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Commentary

Obtaining Injunctions in Aid of Arbitration in United States Federal Courts: Addressing a Potential Threshold Jurisdictional Bar

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I. Introduction

Determining the proper division of jurisdictional responsibilities between national courts and arbitral tribunals requires constant calibration by the courts, tribunals, and the parties themselves. One situation in which national courts play a crucial role in the arbitral process is to issue preliminary injunctive relief, where necessary and appropriate, in support of an arbitral tribunal, particularly before the constitution of the tribunal. The discretion to grant preliminary injunctive relief is a significant component of a court's equitable powers because it may be necessary to preserve the *status quo* until the arbitral tribunal may entertain a request for that relief. Otherwise, a party could "irreversibly alter the *status quo* and render arbitration a hollow formality."¹

Although the vast majority of U.S. federal courts now hold that there is no threshold jurisdictional bar to the issuance of preliminary injunctive relief in aid of arbitration, some U.S. federal courts still apply a jurisdictional hurdle that may improperly impede parties from obtaining injunctive relief in aid of arbitration where the situation warrants that remedy.² Although there is a split of authority on this issue among U.S. federal courts, most U.S. circuit courts have unified their approach to granting injunctive relief in aid of arbitration, particularly before the constitution of the arbitral tribunal.

Because the New York Convention does not expressly speak to the propriety of issuing injunctions in aid of arbitration, federal courts in the United States have sought to resolve the issue by developing and applying certain principles. These principles have been adopted regardless of whether the case demands application of the New York Convention or not. In summary:

- The vast majority of the U.S. federal circuit courts of appeal—including the First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits—hold that, where parties have agreed to resolve their disputes in arbitration, a district court possesses the inherent authority to grant preliminary injunctive relief in aid of arbitration, even in the absence of clear contractual language, provided that the movant satisfies the four traditional factors for injunctive relief.
- The Eighth Circuit places a heightened degree of emphasis on the parties' consent, as evidenced by (i) the parties' agreement to resolve the underlying dispute(s) in arbitration, and (ii) the existence of "qualifying contractual language" in the agreement, to the extent that such language provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute(s). As discussed below, the analysis in the Eighth Circuit is guided by the parties' consent, and not by an evaluation of the four traditional injunctive relief factors.
- Although the Eighth Circuit tends to focus on the issue of consent, it is more difficult to divine

any rule from the Fifth Circuit. In the absence of controlling and principled circuit authority, district courts in the Fifth Circuit have generally modeled the majority's analysis of the four traditional injunctive relief factors.

- Like the Fifth Circuit, the Eleventh Circuit has not ruled on the authority of a district court to issue preliminary injunctive relief in aid of arbitration when the parties' arbitration clause is silent regarding such relief. However, while district courts in the Fifth Circuit appear to be moving toward the majority rule, the absence of clear guidance from the Eleventh Circuit has resulted in a lack of uniformity amongst the district courts with respect to their inherent power to grant injunctive relief in aid of arbitration where the agreement does not so provide.
- The U.S. Court of Appeals for the District of Columbia has not yet addressed this issue. Again, given the lack of clear guidance from the D.C. Circuit, there is little to no uniformity in the decisions of the district courts in this circuit.

The above-referenced divide impacts not only the ability of a party that may otherwise qualify for injunctive relief to obtain that relief from a court or tribunal, but also the choice of the U.S. federal court in which a party may seek injunctive relief. Prudence dictates an evaluation of controlling law in the applicable jurisdiction(s) when seeking preliminary injunctive relief in aid of arbitration. Parties in the Eighth, Fifth, and Eleventh Circuits may minimize their jurisdictional problems when they are negotiating their arbitration agreement by expressly inserting the necessary provisions regarding the availability of injunctive relief.

The purpose of this article is to analyze federal law in the United States regarding a federal court's authority to issue preliminary injunctive relief in aid of arbitration. This article concludes by offering a proactive approach for parties litigating in the circuits that have not yet adopted the majority rule. These recommendations should help protect parties litigating or arbitrating in those circuits until the law in these jurisdictions is clarified or more closely aligned with the majority, which will only be a matter of time.

II. The Rationale For Court-Ordered Injunctive Relief in Aid of Arbitration

Where parties have agreed to resolve their disputes by arbitration, the potential need for injunctive relief from a U.S. federal court arises from three facts. First, until the parties (perhaps with the assistance of an arbitral institution) constitute an arbitral tribunal, it does not exist and, as such, it cannot entertain a request for preliminary injunctive relief. Second, constituting an arbitral tribunal takes time, particularly in cases where three tribunal members will be appointed. Third, even if injunctive relief is available from a tribunal once it is constituted (or an "emergency" arbitral tribunal before that), injunctive relief does not automatically possess the force of law, particularly with respect to third parties.³

What happens to the parties' rights before an arbitral tribunal is fully constituted can significantly affect the course and outcome of the entire dispute. The purpose of the arbitration may be thwarted by the absence of an extant arbitral tribunal to protect the rights of a party. The risks may be particularly high because an adverse party may have a perverse incentive to engage in "foot-dragging" to its own advantage.⁴ U.S. courts have recognized that arbitration may be rendered a nullity if parties are precluded from obtaining injunctive relief in aid of arbitration. This is especially true where a party attempts to circumvent its agreement to arbitrate, as in *Simula, Inc. v. Autoliv, Inc.*, where the plaintiff (Simula) attempted to avoid arbitration by asking the district court to resolve the merits of its claims.⁵

The U.S. federal courts that have grappled with the issue of whether a jurisdictional bar exists to obtaining injunctive relief in aid of arbitration have utilized various rationales in support of their conclusions that a district court may grant injunctive relief. Arbitration is fundamentally a matter of consent,⁶ and parties often have consented, either expressly or implicitly, to the granting of injunctive relief either by a competent judicial authority or by an arbitral tribunal. Where the parties' consent arises directly from the arbitration agreement itself, so long as the language is clear, there will likely be little doubt that the parties agreed to permit injunctive relief in aid of arbitration.

