No. 18-1546

In The
Supreme Court of the United States

CENTURY III MALL PA LLC,

Petitioner,

v.

SEARS, ROEBUCK & CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF TRANSFORM SR LLC, ASSIGNEE OF SEARS, ROEBUCK & CO.

HARLAN S. STONE
Counsel of Record
ADAM J. VENTURA
Application for Admission Pending
DICKIE, MCCAMEY & CHILCOTE, P.C.
Two PPG Place
Suite 400
Pittsburgh, PA 15222
(412) 281-7272
hstone@dmclaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CORPORATE DISCLOSURE STATEMENT

Sears, Roebuck & Co assigned its interest in this case to Transform SR LLC. Transform SR LLC is therefore the true party in interest in this case. Transform SR LLC is an indirect wholly-owned subsidiary of Transform Holdco LLC. Transform Holdco LLC is a privately held company. No publicly held company owns 10% or more of Transform Holdco LLC stock.

RELATED CASES

Century III Mall PA., LLC v. Sears, Roebuck & Co., No. 16-cv-1839, U.S. District Court for the Western District of Pennsylvania. Judgment entered May 10, 2017.

Century III Mall PA., LLC v. Sears, Roebuck & Co., Nos. 17-2284 and 17-2759, U.S. Court of Appeals for the Third Circuit. Judgment entered Dec. 20, 2018.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY PROVISIONS INVOLVED

Pursuant to 9 U.S.C. § 10(a)(4), a court may vacate an arbitration award where the arbitrators exceeded their powers.

INTRODUCTION

Petitioner Century III seeks certiorari for the extraordinary purpose of setting aside an arbitration award in favor of Respondent Sears stemming from a commercial dispute between the parties. The arbitration was conducted pursuant to a valid arbitration clause, the validity of which has never been questioned by Petitioner. Similarly, Petitioner never objected to the scope of the issues submitted to the arbitrators, and does not contend that the award rendered by the arbitrators went beyond the scope of issues submitted to the arbitrators. Instead, under the guise that the arbitrators somehow exceeded their powers, Petitioner seeks an impermissible judicial review and do-over of the arbitration proceedings. But the question posed by Petitioner – at what point does an arbitrator's exercise of his or her authority to interpret a contract cross into an impermissible re-writing of that contract – is not new or novel; it has been asked and answered by this Court. This Court should decline to entertain Petitioner's unstated invitation to revisit the well-established standard pertaining to the scope of an arbitrator's powers under the Federal Arbitration Act.

STATEMENT OF THE CASE

Sears, Roebuck and Company ("Sears") and Century III Mall PA LLC ("Century III" or "Petitioner") were parties to a ground Lease dated May 29, 1979 ("Lease") with Sears as tenant and Century III as landlord. (JA at 4). Sears, at its own expense, built and maintained a 231,004 square foot retail building on the leased ground. (JA at 4). The Lease contained a twenty-year operating covenant. From 1979 through 2014, well beyond the expiration of the operating covenant, Sears operated a retail store in the building. (JA at 4). On September 18, 2014, pursuant to the terms of the Lease, Sears notified Century III that it would be discontinuing operations of the store. (JA at 6).

Pursuant to Section 6.3(a) of the Lease, if Sears discontinued the operation of a department store, then Century III, within sixty (60) days, could "elect to terminate this Lease and acquire the Sears Building and Improvements as hereinafter set forth." (JA at 5). If Century III "elects not to so terminate, Landlord and Tenant" continue to be bound by the Lease. (JA at 5). By letter dated November 17, 2014, the sixtieth (60th) day, Century III exercised its option to terminate the Lease. In the letter, Century III unambiguously stated that "Pursuant to Section 6.3(a) of the Lease, Landlord ***elects to terminate the Lease and acquire the Building and Improvements.***" (JA at 6) (emphasis added).

