arbitral body than the one set forth in the parties' contract. Rather, Section 2 of the FAA only permits a court to decline to enforce an agreement to arbitrate based upon legal or equitable grounds for the revocation of contracts generally. No party has presented any such grounds here; indeed, all parties agree that their dispute should be arbitrated. Had they challenged the arbitrability of their dispute, the remedy would be to void the arbitration clause, thus requiring the parties resolve their differences before a court or a different arbitration forum to which the parties subsequently agreed. The other potentially relevant provision of the FAA, Section 10(b), permits the courts to disqualify a particular arbitrator, but that remedy was not sought from Supreme Court, nor is it sought on this appeal. That provision does not empower a court to substitute its choice for the parties' contractual selection of the arbitral forum to resolve disputes and select a different arbitration setting.

As New York courts and courts around the country have acknowledged, honoring arbitration provisions as agreed to by the parties is essential both to ensuring

that parties will elect to arbitrate disputes and New York's role as a center for financial and commercial transactions and the resolution of commercial and financial disputes, in particular sophisticated arbitration, including inside-industry arbitrations.

A. Background

The parties here signed an agreement dated March 28, 2005 (the "Agreement") providing that, should the parties be unable to agree on the fees that should be paid to the Washington Nationals Baseball Club, LLC (the "Nationals") for the rights to broadcast the Nationals' games on the regional sports network MASN during the 2012–2016 seasons, the matter should be resolved through arbitration. R.23 (Supreme Court Nov. 14, 2015 Decision ("Dec.") at 9). In the Agreement, the parties chose the Revenue Sharing Definitions Committee ("RSDC") of Major League Baseball ("MLB") as the body before which the arbitration would be held to resolve such disputes, as well as the forum for any future disputes that may arise over the broadcast fees for subsequent five-year periods. R.18 (Dec. at 4, *quoting* Agreement ¶ 2.J.3).[2] The decision to arbitrate broadcast fee disputes before the RSDC made sense for a number of reasons.

First, the RSDC has specialized knowledge on the complex issue of how to calculate the appropriate fees that television networks should pay to baseball teams

[2] Under the parties' agreement, the broadcast rights fees are to be reset every five years. The next five year period is 2017–2021. R.202–03 (Agreement ¶ 2.I). Thus, Appellants' (term defined on page 10) request that this Court order broadcast fees disputes to be resolved in a forum other than the RSDC effects not only arbitration over the fees for 2012–2016, but also for future years.

for broadcast rights. As Supreme Court noted, the RSDC was "inside baseball." R.42 (Dec. at 22). The RSDC arbitrators are senior officials or owners of other MLB teams that had their own broadcast contracts and the panel had or would be resolving other broadcast right issues involving other MLB teams. R.19 (Dec. at 5). The parties knew that the RSDC members change periodically, but are always selected by MLB in MLB's sole discretion. *Id.*; R.1762. In addition, as part of any RSDC arbitration, MLB staff would be assisting the arbitrators by providing expert assistance—including by gathering relevant information, performing necessary calculations, and providing legal advice and drafting assistance. R.2922–23 ¶¶ 5, 8; R.3151–52 ¶ 6.

Second, the parties were familiar with how the RSDC operated. For example, the Baltimore Orioles Limited Partnership participated in an RSDC proceeding in 2004, the year before the Agreement was negotiated and signed. R.2924–25 ¶ 12. Moreover, the RSDC regularly evaluates fair market value of telecast rights fees in connection with the MLB revenue sharing plan and had been doing so since 1997. R.1762 ¶ 3; R.2922 ¶ 4.

Third, presumably at least some of the financial information that would be used in the proceedings would be confidential, and an arbitration proceeding would make it easier to keep the information confidential. *See, e.g.*, R.638–77 (copies of the RSDC's reports from the underlying arbitration with redacted financial information).

It is noteworthy that for *other* disagreements that presumably did not involve

the types of esoteric issues presented by valuing broadcast rights, the parties selected a different arbitral body, the American Arbitration Association, that did not have specialized knowledge and expertise about the determination of the fair market value of broadcast rights in the baseball industry. R.18 (Dec. at 4 n.3, *quoting* Agreement ¶ 8.A).

