No. 2021-CV-0079

In the

District of Columbia Court of Appeals

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Appellant,

v.

JAMS, INC. and WINSTON & STRAWN LLP,

Appellees.

Appeal from the Superior Court of the District of Columbia
Civil Division in Case 2020 CA 003346 B *(Hon. Robert Rigsby, Judge)*

BRIEF FOR APPELLANT

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RULE 28(a)(2) STATEMENT/DISCLOSURE

The parties in the trial court and appellate proceeding, and their respective counsel, are:

> Plaintiff-Appellant the National Rifle Association of America, represented by Robert H. Cox and William DeVinney of Briglia Hundley, P.C., and Philip J. Furia and Stewart G. Milch of Brewer, Attorneys & Counselors.
>
> Defendant-Appellee JAMS, Inc., represented by Robert F. Muse, Ronald Kovner, and Yannick B. Morgan of Levy Firestone Muse LLP.
>
> Defendant-Appellee Winston & Strawn LLP, represented by Paul J. Maloney and Matthew Berkowitz of Carr Maloney P.C.

There were no intervenors or amici curiae in the Superior Court. Plaintiff-Appellant the National Rifle Association of America discloses that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

This appeal is from final orders issued by the Superior Court granting JAMS, Inc.'s and Winston & Strawn LLP's motions to dismiss.

STANDARD OF REVIEW

This Court reviews dismissals under Rule 12(b)(6) for failure to state a claim *de novo*.[1]

ISSUES PRESENTED

1. When the Superior Court dismisses a complaint under Rule 12(b)(6) by considering external evidence and drawing factual conclusions, should the complaint be reinstated?

2. Did the NRA plead a viable negligent misrepresentation/constructive fraud claim when it alleged Winston had a duty to disclose a material fact and that the NRA detrimentally relied on the omission?

3. Did the NRA plead a viable unjust enrichment cause of action when it alleged it conferred a benefit on Winston and that Winston unjustly retained the benefit?

4. Does the arbitral immunity doctrine shield JAMS from a breach of contract claim when the alleged breach occurred well outside of the arbitral process?

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[1] *Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 316 (D.C. 2008).

5. Retired Judge Richard Neville, a JAMS neutral, was chosen as the arbitrator in a matter involving a Winston & Strawn client and the NRA. Unbeknownst to the NRA, Neville had a close friendship with Winston senior partner Terry Grimm, socialized with him regularly, communicated with him by email during the arbitration, and the two were in the same Chicago market. Under these circumstances, was the NRA entitled to a declaration that Winston and JAMS had a duty to disclose the extent of that relationship? And, where JAMS allegedly failed to appropriately vet its neutral and therefore did not discover his connection to Winston or his racist tendencies, was the NRA entitled to a declaration that Neville was unfit, *ab initio*?

STATEMENT OF THE CASE

For about nine months, retired Judge Richard E. Neville acted as arbitrator for a dispute between the NRA and Winston's client. This action alleging unjust enrichment, negligent misrepresentation, and breach of contract stems from defendants' failure to disclose two things about Neville.

First, Winston failed to disclose facts that called into question Neville's impartiality: that Neville had a "decades-long" friendship with Terry Grimm, a Winston senior partner based in the same Chicago market as Neville. Winston also failed to disclose that Neville and Grimm had personal contact during the same calendar year Neville began presiding over the arbitration. Second, a mis-directed email from Neville—using his JAMS signature block—to an NRA lawyer and Grimm while the arbitration was pending revealed Neville as a purveyor of racist literature. Yet JAMS vouched for him as a competent neutral.

Winston knew or should have known about the Neville-Grimm relationship—and certainly should have disclosed it to the NRA. JAMS failed to adequately vet Neville's background and credentials. Because both Winston and JAMS kept this information from the NRA, the NRA spent several months and hundreds of thousands of dollars participating in an arbitration proceeding that had to be re-done from scratch.

The NRA sued Winston and JAMS based on those failures and resulting damages. It alleged unjust enrichment against Winston, breach of contract against JAMS, and sought a declaration as against both that (i) they had an obligation to disclose the Neville-Grimm/Winston relationship and (ii) Neville was unfit to serve as arbitrator *ab initio*.