The Lease established a formula for determining the amount that Century III would pay in the event

that Century III elected to purchase the Building and Improvements. Pursuant to its November 17, 2014 letter, Century III invoked both of Section 6.3(a)'s conditions, triggering the provisions of Section 6.3(b), which states:

> (i) if termination of operation shall occur during the period of Tenant's operating covenant . . . Landlord agrees to pay Tenant, within ninety (90) days after exercising its election to terminate, Tenant's depreciated book value of its Building and Improvements or the appraised fair market value thereof, whichever is greater. Each party shall appoint one (1) appraiser for the purpose of determining the fair market value and in the event they cannot jointly agree upon the value, the arithmetical average of the values submitted by such appraisers shall be deemed to be the fair market value of Tenant's Building and Improvements. . . .; and
>
> (ii) if Tenant shall discontinue the operations of a retail Department Store after the expiration of Tenant's operating covenant . . . and Landlord exercises its option to terminate this Lease, Landlord shall pay Tenant, within ninety (90) days after exercising its election to terminate, the amount of Tenant's depreciated book value or the appraised fair market value of the leasehold improvements made by Tenant, determined as in (i) above, whichever is greater, provided, however, that if Landlord does not elect so to purchase Tenant's

> Building and Improvements, Tenant may use Tenants' Building for any lawful purpose.

(JA at 5). Finally, Section 6.3(c) states that "the depreciated book value of Tenant's Building and Improvements shall be computed on a straight line basis in accordance with Tenant's customary method of computing book value of similar types buildings and improvements." (JA at 5).

Following Century III's November 17, 2014 letter terminating the Lease, both parties obtained appraisal reports as mandated by Section 6.3. Sears' appraisal was $9,200,000; Century III's appraisal was *negative* $11,100,000. (JA at 6). Both parties disputed the findings of the other's appraisal. Subsequently, in accordance with an arbitration clause in the Lease, Sears submitted the matter to the American Arbitration Association. Century III did not object to either the submission of the matter to arbitration or the scope of the issues submitted, and the Parties jointly selected the highly skilled and experienced three-member arbitration panel ("Arbitrators").

The Arbitrators conducted a three-day trial on June 27, 2016, June 28, 2016 and August 30, 2016. During the arbitration proceedings, Century III never argued that the Lease or the arbitration clause was invalid. Century III even agreed that Section 6.3 of the Lease was the controlling provision. Each party presented the testimony of their respective real estate appraisers. Sears also presented testimony from a representative of its accounting department that its

calculation for the depreciated book value of the Building and Improvements, $3,937,636, was prepared in accordance with its customary method of computing book value of similar buildings and improvements. (JA at 6). Century III also presented the testimony of an accounting expert who testified as to his opinion of what Sears' book value should be. The mathematical average of the two appraisals is negative $950,000 ($9,200,000 + -$11,100,000 = -$1,900,000; -$1,900,000/2 = -$950,000). Sears book value for the property, $3,937,636, is mathematically greater than -$950,000.

On November 10, 2016, the Arbitrators issued a nineteen (19) page Opinion and Award of $3,937,636 in favor of Sears. (JA at 6). The Arbitrators determined that Century III unambiguously exercised its option to purchase the Building and Improvements. (JA at 6-7). The Arbitrators then determined that both parties' appraisers valued an incorrect property interest. (JA at 7). Having determined that Sears met its burden with respect to book value, the Arbitrators noted that its decision to reject both parties' appraisals had no effect on the award because the book value ($3,937,636) was greater than the arithmetical average of the two appraisals exchanged (-$950,000) and, pursuant to Section 6.3, the book value represented the correct price. (JA at 7).

Seeking to overturn the Arbitrators' Award, Century III filed a Complaint in the U.S. District Court for the Western District of Pennsylvania ("District Court") on December 9, 2016 claiming that the Arbitrators exceeded their powers. (JA at 7). Sears filed a Motion to

Dismiss Century III's lawsuit, and on May 10, 2017, the District Court entered an order dismissing the lawsuit and confirming the Award in favor of Sears. On appeal, the Third Circuit affirmed the District Court's order in a non-precedential opinion, finding that Century III's claims that the arbitrators exceeded their authority "do not pass muster."