Consent also may arise from the agreed-upon arbitration rules that the parties have incorporated into their

agreement. Where consent arises from the arbitration rules incorporated into the parties' agreement (instead of the agreement itself), however, the parties may disagree over the effect of those rules.⁷ These arbitration rules differ from institution to institution, but generally fall into two categories: (i) rules that expressly permit federal courts to issue injunctive relief; and (ii) rules that provide that interim relief shall not be deemed incompatible with the agreement to arbitrate. What the respective arbitration rules state may, of course, be dispositive. For example, in *Sauer-Getriebe KG v. White Hydraulics, Inc.*, the Seventh Circuit found that the district court possessed the authority to grant a request for injunctive relief pursuant to its equitable power and the International Chamber of Commerce ("ICC") arbitration rules, which expressly permitted either party to seek interim injunctive relief pending arbitration.⁸ The court found that it had discretion to decide a request for preliminary injunctive relief pursuant to the applicable rules of arbitration.⁹ Similarly, in *Faiveley Transport Malmo AB v. Wabtec Corp.*, the Second Circuit upheld the district court's jurisdiction to grant preliminary injunctive relief in aid of arbitration, applying Article 23(2) of the ICC Rules, as incorporated into the parties' arbitration agreement.¹⁰

As discussed further below, whether parties have consented to the issuance of injunctive relief in aid of arbitration plays only part of the calculus of reasons that U.S. courts have, or have not, permitted parties to obtain injunctive relief in aid of arbitration.

III. The Availability of Injunctive Relief in Aid of Arbitration: The New York Convention and the Federal Arbitration Act

A. The New York Convention Does Not Expressly Address Preliminary Injunctions In Aid of Arbitration

The New York Convention does not expressly address the availability of injunctive or provisional relief, whether from a federal court or arbitral tribunal. The Convention's silence on this point has led to some confusion in U.S. courts, contributing to the creation of a vacuum that has been filled by judicial decisions with varying degrees of uniformity depending on the jurisdiction.

For example, in *McCreary Tire & Rubber Co. v. CEAT SpA*, the Third Circuit addressed the implications the

apparent silence of Article II(3) and its binding effect in U.S. courts.¹¹ To honor the parties' arbitration agreement and thereby uphold its obligation under Article II(3) of the New York Convention, the Third Circuit denied the plaintiff's request for preliminary relief. The court premised this denial on its observation that the plaintiff sought to use the preliminary measures to bypass the arbitration process altogether, instead of to *enforce* an arbitration award.¹² This attempt to make an end-run on arbitration, the court reasoned, would contravene the purpose of Article II(3).¹³

Some courts subsequently misinterpreted the *McCreary* decision as providing a blanket Article II(3) prohibition on court-ordered provisional relief in aid of arbitration.¹⁴ Unfortunately, as discussed further below, this error has also been repeated by certain courts in circumstances involving a party's request to U.S. courts in support of injunctive relief. Consistent with the true premise of *McCreary*, however, most U.S. courts, and almost all commentators, have held that Article II(3) does not prohibit preliminary relief.¹⁵ For example, as the Second Circuit observed in *Borden, Inc. v. Meiji Milk Products Co.*, where plaintiffs sought provisional measures *in aid* of arbitration, and *not* to bypass it, injunctive relief may be appropriate.¹⁶ Thus, whether injunctive relief should be granted to a party necessarily requires a court to consider if the provisional relief is being sought in aid, or in frustration, of the parties' agreement to arbitrate.

B. The Federal Arbitration Act Does Not Expressly Address Preliminary Injunctions in Aid of Arbitration

The FAA, like the New York Convention, does not expressly address the availability of injunctive or provisional relief from U.S. courts or from an arbitral tribunal. Nonetheless, the language and purpose of the FAA is designed to encourage the resolution of disputes by arbitration where the parties have agreed to do so.¹⁷ Likewise, the FAA expressly provides that arbitration be compelled "in the manner provided for" by the parties' agreement.¹⁸ These provisions apply regardless of whether the New York Convention is involved or not. Consequently, many, if not most, of the U.S. cases involving the role of injunctive relief in aid of arbitration arise from "domestic" U.S. litigation, but nonetheless apply in cases involving the New York Convention.

IV. The Availability of Injunctive Relief in Aid of Arbitration: United States Federal Courts

A. The Majority of U.S. Federal Courts Hold That They May Grant Injunctive Relief In Aid of Arbitration

Every U.S. circuit court that has considered the issue has rejected a blanket rule barring district courts from issuing preliminary injunctions to preserve the *status quo* pending the selection of an arbitrator and/or the constitution of an arbitral tribunal, for the reasons discussed above. As discussed further below, the majority of federal courts teach that a district court maintains its equitable authority to grant preliminary injunctive relief in aid of arbitration provided that a plaintiff establishes the four traditional injunctive relief factors: (i) the likelihood of success on the merits; (ii) irreparable harm in the absence of such relief; (iii) the balance of hardships tips in the plaintiff's favor; and (iv) that an injunction would serve the public interest.¹⁹

1. First Circuit

In 1986, the First Circuit observed in *Teradyne, Inc. v. Mostek Corp.* that “the congressional desire to enforce arbitration agreements would frequently be frustrated if the courts were precluded from issuing preliminary injunctive relief to preserve the status quo pending arbitration and, *ipso facto*, the meaningfulness of the arbitration process.”²⁰ Nearly two decades later, in *Puerto Rico Hospital Supply, Inc. v. Boston Scientific Corp.*, a dispute involving an exclusive international distribution agreement that incorporated the ICC Rules of Arbitration, the First Circuit affirmed the district court's inherent power to consider a party's request for a preliminary injunction in aid of arbitration and, thereby, to engage in the balancing of the traditional injunctive relief factors.²¹ There, the court noted that “[a] district court has jurisdiction to issue preliminary injunctions to preserve the status quo pending arbitration” and that the “ICC rules . . . allow either the arbitrator or ‘any competent judicial authority’ to issue interim relief.”²²