Winston moved to stay and compel arbitration or, alternatively, to dismiss; JAMS simply moved to dismiss the complaint. After briefing was complete, the NRA filed an amended complaint, adding a claim for negligent misrepresentation against Winston. Following another series of motions seeking dismissal of the amended complaint, the Superior Court granted them and dismissed the NRA's action in its entirety.

This Court should reverse and reinstate the NRA's amended complaint because:

- The NRA pleaded a viable negligent misrepresentation claim against Winston. Winston had a duty to disclose the Neville-Grimm relationship; this was a material issue; and the NRA relied on Winston's omission to its detriment—to the tune of hundreds of thousands of dollars spent on a scuttled arbitration.
- The NRA pleaded a viable unjust enrichment claim against Winston. Even the Superior Court found that the NRA conferred a benefit on Winston when

it advanced Winston's client's attorney fees as ordered by Neville, and that Winston retained the benefit by keeping the fees. This Court should further find the NRA properly pleaded that retaining the fees was unjust and reinstate the NRA's unjust enrichment claim. Winston has kept fees Neville awarded during the tainted arbitration. Whether retention of those fees is just or not is a matter for a jury to decide.

- The NRA pleaded a viable breach of contract claim against JAMS. Contrary to the motion court's holding, the arbitral immunity doctrine doesn't shield JAMS here because its failure to appropriately vet Neville was not integrally related to the arbitration, nor was it within the scope of the arbitrable process.
- The NRA is entitled to a judicial declaration that (i) Winston and JAMS had an obligation to disclose the Neville-Grimm relationship and (ii) Neville was unfit to serve as arbitrator *ab initio* based on what JAMS should have uncovered about his racist views and connection to Grimm and Winston if it had thoroughly investigated his background.

STATEMENT OF FACTS

The Parties

The National Rifle Association is a not-for-profit corporation organized under the laws of New York. It is America's leading provider of gun safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment to the United States Constitution. It has approximately 5 million members and is designated a 501(c)(4) tax-exempt organization.[2]

JAMS is a for-profit business providing alternative dispute resolution services, including the services of neutral arbitrators. JAMS extensively markets its "neutrals" as individuals who are trained, fit, non-biased, impartial, and ultimately fit to adjudicate the rights of others.[3] The Hon. Richard E. Neville (Ret.) is a former Cook County, Illinois circuit court judge; he was a JAMS neutral between 1999 and 2020 when he was terminated for his conduct during the underlying arbitration here.[4] For about nine months between late 2019 and June 2020, Neville served as the arbitrator in a dispute between the NRA and a Winston client.[5]

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[2] A655.

[3] *Id.*

[4] *Id.*

[5] A655-56.

Winston is a law firm headquartered in Chicago, Illinois, with offices worldwide, including in Washington D.C. Terry Grimm is a senior partner in Winston's Chicago office. He and Neville have been friends and "golfing buddies" for decades.[6]

Neville presides over an NRA-Winston client arbitration for several months. Then he inadvertently sends NRA's counsel racist literature and is removed as arbitrator.

A contract between the NRA and another party required arbitration of all disputes between them.[7] Any such arbitration would be governed by the International Institute for Conflict Prevention and Resolution.[8] So when a dispute did arise the parties contacted JAMS, and the NRA ultimately proposed Neville as arbitrator.[9] Winston, as counsel for the other party, agreed.[10] The parties later signed an agreement with JAMS memorializing Neville's retention and payment terms.[11]

Under both the International Institute's rules and JAMS ethical guidelines, Neville was required to disclose any information that would "give rise to a

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[6] A656.

[7] A657; The arbitration is confidential, with limited exceptions.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

justifiable doubt regarding [his] independence or impartiality," including connections to the parties that would create even the appearance of bias.[12] And although JAMS asked only about contact with the parties in the five years preceding the engagement, Neville disclosed that he'd arbitrated disputes with NRA counsel more than five years earlier.[13]

JAMS also asked the parties' counsel to "advise all parties and JAMS of any information that is inconsistent with or not included in [Neville's] disclosure," including "any matters that may affect the arbitrator's ability to be impartial."[14] But Winston said nothing about Neville's decades-long connection to Grimm.

The arbitration proceeded, the NRA paid hundreds of thousands in connection with it, and at one point Neville even ordered the NRA to advance Winston's client's fees for the arbitration.[15]

Only weeks before the merits trial, Neville—using his JAMS signature block—forwarded an email to several people, among them the NRA's counsel and Grimm.[16] The bland subject—"Editorial in the *Baltimore Sun*"—belied the hate-filled content, which was an article entitled "The Black Dilemma." The NRA's

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[12] A657-58

[13] A37, A41, A658.