REASONS FOR DENYING CERTIORARI

I. THE COURT HAS ALREADY ESTABLISHED THE SCOPE OF AN ARBITRATOR'S AUTHORITY AND THE THIRD CIRCUIT CORRECTLY APPLIED THE EXISTING STANDARD.

The question raised by Petitioner is a simple one: what is the scope of an arbitrator's authority to interpret a contract? Endeavoring to answer its own question, Petitioner argues that "parties must have faith that the scope of the arbitration will not exceed the boundaries of the parties' contractual agreement to arbitrate." Petitioner's question reads as though there are no existing vehicles through which parties aggrieved by an arbitrator's decision could seek redress. But that is simply not the case. The protections sought by Petitioner for litigants who feel aggrieved by an arbitrator's decision already exist. The Federal Arbitration Act ("FAA") allows for judicial vacatur of arbitration awards where, *inter alia*, the arbitrators exceed their authority, 9 U.S.C. § 10(a)(4), and the

the standard for evaluating such a claim is well-established. The errors Petitioner assigns to the Third Circuit are simply not reviewable under the standard set forth by the FAA.

Petitioner contends that the Third Circuit "overlooked or misapprehended important points of law" in holding that: (1) "leasehold improvements made by Tenant" and "Buildings and Improvements" were intended to be defined and valued identically under the Lease; (2) the Arbitrators correctly rejected both parties' appraisals and determine that the same result would have [been] obtained had it accepted both appraisals; (3) the Arbitrators "rationally applied" a specific formula allegedly provided by the Lease for determining book value; (4) Generally Accepted Accounting Principles ("GAAP") did not apply to Sears' determination of depreciated book value, and that even if they did, those principles were satisfied, and; (5) that Century III had "unambiguously" exercised its option to purchase the Buildings and Improvements and that the Lease does [not] provide Century III with the option to opt-out of that purchase.

In assigning these errors to the Third Circuit, Petitioner fatally misstates the Third Circuit's decision. The Third Circuit did not reach any such conclusions regarding the Lease. Rather, the Third Circuit held that the Arbitrators did not exceed their authority in reaching those conclusions. *Century III Mall PA LLC v. Sears, Roebuck & Co.*, 758 Fed. Appx. 242, 246 (3d Cir. 2018) ("We agree with the District Court that, given the applicable FAA standards, Century III's assertions

that 'the Panel Opinion departed dramatically from the unambiguous terms of the Lease', 'exceeded the Arbitrators' authority', and was an 'irrational error requiring vacatur', do not pass muster."). Century III's claim that the Third Circuit "overlooked" or "misapprehended" points of law in reaching these conclusions presumes that the Third Circuit conducted an independent review of the evidence presented to the Arbitrators and determined that it would reach the same conclusion, but that is not the case. Century III is not entitled to such a review.

When a court evaluates a claim under Section 10(a)(4) of the FAA, it is not the role of the court to "sit as the [arbitration] panel did and reexamine the evidence under the guise of determining whether the arbitrators exceeded their powers." *Mutual Fire, Marine & Island Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989). The court does not "entertain claims that an arbitrator has made factual or legal errors." *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 219 (3d Cir. 2012) *aff'd, Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013). Rather, the court is "mindful of the strong federal policy in favor of commercial arbitration" and begins "with the presumption that the award is enforceable." *Id.* "Only if 'the arbitrator act[s] outside the scope of his contractually delegated authority' – issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract' – may a court overturn his determination" making the sole question "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."

Oxford Health, 569 U.S. at 569 (internal citations omitted).

In *Oxford Health*, this Court explained that "[i]t is not enough . . . to show that the arbitrator committed an error – or even a serious error." *Id.* (internal citations omitted). Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Id.* (citing *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Paperworks v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). Only if the arbitrator acts outside the scope of his contractually delegated authority – issuing an award that "simply reflects his own notions of economic justice rather than drawing its essence from the contract" – may a court overturn the arbitrator's determination. *Oxford Health*, 569 U.S. at 569 (quoting *Eastern Associated Coal Corp.*, 531 U.S. at 62).