Most recently, in *Next Step Medical Co. v. Johnson & Johnson International*, the First Circuit affirmed its holding in *Teradyne*.²³ In that case, the First Circuit recognized that “a district court retains power to grant an interim preliminary injunction, where otherwise justified, for the interval needed to resort to the

arbitrator—that is, for the period between the time the district court orders arbitration and the time the arbitrator is set up and able to offer interim relief itself.”²⁴

2. Second Circuit

The Second Circuit consistently has favored the authority of a district court to provide injunctive relief in aid of arbitration. In 1984, the Second Circuit held, in *Roso-Lino Beverage Distributors v. Coca-Cola Bottling Co.*, that the “fact that a dispute is to be arbitrated . . . does not absolve the court of its obligation to consider the merits of a requested preliminary injunction.”²⁵ Similarly, in *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Second Circuit again affirmed its position, reasoning that “[a]rbitration can become a ‘hollow formality’ if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute. A district court must ensure that the parties get what they bargained for—a meaningful arbitration of the dispute.”²⁶

Notably, in three cases, the Second Circuit affirmed the district court's obligation to analyze the traditional injunctive relief factors despite express contractual provisions requiring maintenance of the *status quo* pending arbitration.²⁷ According to the Second Circuit, the district court must apply these factors because “a request to a district court for injunctive enforcement of the provision necessarily invokes consideration of the traditional factors governing injunctive relief.”²⁸

District courts in the Second Circuit have followed the precedent. For example, in *United Insurance Co. v. World Wide Web*, the district court found that “[a] district court may issue interim injunctive relief on arbitrable claims to preserve the status quo pending arbitration.”²⁹ Similarly, in *Blom Asa v. Pictometry International Corp.*, a licensee filed a petition for injunctive relief pending arbitration of a breach of contract claim against the licensor, along with a motion for a preliminary injunction.³⁰ The district court relied upon the Second Circuit rule and the Ninth Circuit's decision in *Toyo Tire Holdings of Americas Inc. v. Continental Tire North America, Inc.*³¹ for the proposition that a district court's power to issue preliminary injunctive relief is key to preserving the meaningfulness of arbitration.³² Further, in applying the principles espoused by *Toyo*, the district court concluded that the most appropriate remedy in the case was to issue an injunction that

restored the parties to the *status quo ante* (e.g., the parties' respective status prior to the genesis of this dispute).³³

3. Third Circuit

Courts in the Third Circuit also follow the general rule that a district court is vested with the equitable authority to grant a request for preliminary injunctive relief to preserve the meaningfulness of arbitration. In *Ortho Pharmaceutical Corp. v. Amgen, Inc.*, the Third Circuit held that a "district court has jurisdiction to entertain a motion for preliminary injunctive relief in a dispute that the parties agree is arbitrable."³⁴ In that case, the Third Circuit ruled that a district court has jurisdiction to issue injunctive relief pending arbitration if the movant satisfies the four traditional injunctive relief factors.³⁵

District courts in the Third Circuit have followed suit. In fact, at least one district court has reasoned that "[a]n arbitration agreement should not force a party to endure possibly damaging conduct that only injunctive relief could halt."³⁶ Put another way, a jurisdictional bar as to requests for preliminary injunctive relief would thwart the arbitration process and the nature of the parties' agreement to resolve disputes under the FAA.

4. Fourth Circuit

The Fourth Circuit also has addressed this legal issue, finding that the FAA does not strip district courts of their authority to grant equitable relief. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, the Fourth Circuit reasoned that Congress would not have "enacted a statute intended to have the sweeping effect of stripping the federal judiciary of its equitable powers in all arbitrable commercial disputes without under-taking a comprehensive discussion and evaluation of the statute's effect."³⁷

In a recent district court case, *Morris-Griffin Corp. v. C & L Service Corp.*, the court noted that a request for interim equitable relief (such as a preliminary injunction or temporary restraining order) should not over-reach (e.g., that it simply should seek to preserve the status quo prior to the parties' dispute), in view of the fact that the parties have agreed to resolve the merits of the underlying claim(s) in arbitration.³⁸

5. Sixth Circuit

In *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, the Sixth Circuit reversed the district court's

denial of a request for preliminary injunctive relief and joined the majority of the circuits in holding that district courts have subject matter jurisdiction under the FAA to grant preliminary injunctive relief pending arbitration. The Sixth Circuit concluded "that a grant of preliminary injunctive relief pending arbitration is particularly appropriate and furthers the congressional purpose behind the Federal Arbitration Act, where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality . . ."³⁹

To preserve the meaningfulness of arbitration, district courts in the Sixth Circuit have echoed the *Questar* decision. For instance, in *PFS Investments, Inc. v. Imhoff*, the district court urged that "[b]ecause the party seeking injunctive relief must also submit his claim to arbitration, it is clear that the request for temporary injunctive relief simply preserves the status quo until arbitration is commenced."⁴⁰

6. Seventh Circuit

As discussed in Section II, in *Sauer-Getriebe KG*, the Seventh Circuit reversed the district court's denial of a request for injunctive relief pending arbitration pursuant to ICC Rules. The appellate court specifically discussed the ICC Rules (incorporated into the parties' agreement), as such rules expressly permitted either party to seek interim injunctive relief in aid of arbitration.⁴¹ To that end, the Seventh Circuit found that the district court possessed the authority to grant a request for injunctive relief incident to its equitable power in addition to ICC Rules.⁴²

7. Ninth Circuit

In its 2010 *Toyo* decision, the Ninth Circuit reconciled seemingly contrary authority within the same circuit—*Simula, Inc. v. Autoliv, Inc.*⁴³ and *PMS Distributing Co. v. Huber & Suhner, A.G.*⁴⁴ In *Toyo*, the defendants relied on *Simula* to support their claim that a district court did not have the equitable authority to grant a request for injunctive relief; the plaintiff relied upon *PMS* to support its claim that the district court could grant the equitable remedy of a writ of possession to preserve the *status quo ante* so that the parties could resolve the merits in arbitration.⁴⁵

