New York County Clerk's Index No. 652044/14

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;
WASHINGTON NATIONALS BASEBALL CLUB, LLC,

Respondents-Respondents-Cross-Appellants-Appellants,

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.

MOTION FOR PETITION TO FILE *AMICUS CURIAE* BRIEF

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

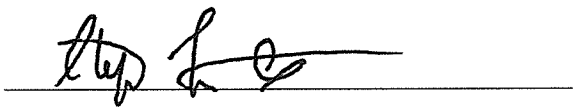
TCR SPORTS BROADCASTING HOLDING, LLP, Petitioner-Appellant-Cross-Respondent-Respondent, —against— WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC Respondents-Respondents-Cross-Appellants-Appellants, THE OFFICE OF COMMISSIONER OF BASEBALL; and THE COMMISSIONER OF MAJOR 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.	Index No.: 652044/14

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Please take notice that upon the annexed affirmation of Stephen L. Ascher, dated January 13, 2017, Diamond Dealers Club, Inc. ("DDC"), by its attorneys Jenner & Block LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York, 10010, on

January 23, 2017 at 10:00 AM or as soon thereafter as counsel may be heard, for an order permitting DDC to serve and file a brief as *amicus curiae*. This motion is filed pursuant to CPLR § 2215 and NYCRR 600.2(a)(2).

Respectfully submitted,



Dated: New York, NY
January 13, 2017

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

TCR SPORTS BROADCASTING HOLDING, LLP, Petitioner-Appellant-Cross-Respondent-Respondent, —against— WN PARTNER, LLC; NINE SPORTS HOLDING, LLC; WASHINGTON NATIONALS BASEBALL CLUB, LLC Respondents-Respondents-Cross-Appellants-Appellants, 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.	Index No.: 652044/14

AFFIRMATION OF STEPHEN L. ASCHER IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

STEPHEN L. ASCHER, an attorney duly admitted to practice law before the courts of the State of New York and not a party to this action, affirms the following to be true under penalty of perjury pursuant to CPLR § 2106.

1. I am a partner of the law firm Jenner & Block LLP, attorneys for *amicus curiae* Diamond Dealers Club, Inc. ("DDC"). I respectfully submit this affirmation in support of DDC's motion to file a brief as *amicus curiae* in this appeal. DDC has a strong interest in the issues in this matter and can be of special assistance to the Court. A copy of DDC's proposed brief is attached hereto as Exhibit A.

2. The DDC is a membership organization, or "bourse," for participants in the diamond, precious stone, and related jewelry industry. The DDC was founded in New York in 1931, and currently has more than 1,200 members nationwide. The DDC is affiliated with like clubs worldwide as part of the World Federation of Diamond Bourses, which has 30,000 members total.

3. The DDC's original purposes were "to foster the interests of diamond dealers in the City of New York, to reform abuses, to promote enlarged and friendly commerce among members, to cooperate in creating better social and economic conditions for members[,] to develop higher business standards, and to eliminate unfair trade practices." Diamond Dealers Club, *A Brief History of the Diamond Dealers Club*, *available at* http://www.nyddc.com/about-the-ddc.html (last visited Jan. 11, 2017). Although the DDC's functions have evolved over time to meet changing market demands and to address new technological opportunities and requirements, even today DDC members "know that they are protected by the Club's stringent membership requirements, by-laws, and a proven system of arbitration, in

which disagreements can be promptly resolved by a neutral dispute resolution mechanism whose decisions are upheld by the New York State Supreme Court." *Id.*

4. The DDC's long-established arbitration process is central to its mission. It applies to all trade-related disputes between members, and is organized under the DDC's by-laws and other rules developed specifically for the diamond and precious metals industry. The rules reflect the bourse's commitment to a dispute resolution process built around fairness, familiarity, experience, institutional knowledge, credibility, and accountability.

5. Under the applicable rules, disputes between members are decided by fellow members who are elected by the membership or appointed to serve as arbitrators by DDC officials. DDC rules provide for a total panel of 48 member-arbitrators who are to act as the Board of Arbitrators of the DDC. Of these, 26 are directly elected by the membership and 22 are appointed by the Board of Directors. The Vice President of the DDC serves as the chairman of the Board of Arbitrators, and is responsible for organizing the 48 arbitrators into eligible panels of three arbitrators. A random drawing determines which panel arbitrates a particular dispute.

