Appeal No. 19-2753

In the

United States Court of Appeals

For the

Third Circuit

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION,
MDL No. 2323

Amon C. Gordon,

Plaintiff-Appellant

This Document Relates To:

BAGGS et al. v. NATIONAL FOOTBALL LEAGUE et al.,
Civil Action No. 2:13-cv-05309-AB

PLAINTIFF APPELLANT AMON C. GORDON'S RESPONSE TO THE ORDER TO SHOW CAUSE WHY THE THIRD CIRCUIT HAS AUTHORITY TO CONSIDER THIS APPEAL

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Plaintiff Appellant respectfully submits that this Court has authority to entertain this appeal. For the reasons set forth below, however, Plaintiff Appellant seeks a limited remand to the District Court and a stay of this appeal as set forth in the accompanying motion.

Here, Plaintiff Appellant challenges the application of the Settlement Agreement's term to his claim, and respectfully submits that there was mistake in its application. Therefore, since this is a question of law as to whether or not the application of the language was correct under the Agreement, and not a question of whether the Agreement itself is void or invalid, this is a question that must come before this Court. And, common sense maintains that had the parties intended to bargain away their respective rights to appeal, they would have done so expressly. *See Waters v. Int'l Precious Metals Corp*., 237 F.3d 1273, 1276 (11th Cir. 2001) ("This court rejects the proposition that a party may be barred from appealing a settlement agreement just because the party failed to specifically reserve a right of appeal. . . . In any event, appellate courts routinely review disputes about the meaning of settlement agreements without requiring that the appealing party expressly reserved a right of appeal in the agreement."); *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000) (holding that a consent decree's waiver-of-appeal provision did not bar an appeal when the district court's judgment deviated from the terms of the decree). *Compare Throne v. Citicorp Inv. Servs. Inc*., 378 F.

App'x 629, 631 (9th Cir. 2010) (class settlement provided "Named Plaintiffs and [Citigroup] hereby waive their right to appeal or seek other judicial review of any order that is materially consistent with the terms of this Agreement") (citation and internal quotation marks omitted). Here, there is no express statement that the parties intended to waive all appellate rights.

There is no dispute that the Settlement Agreement states that the District Court's decision is "final and binding." The question then becomes: what does "final and binding" mean? Both well-established precedent and common sense teach that the District Court's order is "final and binding" as to proceedings before the Claims Administrator, the Special Master, and the District Court, but does not bar an appeal, much in the way that a "final judgment" marks the conclusion of proceedings in one court and the initiation in another. This Court has long recognized that in construing the Agreement, words may not be taken out of their context and endowed with an absolute quality nor may the Agreement be disregarded in interpreting any single provision. As this Court pointed out in *Dahlberg v. Pittsburgh & L.E.R. Co.*,138 F.2d 121 (3d Cir. 1943), "[o]bviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. . . .

and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if that the proceeding was authorized by law." *Id.* at 122.

This Court has held that the requirement that an arbitration award be "final and binding" before it can be enforced—the so-called "complete arbitration rule"—is not one that determines this Court's subject matter jurisdiction over the matter. *See Union Switch & Signal Div. Am. Std. Inc. v. United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 612 (3d Cir. 1990); *APWU of L.A., AFL-CIO v. U.S. Postal Service*, 861 F.2d 211, 215 (9th Cir.1988The complete arbitration rule "while a cardinal and salutary rule of judicial administration, it is not a limitation on a district court's jurisdiction," which is conferred by Congress in sections 15(b) and 301, *Union Switch*, 900 F.2d at 612. Therefore, while the ambiguity of the arbitrator's award *vel non* may be entirely relevant to determine whether the union has stated a claim for relief, it is not relevant to this Court's subject matter jurisdiction, which has already been conferred by Congress. *See Bensalem Park Maint., Ltd. v. Metro. Reg'l Council of Carpenters*, Civ. A. No. 11–2233, 2011 WL 2633154, at *4 (E.D. Pa. July 5, 2011) (applying Union Switch to hold subject matter jurisdiction proper before determining arbitrability); *Pittsburgh Metro Area Postal Workers' Union, AFL–CIO v. U.S. Postal Service*, Civ. A. No. 07–00781, 2008 WL 1775502, at *3–4

(W.D. Pa. Apr.16, 2008) (same); *see also Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 2876–77, 177 L.Ed.2d 535 (2010) ("Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case.' It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.") (citations omitted). In *McLaurin v. McLaughlin*, 215 F. 3345 (4th Cir. 2014), an appeal from an arbitration agreement that was similarly "final and binding" was deemed to be properly before the Court. There, the decree from which the appeal was made in an arbitration of certain differences between the parties thereto, but because "the refusal of the arbitrators to hear the evidence offered" was determined to be in violation of the rules of law governing the conduct of arbitration, the Court determined it had authority to consider it. The Western District of Pennsylvania recently addressed this same question of subject matter jurisdiction when faced with an agreement below to enter into a final and binding resolution. There, it was in the context of an arbitration, *Pittsburgh Metro Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 938 F. Supp. 2d 555 (W.D. Pa. 2013).

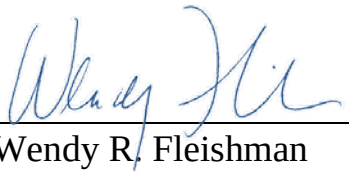
If the parties had intended that the district court have the final say on any question of internal review, the Agreement has to clearly state that the parties are waiving their rights to appeal to the Appellate Courts. That is not spelled out in the

Class Action Settlement Agreement below. There is no reason to speculate that was the intention of the parties.

Therefore, Plaintiff Appellant respectfully submits that this Court has standing to review this matter. However, Plaintiff seeks to stay that appeal pending a limited remand to the Eastern District of Pennsylvania, which motion is being submitted to that court simultaneously.

Dated: August 20, 2019

Respectfully submitted,

By: 

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CERTIFICATE OF FILING AND SERVICE

I, Noel Reyes, hereby certify pursuant to Fed. R. App. P. 25(d) that, on August 20, 2019 the foregoing Document was filed through the CM/ECF system and served electronically on parties in the case.

/S/Noel Reyes