As the *Toyo* court observed, the issue in *Simula* was not whether *Simula* was seeking injunctive relief in aid of arbitration; rather, it was limited to whether *Simula's*

claims warranted avoiding arbitration altogether.⁴⁶ The Ninth Circuit then harmonized the *Simula* and *PMS* decisions by limiting the application of *Simula* to circumstances in which a party is seeking to evade the jurisdiction of an arbitral tribunal.⁴⁷

Thus, the linchpin for *Toyo* and other courts applying the majority rule is that a district court's power to grant preliminary injunctive relief is founded on the presumption that such relief will preserve the *status quo* until an arbitral panel can consider whether it will grant interim relief. Simply put, for these courts, the crux of the district court's power lies in *aiding* the arbitral process. Given *Toyo's* reconciliation of *Simula* with *PMS*, courts in the Ninth Circuit have since relied on their own equitable powers to grant preliminary injunctive relief in aid of arbitration.⁴⁸

8. Tenth Circuit

The Tenth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton* affirmed the district court's grant of preliminary injunctive relief to preserve the *status quo* until the arbitration panel could be constituted and the panel exercised jurisdiction over the dispute. The appellate court noted that "[c]ourts have effectively protected the parties' competing interests by approving initial grants of injunctive relief pending arbitration."⁴⁹ Following this precedent, in *Samson Offshore Co. v. Chevron U.S.A., Inc.*, the district court found that a federal district court has the obligation to hear a motion for preliminary injunctive relief in aid of arbitration.⁵⁰

B. U.S. Circuit Courts Not Following the Majority Rule

Notwithstanding this clear, sensible majority rule, the Fifth, Eighth, and Eleventh Circuits all take different approaches—from the majority rule and from each other—with respect to a federal court's inherent power to grant preliminary injunctive relief in aid of arbitration. The D.C. Circuit, meanwhile, has not yet addressed the issue. The effect of these cases is that, in addition to the four traditional injunctive relief factors, a lurking "fifth factor" must be considered—namely, whether, under controlling circuit precedent, a U.S. federal district court possesses the jurisdiction to grant preliminary injunctive relief.

1. Eighth Circuit

As set forth above, the court's view of the parties' consent—and not an evaluation of the four traditional

injunctive relief factors—controls the Eighth Circuit's analysis.⁵¹ In *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*, the Eighth Circuit reviewed the district court's issuance of injunctive relief in an alleged breach of an employment agreement.⁵² Finding the dispute arbitrable under the terms of the agreement,⁵³ the Eighth Circuit held the preliminary injunction to constitute an abuse of discretion.⁵⁴ The court premised this determination on the fact that neither party had alleged any contemplation of injunctive relief in the contract.⁵⁵ On that basis, the court urged that "the judicial inquiry requisite to determine the propriety of injunctive relief necessarily would inject the court into the merits of issues more appropriately left to the arbitrator."⁵⁶ As such, the *Hovey* court found that "*where the [FAA] is applicable and no qualifying contractual language has been alleged, the district court errs in granting injunctive relief.*"⁵⁷

Ten years after the *Hovey* decision,⁵⁸ in 1994, the Eighth Circuit again confronted the issue of whether a district court had the equitable authority to issue injunctive relief in aid of arbitration. In *Peabody Coal-sales Co. v. Tampa Electric Co.*, the Eighth Circuit, relying on *Hovey*, stated: "When a court determines that the making of the arbitration agreement is not at issue, the FAA requires the court to 'make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*'"⁵⁹ The agreement in *Peabody* unambiguously provided that the parties' "respective obligations . . . shall be continued in full by the parties during the dispute resolution process . . ."⁶⁰ In light of this language, *Peabody* found that the "bargained-for terms of the Agreement require continued performance as part of the dispute resolution process[.]" and therefore, "an order compelling arbitration 'in accordance with the terms of the agreement' must necessarily include an order requiring continued performance."⁶¹

Peabody rejected an application of the four traditional injunctive relief factors, finding that it would be "inconsistent with *Hovey* to delay the arbitration proceedings by requiring an evidentiary hearing in district court on the existence of irreparable harm or the other standard criteria for the grant of a preliminary injunction."⁶² Instead, it ruled that "[w]here the language of the contract is clear, the FAA requires that the court honor the agreement of the parties and order them to arbitration."⁶³

In 2001, the Eighth Circuit reinforced its position that once the determination is made with respect to arbitrability, the existence of “qualifying contractual language” is central to the issue of consent. In *Manion v. Nagin*, the Eighth Circuit confirmed that “qualifying contractual language” is “language which provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute.”⁶⁴ The court emphasized that language which “contemplates the possibility of interim judicial relief” is insufficient because it does not specify the parties’ respective obligations.⁶⁵ Moreover, *Manion* found that broad language stating that a party is entitled to injunctive relief “in case of any breach” would have unnecessarily and incorrectly entangled the court in “a determination on the merits of the underlying dispute, an issue for the arbitrator.”⁶⁶

In view of *Hovey* and its progeny, district courts in the Eighth Circuit have focused their inquiries on the threshold issue of consent, finding that injunctive relief may be appropriate if a contract “clearly evinces a desire to have preliminary injunctive relief in place until the arbitrator passes on the merits of the dispute and determines what relief, if any, is appropriate.”⁶⁷ In fact, in *Manhattan Group, LLC v. Automoblox Co.*, a federal district court articulated certain characteristics of matters in which district courts in the Eighth Circuit have been “careful to avoid . . . interference with the arbitration process,” including where: (i) a contract has been terminated by one party; (ii) the contract contains a mandatory arbitration clause; (iii) the terminated party seeks ongoing performance of the contract preliminary to arbitration; and (iv) the contract contains no provision requiring the parties to continue their contractual obligations during the dispute resolution process.⁶⁸

2. Fifth Circuit

While the Eighth Circuit tends to focus on the issue of consent, it is more difficult to divine any rule from the Fifth Circuit authority. In the absence of controlling and principled circuit authority, district courts in the Fifth Circuit appear to have modeled the majority’s analysis of the four traditional injunctive relief factors.