6. The DDC recognizes that given the relatively small size of its industry, arbitrators will likely be familiar with the disputing members and have at least indirect relationships with them. The DDC believes that any potential disadvantages

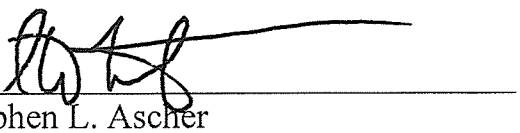
of that familiarity are vastly outweighed by the benefits of having disputes decided by arbitrators who have a deep understanding of the customs and practices of our industry, who can decide disputes quickly and efficiently, and who uphold an institutional interest in maintaining consistency of arbitration awards.

7. The DDC's peer arbitration process gives it a direct interest in the issue presented in this appeal, namely, under what circumstances an arbitral award can be vacated as a result of the arbitrators' "evident partiality." The DDC also has a direct interest in protecting the right and ability of arbitral institutions to administer and assist intra-industry arbitrations.

8. In light of DDC's perspective as another intra-industry association that requires in-house arbitrations, DDC believes that its proposed *amicus* brief will be of considerable assistance to this Court in resolving this appeal, and respectfully requests that it be considered by this Court.

WHEREFORE, on behalf of proposed *amicus curiae* Diamond Dealers Club, Inc., I respectfully request that the Court grant DDC's motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,



Stephen L. Ascher

Dated: New York, NY
January 13, 2017

Affirmation of Stephen L. Ascher
In support of Motion for Leave to File Brief as Amicus Curiae

EXHIBIT A

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STATEMENT OF INTEREST

The DDC is a membership organization, or "bourse," for participants in the diamond, precious stone, and related jewelry industry. The DDC was founded in New York in 1931, and currently has more than 1,200 members nationwide. The DDC is affiliated with like clubs worldwide as part of the World Federation of Diamond Bourses, which has 30,000 members total.

The DDC's original purposes were "to foster the interests of diamond dealers in the City of New York, to reform abuses, to promote enlarged and friendly commerce among members, to cooperate in creating better social and economic conditions for members[,] to develop higher business standards, and to eliminate unfair trade practices." Diamond Dealers Club, *A Brief History of the Diamond Dealers Club*, *available at* http://www.nyddc.com/about-the-ddc.html (last visited Jan. 11, 2017). Although the DDC's functions have evolved over time to meet changing market demands and to address new technological opportunities and requirements, even today DDC members "know that they are protected by the Club's stringent membership requirements, by-laws, and a proven system of arbitration, in which disagreements can be promptly resolved by a neutral dispute resolution mechanism whose decisions are upheld by the New York State Supreme Court." *Id.*

The DDC's long-established arbitration process is central to its mission. It applies to all trade-related disputes between members, and is organized under the DDC's by-laws and other rules developed specifically for the diamond and precious metals industry. The rules reflect the bourse's commitment to a dispute resolution process built around fairness, familiarity, experience, institutional knowledge, credibility, and accountability.

Under the applicable rules, disputes between members are decided by fellow members who are elected by the membership or appointed to serve as arbitrators by DDC officials. The DDC rules provide for a total panel of 48 member-arbitrators who are to act as the Board of Arbitrators of the DDC. Of these, 26 are directly elected by the membership and 22 are appointed by the Board of Directors. The Vice President of the DDC serves as the chairman of the Board of Arbitrators, and is responsible for organizing the 48 arbitrators into eligible panels of three arbitrators. A random drawing determines which panel arbitrates a particular dispute.

The DDC is committed to sponsoring the fairest, most efficient, and most effective process for our members. The DDC recognizes that, given the relatively small size of its industry, arbitrators will likely be familiar with the disputing members and have at least indirect relationships with them. For example, a handful of attorneys handles a substantial percentage of significant matters for our

members, making overlapping relationships between members and law firms unavoidable. The DDC believes, however, that any potential disadvantages of these overlapping relationships are vastly outweighed by the benefits of having disputes decided by arbitrators who have a deep understanding of the customs and practices of our industry, who can decide disputes quickly and efficiently, and who uphold an institutional interest in maintaining consistency of arbitration awards.