B. Relevant Case and Statutory Law

This Court has specifically addressed the issue of whether New York courts have the power to force parties to arbitrate in an arbitral forum that is different from the one they contractually chose. This Court held in *In re Cullman Ventures, Inc.*, 252 A.D.2d 222, 228 (1st Dep't 1998) (Tom, J.), that a court has no power to "direct that the arbitration take place in a forum other than that specified in the agreement, notwithstanding a possibly fairer or more convenient proceeding in a forum not designated in the agreement." In that case, the IAS court effectively ordered the consolidation of an arbitration that was pending in Indiana with one in New York. *Id.* Those arbitrations had been filed in those venues in accordance with the contracts at issue in each of the arbitrations. *Id.* This Court reversed that decision, explaining that the IAS Court's decision amounted to "an unauthorized reformation of those contracts." *Id.* at 229. This Court then went even further, holding that the IAS Court even "lacked authority to enjoin the Indiana arbitration, or prohibit the arbitration of those claims in any forum other than New York, or to interfere, in any manner, with

the Indiana arbitration carried out under the terms of that agreement, even if the court articulated salutary grounds for doing so." *Id.* As decisions from courts around the country and an analysis of the FAA make clear, this Court in *Cullman Ventures* correctly stated the law in New York and elsewhere.

Courts across the United States have recognized that parties have wide latitude in designing their own arbitration process, and then are bound by the process they have chosen, even if it does not enable them to present their case in the most optimal way. *See, e.g., Nat'l Football League Players Ass'n ex rel. Peterson v. Nat'l Football League*, 831 F.3d 985, 998–99 (8th Cir. 2016) (recognizing there is no "[f]undamental fairness" in arbitration); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (Posner, J.) (parties can contract to have an arbitrator who is "precommitted to a particular substantive position").

The corollary to this principle, also widely recognized, is that parties should be free to choose the forum in which they will arbitrate and to make the tradeoffs choosing a particular arbitral forum entails. *See In re Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y.2d 173, 181–82 (1995) (recognizing the goal of the FAA is to rigorously enforce arbitration agreements according to their terms, and that thereby courts cannot direct parties to "arbitrate in a forum other than that specified in their agreement, even though permitting the choice of a different forum might seem fairer or more suited to the needs of a particular party"); *see also Nat'l Football*

League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2006).

Indeed, the FAA recognizes that a party, having chosen a particular forum, should not be able to go to court and have the court choose a different one. The FAA affords courts very limited powers to modify an agreement to arbitrate, which Supreme Court properly recognized. R.42 (Dec. at 22 n.21) ("[R]e-writing the parties' Agreement is outside of [Supreme Court's] authority."). *See also, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.") (internal quotations and citations omitted) (emphasis in original); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (recognizing that parties are "free to structure their arbitration agreements as they see fit," including choosing "who will resolve specific disputes"). Similarly, New York decisions in addition to this Court's opinion in *Cullman Ventures* have recognized that courts should not rewrite arbitration clauses. *See In re Salvano*, 85 N.Y.2d at 182 ("The court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their [arbitration] contract."); *Gulf Underwriters Ins. Co. v. Verizon Commc'ns, Inc.*, 32 A.D.3d 709, 710 (1st Dep't 2006) ("A party cannot be forced to an arbitration to

which it has not agreed, . . . and the IAS court was not free to rewrite the limited arbitration clause.").

Section 2 of the FAA permits a court to void the arbitration provision if a party can, on legal or equitable principles, show that their agreement to arbitrate should be revoked. For example, if the parties' agreement to arbitrate is the result of a mutual mistake, undue influence, or fraud, a court may strike an arbitration clause. *See, e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements..."); *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 364 (2d Cir. 1965) (holding that an arbitration agreement can be invalidated under Section 2 of the FAA by "fraud, duress, or undue influence"); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2d Cir. 1959) ("If this arbitration clause was induced by fraud, there can be no arbitration."); *Frankel v. Citicorp Ins. Servs., Inc.*, No. 11-CV-2293 (NGG)(RER), 2014 WL 10518555, *5 (E.D.N.Y. Aug. 12, 2014) (recognizing that "if an agreement to arbitrate is the product of fraudulent inducement or mutual mistake, these contract defenses protect parties from being bound to" the arbitration agreement); *Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 334 (1961) (holding that courts may enjoin arbitration "where fraud or duress, practiced against one of the parties, renders the agreement [to arbitrate] voidable"). Here there is no such claim of which *Amicus* is

aware. Of course, the parties could agree to change their agreement or reach a new agreement to arbitrate the dispute, but that is within the control of the parties and not the courts. Nothing in section 2 allows a court to change the arbitral forum selected.

Similarly, section 10(b) of the FAA permits parties to seek disqualification of arbitrators, but not the arbitral forum. The Baltimore Orioles Baseball Club, Baltimore Orioles Limited Partnership, and TCR Sports Broadcasting Holdings, LLP (collectively, the "Appellants") do not seek such relief from Supreme Court or as part of this appeal. In any event, it is conceded that if there is a new RSDC arbitration, the arbitrators for that rehearing will be different from those that handled the arbitration the Appellants are challenging. R.3670.