Presented with an arbitrable dispute in which the parties specifically contracted for continued performance pending arbitration, the Fifth Circuit affirmed the district court’s injunction in *RGI, Inc. v. Tucker &*

*Associates, Inc.*⁶⁹ In support of its decision, the *RGI* court reasoned that “the preliminary injunction serves both to implement a bargained-for relationship clearly specified in the subcontract and is in accordance with federal policy to expedite arbitration which is articulated in the Federal Arbitration Act.”⁷⁰ Because the parties expressly contracted for such continued performance, the court declined to address the split of authority with respect to the availability of injunctive relief; indeed, the court referenced the differing approaches of the Eighth Circuit’s decision in *Hovey* and the majority rule as discussed in *Teradyne*.⁷¹

On its face, the *RGI* analysis appears to favor the Eighth Circuit authority, in that *RGI* found that a preliminary injunction was appropriate because the parties’ agreement expressly contemplated that result.⁷² Moreover, like the Eighth Circuit in *Peabody*, the *RGI* court declined to analyze the four traditional injunctive relief factors, reasoning that when the parties have expressly contracted for continued performance, “the court need not involve itself in balancing the various factors to determine whether a preliminary injunction should be issued.”⁷³ These similarities aside, *RGI* expressly declined to adopt the Eighth Circuit’s approach. It also failed to provide any guiding principles for district courts when considering the availability of court-ordered preliminary injunctions in aid of arbitration.

In its 2010 opinion in *Janvey v. Alguire*, the Fifth Circuit did not take the opportunity to clarify *RGI* or the state of Fifth Circuit law regarding this topic. Instead, *Janvey* distinguished *RGI* on the ground that, in the instant case, the district court “had not yet decided whether the case is arbitrable.”⁷⁴ Armed with that distinction, the Fifth Circuit proceeded to analyze the four traditional injunctive relief factors.⁷⁵ Put simply, *Janvey*’s narrow procedural posture relieved the court of entertaining the potential jurisdictional hurdles presented by the request for preliminary injunctive relief in aid of arbitration. Meanwhile, in the wake of the Fifth Circuit’s silence on the subject, district courts in the Fifth Circuit appear to have gravitated toward the majority rule, at least insofar as these district courts tend to apply the four traditional injunctive relief factors in regards to a request for injunctive relief in aid of arbitration.⁷⁶

3. Eleventh Circuit

Like the Fifth Circuit, the Eleventh Circuit has not ruled on the authority of a district court to issue

preliminary injunctive relief in aid of arbitration when the parties' arbitration clause is silent regarding such relief. However, while district courts in the Fifth Circuit appear to be moving toward the majority rule, the lack of clear guidance from the Eleventh Circuit has resulted in little uniformity amongst the district courts with respect to their inherent power to grant injunctive relief in aid of arbitration where the agreement does not so provide.

In *American Express Financial Advisors, Inc. v. Makarewicz*, the appellate court decided the issue based upon the plain language of the arbitration clause which provided that American Express was "entitled to an injunction from a court of competent jurisdiction to keep [appellees] from violating [the agreement's restrictions] while the arbitration is pending."⁷⁷ Otherwise, *Makarewicz*, the seminal case on the topic, does not articulate any principles to guide district courts in their assessment of a request for preliminary injunctive relief in aid of arbitration.

Makarewicz appears to be similar to the Fifth Circuit, in that *Makarewicz* relied on the unambiguous terms of the parties' agreement and therefore did not address the question of a district court's authority to issue preliminary injunctive relief when the parties had not contemplated such relief in their contract. Unlike the Fifth Circuit, however, district courts in the Eleventh Circuit have inconsistently interpreted *Makarewicz* and the status of the law on the issue. While most recent district court opinions properly restate the holding of *Makarewicz* (i.e., as leaving open the question about whether a district court is empowered to issue injunctive relief absent clear contractual language⁷⁸), some district courts have cited *Makarewicz* for the proposition that such courts may issue such interim relief *only if* the same is expressly contemplated in the parties' agreement.⁷⁹

This is an important distinction, as demonstrated by the apparent "split" within the Eleventh Circuit as to whether district courts possess the authority to entertain requests for equitable relief when the parties have not specifically contemplated such relief by agreement. At least three recent district court decisions have adopted the majority view and, therefore, have ruled that district courts maintain the inherent authority to grant preliminary injunctions despite the parties' contractual silence.⁸⁰ Meanwhile, at least two recent district court decisions have premised their equitable deliberations

on the parties' express agreement that such relief would be available pending arbitration.⁸¹ In addition, at least three recent district court decisions have refused to consider equitable interim relief due to the parties' contractual silence on the subject.⁸² Finally, despite the reliance on the plain language, the district courts of the Eleventh Circuit, like those of the Fifth Circuit, do not appear to have followed the rigid "qualifying contractual language" analysis espoused by the Eighth Circuit.

4. D.C. Circuit

No D.C. Circuit-level cases have addressed the question of the extent of a district court's equitable authority within the context of a request for preliminary injunctive relief in aid of arbitration. Given this vacuum, decisions of these district courts reflect a fragmented jurisprudence. Some decisions have indicated that the inherent power of the court to issue equitable relief regardless of the parties' contractual language.⁸³ Others have found the power to do so in the parties' agreement, thus avoiding the question of the court's inherent authority.⁸⁴ In one case, the district court followed the approach of the Eighth Circuit in *Peabody* and the Fifth Circuit in *RGI* by declining to analyze the traditional equity factors at all because the parties had specifically contracted for continued performance pending arbitration.⁸⁵ Finally, when faced with contractual silence, one district court observed the split of circuit authority and purported to avoid it altogether by finding a preliminary injunction unwarranted on the basis of the equitable factors, even if such relief were available.⁸⁶

V. Recommendations and Conclusion

Although the traditional injunction analysis is based upon an evaluation of four factors, in fact, a latent "fifth factor" may exist—namely, whether under controlling U.S. circuit law, a district court possesses the equitable authority to grant injunctive relief in aid of arbitration. Pursuant to the majority rule articulated by the First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits, a district court's inherent power to issue preliminary injunctive relief is not curtailed, even in the absence of contractual language. At this time, that rule does not hold in the Eighth, Fifth, Eleventh, and D.C. Circuits.