The trial court in this case applied, and *amicus* Kenneth R. Feinberg, Esq. proposes, a one-size-fits-all measure of arbitral fairness that would interfere with an arbitration model that is demonstrably effective for the DDC's members. The DDC's peer arbitration process thus gives it a direct interest in the issue presented in this appeal, namely, under what circumstances an arbitral award can be vacated as a result of the arbitrators' "evident partiality."[1] The DDC also has a direct interest in protecting the right and ability of arbitral institutions to administer and assist intra-industry arbitrations. For these reasons, the DDC supports reversal of the trial court's finding of evident partiality and confirmation of the arbitral award at issue in this case.

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[1] The DDC's disqualification process was previously the subject of litigation in *Rabinowitz v. Olewski*, 100 A.D.2d 539 (1984). Although that case is inapposite because it was decided pursuant to New York law rather than the Federal Arbitration Act, it is also significant that the disputant there sought to disqualify the arbitrators prior to commencement of the proceeding. No attempt to disqualify the arbitrators was made in this case.

ARGUMENT

I. Inside-the-Industry Arbitration Provides Important Advantages

The DDC's arbitration process represents a traditional form of dispute resolution that has been described favorably as a "private legal system." Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724, 1726-45 (2001) ("*Private Commercial Law*"). It is broadly similar not only to Major League Baseball's Revenue Sharing Definitions Committee ("RSDC"), which is the subject of this appeal, but also to the internal dispute resolution procedures of many other industry organizations. Professor Lisa Bernstein, who has studied these types of arbitrations in several industries, observes that "over fifty industries, including diamonds, grain, feed, independent films, printing, binding, peanuts, rice, cotton, burlap, rubber, hay and tea," have developed private legal systems. Lisa Bernstein, *Private Commercial Law*, 3 The New Palgrave Dictionary of Economics and the Law 108 (Peter Newman ed., 1998). We are aware of similar procedures administered by the Advertising Self-Regulatory Council, the American Cotton Shippers Association, the National Grain and Feed Association, NYMEX, and NYSE. Other sports leagues, including the NBA, NFL, and NHL, also sponsor in-house arbitrations for disputes between members.

The key features of these arbitration systems are subject-specific expertise, speed, and finality. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 40 (1999) ("*Folklore Arbitration*") (describing the traditional concept of arbitration as characterized by "the choice of expert decision makers, a speedy process, privacy, informal presentations of evidence, little or no discovery, no right of judicial review . . . ").

Notably, this form of arbitration adheres much more closely to the traditional concept of arbitration than the evolved form of commercial arbitration as currently administered by organizations such as the American Arbitration Association ("AAA") or the International Chamber of Commerce ("ICC"). Especially in the past decade or two, general commercial arbitration has increasingly come to resemble adjudication in the courts – permitting more discovery (including e-discovery), motion practice, lengthy written awards and other features of full-scale litigation, all of which contribute to increased delay and expense.[2] *See, e.g.*, Brunet, *Folklore Arbitration*, at 40 (describing the move toward "a more judicialized model of arbitration"); Christopher Drahozal, *Private*

[2] At a national business arbitration summit in 2009, "nearly all participants were convinced that arbitration falls short of users' expectations regarding speed, efficiency and economy at least some of the time[.]" Thomas J. Stipanowich, *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, 3 (College of Commercial Arbitrators 2010). "Much of this criticism stems from the fact that business-to-business arbitration has taken on the trappings of litigation[.]" *Id.* at 1; *accord* E. Norman Veasey & Grover C. Brown, *An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions*, 70 Bus. Lawyer 407, 410-14 (2015).

Ordering and International Commercial Arbitration, 113 Penn St. L. Rev. 1031, 1049 (2009) (describing international commercial arbitration as a "hybrid case and not a purely private legal system"); *see also* Gary B. Born, *International Commercial Arbitration* 2127 (2014) ("Particularly in major matters, elements of the procedures of an international arbitration can closely resemble proceedings in the commercial courts of some major trading states.").

By contrast, inside-the-industry arbitrations retain the traditional advantages promised by private arbitration. Professor Bernstein has identified at least four distinct advantages of these private legal systems compared to litigation in court or arbitration administered by commercial arbitration institutions like the AAA or ICC:

First, and perhaps most importantly, the disputes are decided by decision-maker(s) with particularly deep expertise in the subject matter – which is often technical, industry-specific, or even arcane. Bernstein, *Private Commercial Law*, at 1728. Similarly, Professor Barak Richman noted as an important "source[] of efficiency" that such "arbitrators themselves are member merchants who possess industry expertise and specialized knowledge regarding industry transactions," which renders them "well equipped to serve as effective factfinders and positions them to tailor judgments specifically to match individual disputes." Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory*

of Private Ordering, 104 Col. L. Rev. 2328, 2341 (2004). Consistent with these academic findings, the DDC's peer, member-selected arbitrators possess deep expertise, familiarity, institutional memory, and connections with industry, all of which contribute to their ability to issue fair awards in accordance with industry standards and industry norms.