[14] A658.

[15] A660.

[16] A48-52.

counsel, shocked at the racist invective Neville shared, responded that she was disgusted by the content and that it was "at odds with core values of [hers] and [her] firm."[17] Even one of Neville's friends in the distribution list commented about the questionable nature of what Neville had shared.[18] As if Neville's initial email wasn't bad enough, Neville retorted to his friend that "it's just a piece to have a discussion about…[if] that offends you or you find [it] troubling…that is what we should be discussing to see if we are all actually thinking the same thing…."[19]

Neville later apologized for inadvertently sharing the article, but not its content.[20] In fact, he twice called the NRA's counsel to explain that the other email recipients were people he'd known for 50 years, golfing buddies, and "many long-time friends from all walks of life and sports."[21] Acknowledging his lifelong friendships with these people only made matters worse—because among those friends was Winston senior partner Terry Grimm who, like Neville, was based in Chicago.[22] Winston never disclosed the Neville-Grimm relationship; NRA counsel

[17] A68.

[18] A54.

[19] A61.

[20] A112, A663.

[21] A112, A664.

[22] A48, A659.

learned about it fortuitously when she received Neville's email. Less than a week after sending the email, Neville was removed as arbitrator.

After the NRA learns about the Neville-Grimm/Winston connection, it demands additional information from both Winston and JAMS about the extent of the relationship.

Within days of learning about the Neville-Grimm/Winston connection NRA's counsel wrote to the International Institute and JAMS, raising concerns about that connection and the inappropriate material Neville shared.[23] Although JAMS agreed Neville's email was distasteful and promised to investigate his open matters, it refused to turn over any communications between Neville and Grimm.[24] It revealed only that Neville and Grimm had known each other for more than 20 years and had direct contact the same year the arbitration started.[25] Winston likewise refused to cooperate with NRA's counsel.[26]

The NRA sues JAMS and Winston for damages based on their failure to disclose the nature and extent of the Neville-Grimm/Winston relationship; JAMS and Winston move to dismiss; and the NRA files an amended complaint.

After JAMS and Winston dismissed the NRA's counsel's complaints that the undisclosed relationship between Neville and Grimm tainted the months-long

[23] A125-29, A145, A664-65.

[24] A142, A665-66.

[25] A175, A666.

[26] A151.

arbitration proceedings, the NRA filed a complaint (i) claiming Winston was unjustly enriched when Neville directed the NRA to advance Winston's client's attorney's fees in the arbitration; (ii) claiming JAMS breached its contract with the NRA by providing a biased, unfit arbitrator; and (iii) asking the Superior Court to declare that Neville was an unfit arbitrator *ab initio* and that defendants had a duty to disclose the Neville-Grimm/Winston relationship.[27]

Winston moved to stay and compel arbitration or, alternatively, to dismiss the complaint,[28] and JAMS also moved to dismiss.[29] The NRA opposed Winston's motion,[30] and after Winston filed its reply[31] the NRA filed an amended complaint.[32] The only claim added to the amended complaint was for negligent misrepresentation and constructive fraud against Winston.

[27] A8-29.

[28] A178-197.

[29] A260-300.

[30] A198-262.

[31] A301-15.

[32] A651-77.

A new round of motions ensued, with Winston again moving to stay/compel/dismiss and JAMS simply moving to dismiss.[33] The NRA opposed both motions,[34] and Winston and JAMS replied.[35]

The Superior Court's orders dismissing the NRA's amended complaint.

The Superior Court first granted Winston's motion in its entirety.[36] On the NRA's unjust enrichment claim, although the Court agreed the NRA conferred a benefit on Winston and Winston retained the benefit, it drew the factual conclusion that there was no evidence to support the NRA's claim that the retention was unjust.[37] As to the NRA's negligent misrepresentation and constructive fraud claim, the Superior Court found that—despite alleged knowledge of the Neville-Grimm/Winston relationship, and knowledge that Neville was presiding over an arbitration involving a Winston client—Winston had no duty to disclose that information to the NRA.[38] The Court further indicated that Winston was not bound

[33] A503-33, A534-53.

[34] A554-79, A580-602.

[35] A608-25, A626-36.