The "latent" jurisdictional factor is critical because it could, for example, bear on contracting parties'

negotiation of an arbitration provision. That is, a party may seek to incorporate in an arbitration clause, regardless of jurisdiction, clear contractual language that provides that the parties' obligations shall continue throughout the dispute resolution process, including requests for preliminary injunctive relief, without addressing the merits of the underlying arbitrable dispute. Even if suit is filed in a jurisdiction that does not follow the majority rule, the inclusion of certain language in the arbitration agreement may give a party a good argument as to the propriety of its preliminary injunction motion in the face of a challenge to the district court's equitable authority to issue injunctive relief in aid of arbitration, and particularly prior to the constitution of the arbitral tribunal.

Parties and their counsel are therefore wise to exercise forethought regarding whether the subject matter of their agreements is likely to give rise to the need for injunctive relief in aid of arbitration. In this way, the negative effects of the law in the "non-majority" jurisdictions may be minimized or avoided altogether. If such planning does not take place before the agreement is executed, then a party who needs injunctive relief from a district court after a dispute arises must consider in which U.S. circuit it can best obtain the relief it needs in aid of arbitration until all of the circuit courts fall into line with the majority.

Endnotes

1. THOMAS H. OEHMKE, 3 COMMERCIAL ARBITRATION § 60.6 (2009). See also Martin Davies, Court-Ordered Interim Measures in Aid of International Commercial Arbitration, 17 AM. REV. INT'L ARB. 299, 310-311 (2006) (positing that a court should not be deprived of its authority to grant interim relief in support of pending arbitration); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2045-46 (2009) ("[T]he overwhelming weight of U.S. judicial authority under the FAA concludes that federal courts possess jurisdiction to issue provisional measures . . . to protect the parties and the arbitral process. A few U.S. decisions are to the contrary, but these are ill-considered and do not reflect the true state of U.S. domestic law.") (citations omitted).
2. This article does not discuss the law of the various U.S. states but only U.S. federal law.
3. Notably, a number of arbitration rules now provide that an emergency arbitral tribunal may grant injunctive relief pending the constitution of an arbitral tribunal. See, e.g., American Arbitration Association International Arbitration Rules, Art. 39 ("Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006."); International Chamber of Commerce Arbitration and ADR Rules, in force as from Jan. 1, 2012, Art. 29(1) ("A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V."). This mandatory applicability is a critical change from previous versions of those rules, which provided that "emergency arbitrator" provisions were entirely optional. See, e.g., ICC Rules for a Pre-Arbitral Referee Procedure, in force as from January, 1990, Art. 3.
4. See, e.g., *Toyo Tire Holdings of Am. Inc. v. Continental Tire N. Am., Inc.*, 609 F.3d 975, 980-81 (9th Cir. 2010). Paul Hastings LLP served as counsel for Toyo in this case. Counsel from Paul Hastings for Toyo included Donna D. Melby, Michael K. Lindsey, Stephen B. Kinnaird, Donald L. Morrow, Lisa A. Brown, Joel Hernandez, Daniel Prince and Joseph R. Profaizer.
5. 175 F.3d 716, 725-26 (9th Cir. 1999).
6. *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).
7. Although the U.S. Supreme Court has held parties are free to incorporate into their contracts "the rules under which arbitration will be conducted," *Volt*, 489 U.S. at 479, and that "in deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts," under local law, incorporation rules may raise other issues. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).
8. 715 F.2d 348, 349-350 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984).

9. *Id.* at 352.
10. 559 F.3d 110, 116 (2d Cir. 2009).
11. 501 F.2d 1032, 1037 (3d Cir. 1974).
12. *Id.* at 1038.
13. *Id.* (“The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate.”).
14. See, e.g., *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *Cooper v. Ateliers de la Motobecane, S.A.*, 442 N.E.2d 1239 (N.Y. 1982).
15. *BORN*, *supra* note 1, at 2030-31 (2009) (citing *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro*, 555 F. Supp. 481 (D. V.I. 1982)).
16. 919 F.2d 822, 826 (2d Cir. 1990) (agreeing that “the Convention does not oust the court of jurisdiction to issue an injunction in aid of arbitration”).
17. See 9 U.S.C. § 1 *et seq.*; *Volt*, 489 U.S. at 479; *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1053-54 (2d Cir. 1990) (“[T]he pro-arbitration policies . . . are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through preliminary injunction.”). See also *Borden*, 919 F.2d at 826 (“We hold that entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court’s powers pursuant to [Chapter 2 of the FAA].”).
18. 9 U.S.C. § 4.
19. See *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).
20. 797 F.2d 43, 47-51 (1st Cir. 1986).
21. 426 F.3d 503, 505-07 (1st Cir. 2005) (finding that the plaintiff was not entitled to a preliminary injunction for failure to establish irreparable injury).
22. *Id.* at 505.
23. 619 F.3d 67, 70 (1st Cir. 2010).
24. *Id.* See also *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 622 F.3d 36 (1st Cir. 2010) (affirming district court’s denial of preliminary injunction).
25. 749 F.2d 124, 125 (2d Cir. 1984).
26. 910 F.2d at 1053. See also *Borden*, 919 F.2d at 826 (finding that the New York Convention does not prohibit court-issued preliminary relief in aid of arbitration); *Faiveley*, 559 F.3d at 116 (upholding the district court’s jurisdiction to grant preliminary injunctive relief in aid of arbitration, applying Article 23(2) of the ICC Rules, as incorporated into the parties’ arbitration agreement).
27. *Conn. Res. Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31 (2d Cir. 1983) (affirming the district court’s denial of a “status quo” injunction pending arbitration on the basis of finding no irreparable harm and the availability of an adequate remedy at law); *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980) (finding that issuance of the preliminary injunction could be considered part of the parties’ obligation to arbitrate and affirming the lower court’s assessment of the equities); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 434 (2d Cir. 1993) (observing that “the rule seems to be fairly established that where a party’s request for a status quo injunction pending arbitration is grounded in the words of a contract, specific performance analysis is required”).
28. *Conn. Res.*, 705 F.2d at 35.
29. No. 11-CV-1177 CBA JMA, 2011 WL 1870599, at *2 (E.D. N.Y. Apr. 27, 2011).
30. 757 F. Supp. 2d 238 (W.D. N.Y. 2010).
31. 609 F.3d 975.
32. See *Blumenthal*, 910 F.2d at 1052.
33. *Blom*, 757 F. Supp. 2d at 243.
34. 882 F.2d 806, 811-12 (3d Cir. 1989). *Cf.* *McCreary*, 501 F.2d at 1038 (denying preliminary measures designed to thwart to the arbitration process).