The Arbitrators interpreted the Lease, as both Sears and Century III requested them to do, following three days of hearings (spread over several months to allow Century III additional time to engage another expert) and multiple written submissions. At no time prior to the issuance of the Award did Century III suggest the Arbitrators lacked the authority to interpret the Lease. Century III offers no substantiation for its argument that interpreting the meaning of an undefined term in the Lease caused the arbitrators to exceed their powers. Instead, Century III advocates for a

different reading of the agreement. But as the Third Circuit noted in *Metromedia Energy, Inc. v. Enserch Energy Servs.*, it is reversible error "to seize on a contrary reading and to invoke that reading as a basis for concluding that the arbitration panel exceeded its authority." 409 F.3d 574, 581 (3d Cir. 2005).

By placing an arbitration clause in the Lease, the parties bargained for the Arbitrators' construction of the agreement. Even if the Arbitrators' interpretation was flawed, which it was not, the Arbitrators unquestionably interpreted the parties' agreement and rendered an award based on the undisputed controlling provision of the Lease. The Award was based on a mathematical formula set forth in the parties' agreement. The Arbitrators did not make any mathematical errors in applying the formula – they awarded Sears the amount of Sears' book value which was greater than the average of the two appraisals. The errors that Petitioner complains of, even if they were in fact errors, are simply not reviewable under the well-established framework established by the FAA and the Court.

II. THE COURT SHOULD NOT ADOPT A LESS DEFERENTIAL REVIEW OF ARBITRATION DECISIONS

Although Century III does not expressly ask for the Court to reconsider the existing standard, or propose a solution to what it perceives to be a problem, Century III's Petition is in essence asking the Court to consider adopting a less deferential standard of review

of arbitrator's decisions. Practically speaking, a less deferential standard would render arbitration a mere pit stop on the road to traditional judicial litigation, rendering parties' contractual agreement to arbitrate meaningless. Furthermore, a broader scope of review or more deferential standard of review would be in conflict with established federal policy. This Court has long interpreted Section 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitrations agreements. . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In accordance with that policy, this Court expressly adopted the view of numerous Courts of Appeals that "questions of arbitrability must be addressed with a healthy regard for the federal policy in favoring arbitration." *Id*.

Adopting a less deferential review of arbitration decisions would be in conflict with well-established federal policy goals. Century III provides no compelling reason for the Court to take such drastic action.

III. THIS CASE DOES NOT PRESENT AN APPROPRIATE OPPORTUNITY TO REVISIT THE SCOPE OF AN ARBITRATOR'S POWERS BECAUSE THE ARBITRATION AWARD WAS APPROPRIATE AND WOULD WITHSTAND ANY LEVEL OF SCRUTINY.

This case does not represent an appropriate opportunity to revisit the scope of an arbitrator's powers because, even if the Court were to apply a less deferential

standard to the Award in this case, the outcome would not change. The Parties agreed that Section 6.3 was the controlling section of the Lease. Section 6.3 provides a mathematical formula by which the amount due to Sears is to be calculated. Under Section 6.3, both parties are to obtain appraisal reports and the arithmetical average of the two appraisals is deemed to be the fair market value. Section 6.3 then provides that Century III shall pay Sears the greater of the fair market value or the depreciated book value of the Property as calculated by Sears. Sears' appraisal was $9.2 million and Century III's appraisal was negative $11.1 million, resulting in an average of negative $950,000. Sears' depreciated book value was $3,937,636. The Arbitrators issued an award in favor of Sears in the amount of $3,937,636.

Nevertheless, despite the fact that the errors it now assigns to the Third Circuit are exactly the same errors as Century III assigned to the Arbitrators in its complaint seeking vacatur of the Award, Century III *still* does not identify what points of law either the Arbitrators or the Third Circuit "overlooked" or "misapprehended." Century III fails to offer a single case that supports its contention that any of the five (5) conclusions reached by the Arbitrators was flawed at all, let alone beyond the scope of their powers under the FAA. Section 6.3 of the Lease provided that Century III shall pay Sears either the average of the parties' appraisals or the book value, whichever is greater. Century III has never disputed the fact that Section 6.3 is the controlling section of the Lease. Sears' book value was greater

than the average of the two appraisals, and the Arbitrators awarded Sears the book value. Century III's argument that the Arbitrators exceeded their authority under these circumstances simply lacks any merit.