[36] A842-52.

[37] A849-51.

[38] A851-52.

by any ethical duty to disclose the information because the Rules of Professional Conduct impose duties on individual attorneys, not law firms.[39]

Less than a month later, the Court granted JAMS' motion, saying JAMS was protected by the doctrine of arbitral immunity because that doctrine applies to both individual arbitrators and their sponsoring organizations.[40]

Finally, the Court disposed of the NRA's request for declaratory relief by again assessing factual matters, writing "the record is completely devoid of any evidence connecting Grimm to this case other than that he was a senior partner at a law firm with nearly 900 attorneys."[41] The Court held this was enough to dispel the claim that Neville's relationship with Grimm and Winston called Neville's impartiality into question.

ARGUMENT SUMMARY

The Superior Court's orders should be reversed because:

- The Court made factual determinations and considered evidence outside the scope of the pleadings, which is improper on a motion to dismiss.

[39] A852.

[40] A853-54.

[41] A849.

- The NRA's negligent misrepresentation and constructive fraud claim against Winston was appropriately pleaded. Winston had a duty to disclose the Neville-Grimm relationship; this was a material issue; and the NRA relied on Winston's omission to its detriment—to the tune of hundreds of thousands of dollars spent on a scuttled arbitration.
- The NRA's unjust enrichment claim against Winston was appropriately pleaded. Even the Superior Court found that the NRA conferred a benefit on Winston and that Winston retained the benefit. This Court should further find that the NRA properly pleaded that Winston unjustly retained the benefit and reinstate the NRA's unjust enrichment claim. Winston has kept fees Neville awarded during the tainted arbitration. Whether retention of those fees is just or not is a matter for a jury to decide.
- The NRA's breach of contract claim against JAMS was appropriately pleaded. The arbitral immunity doctrine doesn't shield JAMS here because its failure to appropriately vet Neville was not integrally related to the arbitration, nor was it within the scope of the arbitrable process.

- The NRA is entitled to a judicial declaration that (i) Winston and JAMS had an obligation to disclose the Neville-Grimm relationship and (ii) Neville was unfit to serve as arbitrator *ab initio* based on what JAMS should have uncovered about his racist views and connection to Grimm and Winston if it had thoroughly investigated his background.

ARGUMENT

POINT I

THE SUPERIOR COURT IMPERMISSIBLY DREW FACTUAL CONCLUSIONS IN DISMISSING THE AMENDED COMPLAINT. THE ONLY QUESTION BEFORE IT WAS WHETHER THE COMPLAINT PLEADED A VIABLE CLAIM.

The Superior Court had two options when considering the defendants' motions in this case: either treat them as Rule 12(b)(6) motions as written or, if the Court intended to consider external evidence, treat them as summary judgment motions after giving notice to the parties it would do so.[42] Here, the Superior Court considered external evidence not incorporated into the complaint but did not treat the motions as ones for summary judgment.

Although a motion court may consider documents incorporated into a complaint on a 12(b)(6) motion, relying on other extrinsic evidence is reversible error.[43] Indeed, "a defendant raising a 12(b)(6) defense cannot assert any facts which do not appear on the face of the complaint itself."[44] The court in this case was therefore relegated to considering the NRA's amended complaint and attached

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[42] *Washkoviak v. Student Loan Marketing Ass'n*, 900 A.2d 168, 177-78 (D.C. 2006).

[43] *Washkoviak*, 900 A.2d at 178.

[44] *Carey v. Edgewood Mgmt. Corp.*, 754 A.2d 951, 954 (D.C. 2000).

documents and was likewise required to accept all allegations as true and construe them in the NRA's favor.[45]

Instead, the motion court looked outside the four corners of the amended complaint and made factual determinations about what the NRA may or may not be able to prove. For instance, in dismissing the NRA's declaratory judgment claim the court wrote "the record is completely devoid of any evidence connecting Grimm to this case other than that he was a senior partner at a law firm with nearly 900 attorneys."[46] Of course there's no evidence—Winston and JAMS refused to provide it when NRA counsel asked.[47] That's an important point insofar as the NRA's negligent misrepresentation/constructive fraud claim is concerned too. We know Neville and Grimm enjoyed a "decades-long" friendship; that they were in the same geographical area; that they socialized and played golf together; and that they even communicated by email while the arbitration was proceeding. The question is whether it tainted the arbitration proceedings. But that's a factual question for a jury, not a legal question appropriately answered on a 12(b)(6) motion.[48]

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[45] *Darrow v. Dillingham & Murphy, LLP*, 902 A.2d 135, 137 (D.C. 2006).