35. Ortho, 882 F.2d at 813-14.
36. *GGIS Ins. Servs., Inc. v. Lincoln Gen. Ins. Co.*, No. 1:10-CV-932, 2011 WL 743507, at *16 (M.D. Pa. Feb. 24, 2011).
37. 756 F.2d 1048, 1050-55 (4th Cir. 1985).
38. 731 F. Supp. 2d 488, 490 (E.D. Va. 2010).
39. 52 F.3d 1373, 1380 (6th Cir. 1995).
40. No. 11-10142 2011, WL 1135538, at *7 (E.D. Mich. Mar. 25, 2011).
41. 715 F.2d at 351-52. See also *Gateway E. Ry. Co. v. Terminal RR. Ass'n of St. Louis*, 35 F.3d 1134 (7th Cir. 1994) (affirming grant of preliminary injunction); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211 (7th Cir. 1993) (affirming district court's initial grant of temporary restraining orders but reversing district court's extension of such relief once the arbitration panel had determined that the restraining orders should no longer remain in effect).
42. See *Sauer-Getriebe*, 715 F.2d at 351-52. See also *Roche Diagnostics Corp. v. Med. Automation Sys., Inc.*, 646 F.3d 424 (7th Cir. 2011) (affirming in part and modifying in part district court's issuance of a preliminary injunction in aid of arbitration).
43. 175 F.3d 716 (9th Cir. 1999).
44. 863 F.2d 639 (9th Cir. 1988).
45. 609 F.3d 975.
46. *Id.* at 979.
47. *Id.* at 979-80.
48. *Fid. Brokerage Servs. LLC v. McNamara*, No. 11 CV 1092, 2011 U.S. Dist. LEXIS 60325, at *6 (S.D. Cal. May 27, 2011); *Oberto Sausage Co. v. JBS S.A.*, No. C10-2033 RSL, 2011 U.S. Dist. LEXIS 33077, at *6 (W.D. Wash. Mar. 11, 2011); *Zoll Circulation, Inc. v. Elan Medizintechnik, GmbH*, NO. SACV 10-01010 AG, 2010 U.S. Dist. LEXIS 75574, at *5 (C.D. Cal. July 26, 2010).
49. 844 F.2d 726, 726-28 (10th Cir. 1988).
50. No. 11-CV-0109-CVE-TLW, 2011 WL 1238435, at *5 (N.D. Okla. Mar. 30, 2011) (citing *Dutton*, 844 F.2d at 726).
51. See *supra* Section IV(A).
52. 726 F.2d 1286 (8th Cir. 1984).
53. The applicable rules of arbitration provided that "[a]ny controversy . . . arising out of the [individuals'] employment or termination of employment . . . shall be settled by arbitration . . ." *Id.* at 1288.
54. *Id.* at 1291.
55. *Id.*
56. *Id.* at 1292.
57. *Id.* (emphasis added).
58. Nearly two months after the *Hovey* case was decided, the Eighth Circuit issued a ruling in *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589 (8th Cir. 1984). That case did not acknowledge the existence of *Hovey*, and it applied the traditional analysis of the four injunctive relief factors. *Id.* at 592-93. The Eighth Circuit later distinguished *Ferry-Morse* in *Peabody Coalsales Co. v. Tampa Electric Co.* on the ground that the "district court had not yet determined whether the underlying dispute was arbitrable." 36 F.3d 46, 49 n.7 (8th Cir. 1994). Subsequently, and to a significant extent, *Ferry-Morse* has been cited by courts in the Eighth Circuit in support of the general proposition that the purpose of a preliminary injunction is to preserve the status quo until a final hearing on the merits. See, e.g., *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 490 (8th Cir. 1993); *Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, No. C 11-4074-MWB, 2011 U.S. Dist. LEXIS 110634, at *38 (N.D. Iowa Sep. 26, 2011).
59. 36 F.3d at 48 (citing 9 U.S.C. § 4) (emphasis in original).
60. *Id.* at 47 (citation omitted).
61. *Id.* at 48.