Century III's first argument is that the Third Circuit erred in holding that "leasehold improvements made by Tenant" and "Building and Improvements" were intended to be defined and valued identically under the Lease. According to Century III, the undefined term "leasehold improvement made by Tenant" is synonymous with the defined term "Leasehold Estate," rather than "Building and Improvements" as held by the Arbitrators. Century III's interpretation fails for a variety of reasons. Sears did physically "make" the leasehold improvements to the property. Century III offers no explanation for how one could "make" the intangible ownership interest in the property. Moreover, as the District Court noted, Century III "offers no rationalization for a dramatic reduction in its purchase price one day after, as opposed to one day prior to, the expiration of the operating covenant. . . ." *Century III Mall PA LLC v. Sears, Roebuck & Co.*, 2017 U.S. Dist. LEXIS 71114 at *12, 2017 WL 1927737 (W.D. Pa. May 10, 2017). According to Century III, the Lease intended to provide a higher valuation (and thus more favorable to Sears) of the "Building and Improvements" as opposed to the "leasehold improvements made by Tenant." But Century III fails to explain why the Lease would offer Sears a more favorable valuation if they were to violate their operating covenant as opposed to fulfilling it. Any

rational interpretation of Section 6.3 would result in the same Award as rendered by the Arbitrators.

Century III also argues that the Third Circuit erred in holding that the Arbitrators correctly rejected both parties' appraisals and determine that the same result would have [been] obtained had it accepted both appraisals, and basing its award solely on book value. In fact, the Arbitrators determined that Century III's appraisal was not in conformance with the Lease and that their expert was not credible. Credibility determinations are the function of the fact-finder. *See, e.g., In re TMI Litig.*, 193 F.3d 613, 713 (3d Cir. 1999). Century III has not provided any reason that the disregard of the appraisal was not a credibility or factual determination. Moreover, because the book value is greater than the average of the appraisals, the same result would been reached even if the appraisals had been considered. Century III offers no support whatsoever for its disagreement with this mathematical fact. Because the controlling Lease provision calls for the application of a mathematical formula, and the Arbitrators did not make any arithmetical errors in applying the formula, it simply would not be possible to reach a different conclusion than that of the Arbitrators.

Century III next argues that the Arbitrators erred in determining that Generally Accepted Accounting Principles ("GAAP") did not apply to Sears' calculation of book value, and that even if they did, those principles were satisfied. The Lease does not require the application of GAAP to the book value. In fact, Century III has never identified any provision of the Lease that

even mentions, let alone requires, application of GAAP. Nevertheless, the Arbitrators entertained Century III's argument and allowed an entire day of additional testimony, including expert testimony, dedicated solely to GAAP issues raised by Century III. The Arbitrators found Sears' expert to be more credible on this issue and held Sears' calculation of book value was proper and satisfied the terms of the Lease. Century III again fails to identify any flaw with the Arbitrators' analysis. Century III simply disagrees with the result. Under any possible alternative standard this Court could adopt to review arbitration decisions, credibility determinations are always properly made by the trier of fact and should not be disturbed by reviewing courts.

Lastly, Century III argues that the Third Circuit erred in holding that Century III "unambiguously" exercised its option to purchase the Buildings and Improvements, and that the Lease does [not] provide Century III with the option to opt-out of that purchase. Century III offers no explanation for how its letter that expressly stated that Century III "elects to terminate the Lease and acquire the Sears Building and Improvements" was not an unambiguous election of its option. Its argument to the contrary is dubious at best, and Century III offers no support for how or why any reviewing court could have or should have reached a different conclusion.

CONCLUSION

For all the foregoing reasons, Respondent Sears, Roebuck and Company respectfully requests that the Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

HARLAN S. STONE
Counsel of Record
ADAM J. VENTURA
Application for Admission Pending
DICKIE, MCCAMEY & CHILCOTE, P.C.
Two PPG Place
Suite 400
Pittsburgh, PA 15222
(412) 281-7272
hstone@dmclaw.com