Second, because the disputes turn heavily on the application of expertise and industry practice rather than on the classic judicial determination of factual disputes, the parties can agree to streamlined procedures that permit efficient and expedited resolution. Bernstein, *Private Commercial Law*, at 1740-41. Thus, the DDC rules expressly promote speedy resolution: If the arbitrators do not reach decision within twenty business days of a complaint, or thirty business days if the Vice President grants an extension, the matter is redirected to a new panel. *See generally* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992) (describing history of diamond bourses and role of contracts in the diamond industry); Ersoy Zirhlioglu, *The Diamond Industry and the Industry's Dispute Resolution Mechanisms*, 30 Ariz. J. Int'l & Comp. L. 477 (2014) (same).

Third, because decisions are made within a tight-knit body, decision-makers within some industries have an enhanced ability to arrive at decisions that are

consistent not only with market practice but also with decisions in prior similar disputes. Bernstein, *Private Commercial Law*, at 1725.

Fourth, and as a critical consequence of the above three reasons, decisions made pursuant to these procedures have enhanced legitimacy, are promptly complied with, and are rarely challenged in court. *Id.*

In sum, inside-the-industry arbitration systems such as the DDC's, Major League Baseball's, and the many others mentioned above are a desirable form of commercial dispute resolution that should be encouraged to the same extent as generalized forms of commercial arbitration.

II. Arbitrators in Inside-the-Industry Arbitration Frequently Have Some Type of Relationship to the Parties to the Dispute

As fellow market participants and even competitors of the disputing parties, inside-the-industry arbitrators will inevitably have at least indirect or overlapping relationships with the disputants themselves. Moreover, the arbitrators and the disputants will often have common suppliers, customers, and service providers – including even lawyers. In the diamond business, for example, a small handful of attorneys handle a substantial percentage of significant matters for our members, making overlapping relationships between members and law firms particularly unavoidable.

Some degree of overlap is a necessary tradeoff in exchange for achieving the advantages of inside-the-industry arbitration. For groups like the DDC that

systemically prefer experienced and knowledgeable member-arbitrators, it is not practicable to disqualify arbitrators on the basis of indirect relationships with the parties or their counsel or affiliates. Such a standard would make it unsustainable to find suitable arbitrators in the "small world" in which the DDC operates. And it would ultimately defeat one of the primary benefits of its arbitration system: using arbitrators who are intimately familiar with the business customs that are crucial to making a fair and consistent determination on the merits.

III. Application of the "Evident Partiality" Standard to Inside-the-Industry Arbitration Should Take Account of These Important Features

The DDC respectfully submits that the trial court in this case did not take adequate account of these important features of inside-the-industry arbitrations. More specifically, the DDC understands that in the case at hand, the trial court found "evident partiality" based on an indirect relationship between the businesses associated with certain of the RSDC arbitrators, Major League Baseball, and one of the disputants through their common usage of the same law firm, Proskauer Rose LLP. The common usage of the Proskauer firm on unrelated matters – not constituting a conflict of interest under the applicable New York Rules of Professional Conduct, Rules 1.7-1.8 – was the sole ground for the after-the-fact finding that the arbitrators were "evidently partial" – notwithstanding the trial court's several other findings concerning the overall fairness of the proceedings,

including the finding that the award was "reasonable on its face." Vacatur Order at 12-17.

In reaching this conclusion, we believe that the trial court failed to take adequate account of the nature of Major League Baseball's RSDC process, and of private legal systems generally. As the Second Circuit has held, "The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016) (quoting *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896-97 (2d Cir. 1997)).

Thus, the Federal Arbitration Act does not require a one-size-fits-all solution to arbitration, and it does not impose a uniform measure for disqualification either. Specifically, the Federal Arbitration Act standard for an arbitral award to be vacated based on the "evident partiality" of the arbitrators does, and should continue to take into account, the specific context of the arbitration in question.