Further, there is no case of which *Amicus* is aware that would permit a court to modify an arbitration clause to change the arbitral body chosen by the parties rather than to simply disqualify a particular arbitrator. The case law cited by the Appellants is not to the contrary. *See Hyman v. Potterberg's Ex'rs*, 101 F.2d 262, 266 (2d Cir. 1939) (holding only that if trial court finds the arbitrators were partial, then under § 10(e), the court should not refer the matter back to the original arbitrators considering they are "unfit to be judges"; the court explicitly recognized that "[w]hether new arbitrators must be selected by consent, or whether the court has power to appoint them under Sec. 5 of Title 9, we need not now consider"); *Sawtelle v. Waddle & Reed, Inc.*, 304 A.D.2d 103, 117 (1st Dep't 2003) (dicta that § 10(b) allows for discretion to

remand a matter to the same arbitration panel or a new one, but not that they arbitrate outside the forum and remanded the matter to the original panel; remanding to original panel of arbitrators); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Brotherhood of Teamsters*, 969 F.2d 1436, 1446 (3d Cir. 1992) (affirming remand to a different arbitrator, but not to a different arbitration institution/forum); *Olan v. Allstate Ins. Co.*, 212 A.D.2d 362, 363 (1st Dep't 1995) (same); *Aircraft Braking Sys. Corp. v. Local 856*, 97 F.3d 155, 162 (6th Cir. 1996) (same); *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 25 (1st Cir. 2010) (same); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1067–68 & n.2 (2d Cir. 1972) (same); *Pitta v. Hotel Ass'n of N.Y.C., Inc.*, 806 F.2d 419, 423–24 (2d Cir. 1986) (court followed contractually-mandated procedures for designating a replacement arbitrator in the event the chosen arbitrator was "incapable of acting" as arbitrator; court held the chosen arbitrator had a "clear personal interest in the outcome" and concluded he was "incapable of acting" within the meaning of the agreement, thereby triggering the arbitrator replacement procedures of the agreement; court did not remand to a new forum and instead applied the agreement's arbitrator-selection provisions).

Indeed, as discussed, the very reason parties choose specialized arbitral bodies is because they have special rules and practices. Section 10(b) was not meant to address the fact that those rules may subsequently prove disadvantageous to a party. Courts should not be able to substitute their choice of the arbitral forum for that of the

parties because one party is dissatisfied with the outcome of an arbitration conducted in accordance with those rules and practices. Doing so will only discourage parties from choosing those types of arbitrations for fear that they will end up before a body they did not choose. If a party cannot be assured that specialized arbitrations will be recognized by a court, parties will be less likely to arbitrate, creating burdens for courts. This would force courts to address complex, time-consuming disputes involving esoteric, technical issues—like those present here—that can more efficiently be resolved by bodies that regularly address those types of issues.

C. Other Considerations

New York is perhaps the most significant situs for financial and commercial transactions and arbitrations, both domestically and internationally. This is in no small measure a result of the fact that its laws—which are considered the "gold standard" for financial and commercial transactions—are regularly chosen to govern agreements, even those that have little connection to New York. Key elements of New York law that attracts financial and commercial parties are its respect for parties' freedom to contract and support and encouragement of arbitration. Indeed, as discussed, it is the principle of freedom of contract that underlies this Court's decision in *Cullman Ventures* decision not to interfere in any way with the choice of arbitral forum in agreements. Further, New York courts are well-known for their respect for the finality of arbitration awards and their stringent application of the narrow statutory

grounds for vacatur. *See, e.g.*, *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 915 (2011) (recognizing stringent standard party must meet to vacate arbitration award based on arbitrator bias); *Curley v. State Farm Ins. Co.*, 269 A.D.2d 240, 241–42 (1st Dep't 2000) (refusing to recognizing novel non-statutory ground to vacate arbitrator award); *Cty. of Nassau v. Patalano*, 128 A.D.3d 694, 694 (2d Dep't 2015) (emphasizing courts' limited ability to review arbitration awards and the high burden a party must show to vacate an award).

A ruling by this Court here that New York courts will not impose their selection of arbitral forum in place of the forum contractually chosen by the parties will reinforce New York law's position as the "gold standard" for commercial and financial transactions and uphold New York's position as the preeminent location for financial and commercial transactions and dispute resolution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Supreme Court's decision that New York courts do not have the power to require parties to arbitrate before a different arbitral body than the one to which they contractually agreed should be affirmed.

Dated: January 12, 2017

Respectfully submitted,

David G. Keyko
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1540 Broadway
New York, NY 10036
(212) 858-1000
david.keyko@pillsburylaw.com
Attorneys for E. Leo Milonas, Esq.

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SPECIFICATION STATEMENT

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PILLSBURY WINTHROP SHAW
PITTMAN LLP

By _____

David G. Keyko
1540 Broadway
New York, NY 10036
Tel. (212) 858-1000
Fax (212) 858-1500
david.keyko@pillsburylaw.com