[46] A849.

[47] A142, 151.

[48] *Ronaldson v. National Association of Home Builders*, 502 F.Supp.3d 290, 302 (D.D.C. 2020).

The same is true of the motion court's order about the NRA's unjust enrichment claim. It found that the NRA properly pleaded (i) it conferred a benefit on Winston by advancing its client's legal fees and (ii) Winston retained the benefit.[49] But then it determined the factual issue of whether Winston's retention of the benefit was unjust.[50]

And, concerning the NRA's breach of contract claim against JAMS, the Superior Court concluded that the doctrine of arbitral immunity applied.[51] Although the court did not analyze the rule or explain its reasoning, implicit in the order was a finding that JAMS' failure to adequately investigate Neville's background fell within the scope of the arbitration. No evidence was presented either way on that point—the court simply determined it to be true. Again, this was improper on a 12(b)(6) motion, and the Superior Court's orders should be reversed on that basis alone.

[49] A850.

[50] A850-51.

[51] A853-54.

POINT II

EVEN IF THIS COURT FINDS THE SUPERIOR COURT'S FACTUAL FINDINGS APPROPRIATE, THE NRA'S COMPLAINT SHOULD STILL BE REINSTATED BECAUSE IT PROPERLY PLEADED ALL CLAIMS.

A. The First Amended Complaint sufficiently pleads a negligent misrepresentation claim against Winston.

To state a claim for negligent misrepresentation a plaintiff need only allege that (i) defendant omitted a fact it had a duty to disclose; (ii) the omission involved a material issue; and (iii) plaintiff reasonably relied upon the omission to its detriment.[52] The parties' arguments below focused on the first element; Winston denied it had a duty to disclose a relationship between one of its senior partners and the arbitrator presiding over its client's arbitration.

Winston argued it had no duty to disclose the relationship because the Rules of Professional Conduct created no such duty; because even if they did, they applied to individual attorneys, not law firms; and that the JAMS disclosure forms did not require disclosure of the relationship.[53]

Grimm is a senior partner in Winston's Chicago office. Neville is a former judge located in Chicago. He and Neville have been friends for at least 20 years

[52] *Heyer v. Schwartz & Associates PLLC*, 319 F.Supp.3d 299, 306 (D.D.C. 2018).
[53] A549-50.

and had personal contact at a golf outing the same year the arbitration proceeding started.[54] Not only that but also the fact that Neville included Grimm in an email while the arbitration was pending is unmistakable evidence that their friendship continued. What else did Neville and Grimm communicate about while Neville presided over an arbitration involving Grimm's firm? Did they exchange emails or texts or telephone calls about the arbitration? We don't know because Winston and JAMS refused to cooperate when the NRA asked them to disclose the information. But Winston contends all of this is meaningless; that it wasn't required to tell the NRA about the close personal relationship because Grimm wasn't handling the arbitration. Nonsense.

Even if Winston is technically correct that ethical rules are ambiguous and the JAMS questionnaire didn't ask specific enough questions, that is not license for Winston to turn a blind eye to potential bias. JAMS asked the parties to disclose anything that might call the arbitrator's impartiality into question.[55] And the amended complaint alleges exactly that—that based on JAMS requests and what Winston knew or should have known about the Neville-Grimm relationship, it had a duty to disclose that information. Indeed, although professional conduct rules don't provide private rights of action or create a specific duty, they "certainly

[54] A175.

[55] A658.

constitute evidence in an action at common law."[56] The facts as pleaded were therefore sufficient to state a viable negligent misrepresentation claim.

B. The First Amended Complaint sufficiently pleads an unjust enrichment claim against Winston.

The motion court appropriately indicated the requisite elements for pleading an unjust enrichment claim: (i) that plaintiff conferred a benefit on defendant; (ii) defendant retained the benefit; and (iii) defendant's retention of the benefit is unjust.[57] But after recognizing that the NRA's advancement of Winston's client's fees constituted a benefit to Winston and that Winston had retained the fees, the court claimed it "must also determine whether Winston's retention of the fee advancement is just,"[58] and held it was.[59] That was improper on a motion under 12(b)(6).[60]

The amended complaint recites that the NRA advanced Winston's client's fees in the arbitration, thereby conferring a benefit on Winston; that Winston

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[56] *Williams v. Mordkofsky*, 901 F.2d 158, 163 (D.C. Cir. 1990); *Waldman v. Levine*, 544 A.2d 683, 690-91 (D.C. 1988) ("although the Code does not attempt to delineate the boundaries of civil liability for the professional conduct of attorneys, its provisions constitute some evidence of the standards required of lawyers").