The importance of context to Federal Arbitration Act review was made clear in *Morelite Construction Corporation*, where the Second Circuit interpreted the "evident partiality" standard that governs this case. *Morelite Const. Corp. (Div. of Morelite Elec. Serv.) v. N.Y. City Dist. Council Carpenters Ben. Funds*, 748 F.2d

79 (2d Cir. 1984). The *Morelite* court acknowledged that the selection of an arbitrator involves inherent tradeoffs between expertise and perfect impartiality:

> [P]arties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute. Familiarity with a discipline often comes at the expense of complete impartiality. . . . [S]pecific areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time. As this Court has noted, "[e]xpertise in an industry is accompanied by exposure, in ways large and small, to those engaged in it." *Andros Compania Maritima, S.A. v. Marc Rich & Co.,* 579 F.2d 691, 701 (2d Cir. 1978).

Morelite, 748 F.2d at 83.

The *Morelite* court accounted for these tradeoffs in establishing when an arbitration should be vacated under Section 10 of the Federal Arbitration Act. The court noted that, "to disqualify any arbitrator who had professional dealings with one of the parties . . . would make it impossible, in some circumstances, to find a qualified arbitrator at all." *Id.* at 83. "Mindful of the trade-off between expertise and impartiality, and cognizant of the voluntary nature of submitting to arbitration, [the court] read Section 10(b) as requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award." *Id.* at 83-84.

The *Morelite* court thus reinforced the familiar "evident partiality" standard: "Profoundly aware of the competing forces that have already been discussed, we hold that 'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to

one party to the arbitration." *Id.* at 84. The court further explained that courts applying the standard should consider whether contextual factors frequently seen in inside-the-industry arbitration warrant relaxed scrutiny of potential conflicts:

> In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances. Thus, the small size and population of an industry might require a relaxation of judicial scrutiny, while a totally unnecessary relationship between arbitrator and party may heighten it.

Id.

Morelite thus teaches that the determination of "evident partiality" must take into account the specific nature of inside-the-industry arbitration, and the unavoidably overlapping relationships inherent in that form of decision-making. *Morelite* recognizes that arbitrator selection necessarily involves some degree of tradeoff between expertise and perfect neutrality, and holds that arbitration agreements that prioritize expertise are valid and entitled to special deference in small industries. The proven advantages of such insider resolution proceedings will be undermined if courts vacate arbitral decisions based on indirect relationships between the arbitrators and the parties that inevitably exist in such settings, rather than requiring stronger proof of partiality.

Here, the trial court recognized the fundamental nature of Major League Baseball's RSDC proceedings, yet failed to consider their nature in making its finding of "evident partiality." More specifically, the trial court acknowledged that "MASN, and the Orioles as its majority owner, clearly agreed to an 'inside

baseball' arbitration, where the parties and arbitrators would all be industry insiders who knew each other and inevitably had many connections." Vacatur Order at 22. Yet the court evinced no awareness that this agreement to inside-the-industry arbitration shapes the "evident partiality" analysis, and the above finding about the agreed-upon type of arbitration did not factor at all into the court's application of that standard.

Far from acknowledging the crucial implications of the fact that inside-the-industry arbitrations frequently employ arbitrators who are familiar with and even connected to the disputing parties, the trial court went to the other extreme, and described "neutrality [as] so fundamental . . . that trust in the neutrality of the adjudicative process is the very bedrock of the FAA," and that "it is upon that foundation, and in great reliance upon it, that courts can defer to processes decided upon and designed by private contract." Vacatur Order at 28. This analysis is irreconcilable with *Morelite*. The brief of *amicus* Feinberg, which takes this point as its premise, misses the mark for the same reason.

As a result of its failure to consider the context-specific factors identified in *Morelite* and fully applicable to the form of arbitration sponsored by Major League Baseball, the trial court's "evident partiality" ruling jeopardizes the finality of inside-the-industry arbitrations conducted in New York State by subjecting them to excessive risk of subsequent vacatur. *See Morelite*, 748 F.2d at 83. If affirmed,

the trial court's ruling could also undermine the attractiveness of New York as a home for inside-the-industry arbitration. As the sponsor of an inside-the-industry arbitration process within this State, we ask that this Court, in reviewing the trial court's decision, give proper effect to the specific, agreed-upon nature of the RSDC.

CONCLUSION

Accordingly, *Amicus* DDC respectfully requests that this Court reverse the trial court's vacatur order and remand with instructions to enter an order confirming the RSDC award.

Respectfully submitted,

By: 

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PRINTING SPECIFICATIONS STATEMENT

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