62. *Id.*
63. *Id.* at 49.
64. 255 F.3d 535, 539 (8th Cir. 2001) (quoting Peabody, 36 F.3d at 47, n.3).
65. *Id.* at 539.
66. *Id.*
67. RSM McGladrey, Inc. v. Epp, Civil No. 11-612 ADM/SER, 2011 U.S. Dist. LEXIS 47548, at *8-9 (D. Minn. May 3, 2011).
68. Civ. No. 10-3918 (PJS/JJK), 2010 U.S. Dist. LEXIS 140162, at *12-13 (D. Minn. Dec. 30, 2010).
69. 858 F.2d 227, 228 (5th Cir. 1988).
70. *Id.*
71. *Id.* at 230.
72. *Id.* at 229.
73. *Id.* (citing Mississippi Power & Light v. United Gas Pipeline Co., 760 F.2d 618, 621 (5th Cir. 1985)).
74. 628 F.3d 164, 173 (5th Cir. 2010), amended on other grounds by Janvey v. Alguire, 647 F.3d 585 (5th Cir. 2011).
75. *Id.*
76. See, e.g., Nexstar Broad. Group, Inc. v. Lammers, No. 3:08-CV-0953-K, 2008 U.S. Dist. LEXIS 49888, at *8-11 (N.D. Tex. June 27, 2008) (considering traditional factors upon requested preliminary relief pending arbitration); Rudney v. Int'l Offshore Servs., L.L.C., No. 07-3908, 2007 U.S. Dist. LEXIS 75441, at *6-7 (E.D. La. Oct. 1, 2007) (considering factors for a temporary restraining order or a preliminary injunction pending arbitration).
77. 122 F.3d 936, 940 (11th Cir. 1997) (citation omitted).
78. See, e.g., Bank of Am., N.A. v. Skilstaf, Inc., No. 3:10cv597-WHA-CSC (WO), 2010 U.S. Dist. LEXIS 122599, at *8 (M.D. Ala. Nov. 18, 2010) (citing Makarewicz, 122 F.3d at 940, as holding that the “plaintiff could demand an injunction in court while the rest of the case was submitted to arbitration because the contract between the plaintiff and defendant stated ‘[i]f a dispute involving this Agreement is submitted for arbitration . . . [the plaintiff] is entitled to an injunction . . . while the arbitration is pending.’”); Talk Fusion, Inc. v. Ulrich, No. 8:11-CV-1134-T-33AEP, 2011 U.S. Dist. LEXIS 74549, at *23 (M.D. Fla. June 21, 2011) (observing that “there appears to be no Eleventh Circuit cases on point”); Drago v. Holiday Isle, L.L.C., 537 F. Supp. 2d 1219, 1222 (S.D. Ala. 2007) (noting that the Eleventh Circuit “has not spoken directly to the issue of whether jurisdiction exists to grant a preliminary injunction to preserve the status quo pending arbitration”). See also William D. Coleman, The Arbitration Alternative—Some Common Issues, 70 ALA. LAW. 439, 442 (2009) (summarizing Makarewicz as upholding “the district court’s authority to grant injunctive relief in a case where the arbitration agreement specifically provides for such relief,” but not ruling on “whether the district courts have such authority when the arbitration agreement is silent”).
79. See, e.g., Rath v. Network Mktg. Inc., 790 So. 2d 461, 465 (Fla. Dist. App. 2001), rev’d on other grounds, Rath v. Network Mktg. Inc., 798 So. 2d 886 (Fla. Dist. App. 2001).
80. Drago, 537 F. Supp. 2d at 1222; Jameson v. Pine Hill Dev., L.L.C., No. 07-0111-WS-B, 2007 U.S. Dist. LEXIS 13212, at *6-8 (S.D. Ala. Feb. 23, 2007); Frontier Bank v. R&L Trucking Co., Inc., No. 3:05-CV-901-F, 2005 WL 2654038, at *1 (M.D. Ala. Oct. 17, 2005).
81. Bank of Am., 2010 U.S. Dist. LEXIS at *9; Talk Fusion, 2011 U.S. Dist. LEXIS at *23-24.
82. Global Tel*Link Corp. v. Scott, 652 F. Supp. 2d 1240, 1248 (M.D. Fla. 2009); Sprint Corp. v. Teli-magine, Inc., 923 So. 2d 525, 527 (Fla. Dist. App. 2005); Rath, 790 So. 2d at 466.
83. See, e.g., Owen-Williams v. BB&T Inv. Servs., No. 06-0948 (CKK), 2006 U.S. Dist. LEXIS 52392, at *27-28 (D. D.C. July 31, 2006) (stating in dicta that

“[e]ven when a claim filed in court is subject to arbitration, a court retains the authority to enter a preliminary injunction to preserve the status quo ante and prevent irreparable harm pending a decision by the arbitration panel”); *Int’l Bhd of Elec. Workers, Local 1900 v. Potomac Elec. Power Co.*, 634 F. Supp. 642, 643 (D. D.C. 1986) (finding that when the parties have agreed to arbitrate a dispute, a court may issue an injunction if, in addition to the usual equitable concerns, the integrity of the arbitration process would be threatened absent interim relief.”).

84. See, e.g., *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 76 (D. D.C. 2001) (finding that the defendant did not dispute plaintiff’s assertion that their agreement expressly provided for injunctive relief); *Southland Corp. v. Godette*, 793 F. Supp. 348, 351 (D. D.C. 1992) (though the parties contemplated interim relief in their arbitration agreement, the court analyzed the equities of the injunction without

discussing the contractual language or its authority to do so); *Org. Comm. for the 1998 Goodwill Games, Inc. v. Goodwill Games, Inc.*, 919 F. Supp. 21, 26 (D. D.C. 1995) (citing *Nemer Jeep-Eagle*, 992 F.2d at 434, and *Guinness-Harp*, 613 F.2d at 471, for the proposition that because the request for a status quo injunction was grounded in the parties’ agreement, the court must apply “the traditional equitable standards for specific performance rather than the test for preliminary injunctive relief”).

85. *Nat’l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, 233 F. Supp. 2d 39, 50-51 (D. D.C. 2002), rev’d on other grounds, *Nat’l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, 330 F.3d 523 (D. D.C. 2003).
86. *Pan Am Flight 73 Liaison v. Dave*, 711 F. Supp. 2d 13, 44-45 (D. D.C. 2010), aff’d on other grounds, *Pan Am Flight 73 Liaison v. Dave*, 639 F.3d 1102 (D.C. Cir. 2011). ■

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