[57] *See, e.g., Boyd v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 78 (D.C. 2017).

[58] A850.

[59] A850-51.

[60] *In re Domestic Airline Travel Antitrust Litigation*, 221 F.Supp.3d 46, 71-2 (D.D.C. 2016) (court must accept factual allegations in complaint as true on a motion to dismiss; weighing evidence is appropriate only at the summary judgment stage).

retained the fees and has not returned them; and that retaining them is unjust because the Neville-Grimm/Winston relationship tainted the arbitration proceedings.[61] Winston, citing *Harrington v. Troutman*,[62] argued below that there could be no unjust enrichment because there was a contract requiring the fee payment.[63] There are two problems with that argument. First, there is no contract between the NRA and Winston, only the contract between the NRA and Winston's client. Whether Winston's retention of the fee advancement is unjust is therefore a separate matter. Furthermore, *Harrington*'s procedural posture proves the NRA's point about the impropriety of a 12(b)(6) dismissal. The claim in *Harrington* was only dismissed after a full bench trial on the merits, not on a 12(b)(6) motion.[64] The amended complaint here should move forward too.

In any event, the NRA's unjust enrichment claim is rooted in more than the fee advancement order. It is also based on requiring two arbitrations and two fee advances. The duplicative effort was required solely because Winston failed to disclose that its senior partner had a relationship with the arbitrator. The NRA

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[61] A669-70.

[62] 983 A.2d 342, 347 (D.C. 2009).

[63] A732.

[64] *Harrington*, 983 A.2d at 347.

properly pleaded all these facts and elements of an unjust enrichment claim, and the amended complaint should therefore be reinstated.

C. The First Amended Complaint sufficiently pleads a breach of contract claim against JAMS.

It is true, as both JAMS and the Superior Court pointed out, that Neville is protected by the doctrine of arbitral immunity, and that under "proper circumstances" JAMS could be too. But those circumstances extend just so far—arbitral immunity for a sponsoring organization extends only "to the administrative tasks it performs, insofar as these are integrally related to the arbitration."[65] The NRA must also acknowledge the body of case law holding that pre-arbitration actions, such as appointing an arbitrator, are considered part of the arbitration process and therefore protected under the arbitral immunity doctrine.[66] But JAMS' failure to adequately evaluate Neville's background occurred long before this arbitration and should not be protected.

Indeed, to determine whether a particular claim is protected by the arbitral immunity doctrine "[t]he key…is whether the claim at issue arises out of a decisional act…does the claim…effectively seek to challenge the decisional act of

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[65] *New England Cleaning Services, Inc. v. American Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999) (emphasis added).

[66] *See, e.g., Olson v. National Ass'n of Securities Dealers*, 85 F.3d 381, 383 (8th Cir. 1996).

an arbitrator or arbitration panel…If not, the doctrine would not apply."[67] Even the case JAMS cited in the Superior Court—*Cherdak v. American Arbitration Ass'n*[68]—recognizes that arbitral immunity extends only to acts "within the scope of the arbitral process."[69] The NRA's claims against JAMS are based on JAMS' failure to adequately investigate Neville's background before holding him out as a competent neutral—acts that occurred long before Neville's selection in the parties' arbitration.

Nor does D.C. Code § 16-4414 immunize JAMS, as the Superior Court held.[70] That section only immunizes an arbitrator "to the same extent as a judge…acting in a judicial capacity." When the D.C. Council adopted this provision from a similar rule in the Uniform Arbitration Act, it specifically rejected an additional clause that would have extended immunity to sponsoring organizations.[71] This was intentional—the legislature did not want "arbitration

[67] *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1159 (9th Cir. 2007) (cleaned up).

[68] 443 F.Supp.3d 134 (D.D.C. 2020).

[69] *Id.* at 156.

[70] A853-54.

[71] *See* Unif. Arb. Act (2000) § 14(a); *compare* D.C. Code § 16-4414(a) (containing identical language but excising the phrase "or an arbitration organization").

organizations [seeking] immunity for actions that are not directly a part of an arbitration proceeding."[72]

This Court has considered a situation where the D.C. Code conflicted with another code—the Uniform Probate Code—and held that the D.C. Code controls because the conflicting Uniform Probate Code provision was "not part of the law in the District of Columbia."[73] This situation is no different. The D.C. Council specifically excluded arbitration organizations when it wrote § 16-4414. Whether other states and courts persuasively reason that arbitral organizations should be afforded the same immunity as arbitrators[74] is therefore immaterial. Because those organizations are not protected by the D.C. Code, the NRA's complaint against JAMS was properly pleaded and should be reinstated.

D. The First Amended Complaint sufficiently demands declaratory judgment against Winston and JAMS.

D.C. Superior Court Rule 57 and 28 U.S.C. § 2201 permit courts to "declare the rights and other legal relations of any interested party seeking a declaration in a case of actual controversy within their jurisdiction."[75] The party seeking a

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[72] Dist. of Columbia Committee Report, B. 17-50.

[73] *Estate of Liles*, 435 A.2d 379, 383 (D.C. 1981).

[74] A854.

[75] *C.F. Folks, Ltd. V. DC Jefferson Building, LLC*, 308 F.Supp.3d 145, 149 (D.D.C. 2018) (cleaned up).

declaratory judgment must demonstrate the existence of a "substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[76]

The NRA pleaded entitlement to a declaratory judgment that (i) Neville, JAMS, and Winston had an obligation to disclose the Neville-Grimm/Winston relationship to the NRA; that they failed to do so; and that their disclosures at the outset of the arbitration were therefore inadequate; and (ii) that Neville, because of his relationship with Grimm and his racist views, was unfit to act as arbitrator *ab initio*.[77] In dismissing this claim the motion court wrote that "there is nothing to support [the] conclusion" that Neville knew Winston attorneys and therefore could not be impartial; "the record is completely devoid of any evidence connecting Grimm to this case other than that he was a senior partner at a law firm with nearly 900 attorneys."[78] This was an improper factual determination made on a motion to dismiss.[79]

The Superior Court also believed that because Neville had been removed as arbitrator, that ended the inquiry and the "NRA's basis for declaratory judgment is

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[76] *Id.* at 150.

[77] A672.

[78] A849.

[79] *Ronaldson*, 502 F.Supp.3d at 302; *In re Domestic Airline Travel Antitrust Litigation*, 221 F.Supp.3d at 71-2.

no longer ripe….”[80] Not so. All these failures tainted the entire proceeding, caused the NRA to spend even more time and money on proceedings before a new arbitrator, and continue to substantially prejudice the NRA. The claim is therefore still ripe for adjudication and should be reinstated with the rest of the amended complaint.

[80] A849.

CONCLUSION

The NRA's amended complaint should be reinstated because (i) the motion court impermissibly considered extrinsic evidence and made factual determinations on these 12(b)(6) motions and (ii) in any event, the NRA properly pleaded all causes of action by alleging sufficient facts to support its claims. The Superior Court's orders should therefore be reversed.

Respectfully submitted,

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STATEMENT REGARDING SUPER. CT. CIV. R. 5.2 AND ADMINISTRATIVE ORDER M-274-21

Counsel Robert H. Cox. has reviewed this Brief pursuant to Super. Ct. Civ. R. 5.2 and Administrative Order M-234-21 for materials that should be redacted. There are no materials that needed to be redacted in this brief.

/s/Robert H. Cox
Robert H. Cox

District of Columbia Court of Appeals

The National Rifle Association of America,

v.

JAMS, Inc. and Winston & Strawn LLP. **No. 2021-CV-0079**

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Brewer, Attorneys & Counselors, counsel for the Appellant to print this document. I am an employee of Counsel Press.

On the **19th Day of August, 2021**, this document will be filed via the Court's electronic filing system which will send a notice of filing to any of the following registered users:

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In addition to service via to the e-filing notice, on this date I served the within **Brief for Appellant and Joint Appendix** upon the above counsel **via Express Mail,** by causing a true copy to be deposited, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

The required copies will be delivered to the Court within the time allowed by rule.

August 19, 2021

/s/ Robyn Cocho
Robyn Cocho