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**Seeking Emergent Relief Pending A
Mandatory Arbitration Subject To The Federal Arbitration Act**

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I. INTRODUCTION

Most all construction law practitioners have been involved with a dispute that is subject to a mandatory arbitration provision in a construction contract. However, what happens in the event exigent circumstances exist whereby your client is in need of injunctive relief to preserve the “status quo” pending completion of that arbitration proceeding? Specifically, may a federal court properly entertain a request for temporary injunctive relief or are you limited to whatever interim relief your arbitration panel may or may not grant? Moreover, under what circumstances may a federal court appropriately consider a request for expedited discovery typically sought in connection with injunctive proceedings? While the answers to these questions will undoubtedly vary depending on your particular facts and applicable law, this article will examine the leading decisions in the federal circuits regarding a federal court’s jurisdiction to grant injunctive relief in an arbitrable dispute governed by the Federal Arbitration Act (“FAA”)¹ as well as the factors which may impact the issuance of injunctive relief in this scenario. This article will also examine the standards considered by a federal court in evaluating an expedited discovery request in conjunction with injunctive proceedings, including the impact, if any, that a parallel arbitration proceeding may have on such a request.

II. MAY A FEDERAL COURT GRANT INJUNCTIVE RELIEF IN A CONSTRUCTION DISPUTE SUBJECT TO MANDATORY ARBITRATION?

A. Traditional Role Of Courts In An Arbitrable Dispute Governed By The FAA

The Supreme Court of the United States has “long recognized and enforced a ‘liberal federal policy favoring arbitration agreements’” with one notable exception.² Namely, the “question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the ‘*question of arbitrability*,’ is ‘an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.’”³ To that end, the Supreme Court has held that the “‘question

of arbitrability” is limited in scope and “applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.”⁴ Conversely, “‘procedural’ questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide.”⁵

The FAA is consistent with these well-established principals enunciated by our highest court.⁶ Indeed, it is widely recognized that a fundamental purpose of the FAA was to eliminate “any bias in favor of judicial resolution of disputes.”⁷ As such, “the FAA ‘leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.’”⁸ Pursuant to the FAA, “‘any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.’”⁹

B. Standard For Obtaining A Preliminary Injunction Or A Temporary Restraining Order

The decision whether to grant a preliminary injunction or a temporary restraining order (TRO) “is a matter for the discretion of the district court and is reversible only for an abuse of discretion.”¹⁰ “The purpose of a temporary restraining order is to preserve the status quo and prevent imminent harm pending” a full adjudication of the parties’ dispute.¹¹ In determining whether to grant preliminary injunctive relief, federal courts must consider the following four factors:

(1) whether there is a substantial likelihood that plaintiffs will succeed on the merits of their claims, (2) whether plaintiffs will suffer irreparable injury absent an injunction, (3) the harm to defendants or other interested parties (the balance of harms), and (4) whether an injunction would be in the public interest or at least not be adverse to the public interest.¹²

In a matter involving a binding arbitration agreement, “the traditional test to determine whether the case is an appropriate one to issue injunctive relief” should be applied.¹³ “The injunction shall issue only if the [movant] produces evidence sufficient to convince the district court that all four factors favor preliminary relief.”¹⁴

C. A Conflicting Message Regarding The Propriety Of Court Ordered Injunctive Relief In An Arbitrable Dispute

Whether a federal district court will exercise its authority to grant emergent relief to parties that are subject to a binding arbitration agreement in a public works construction contract pursuant to the FAA depends upon the circuit in which the matter is pending. The overwhelming majority of federal circuit courts that have examined the issue have concluded that federal district courts have jurisdiction to grant preliminary injunctive relief pending a binding arbitration. In reaching that conclusion, the courts have further held that the general rules applicable to granting emergent relief apply to a situation where the parties are subject to a binding arbitration agreement.

Courts In Favor Of Preliminary Relief Pending Arbitration

First Circuit

In *Teradyne, Inc. v. Mostek Corp.*,¹⁵ the defendant sought review of the district court’s order which enjoined the defendant from disposing or encumbering its assets pending arbitration in an ongoing breach of contract dispute. The First Circuit held that the district court did not err in issuing a preliminary injunction prior to ruling on whether the dispute was arbitrable because a

district court can grant injunctive relief in an arbitrable dispute pending arbitration.¹⁶ In a detailed opinion, the court examined precedent from several circuits and the U.S. Supreme Court in concluding 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.”¹⁷ The court further noted that allowing courts to grant injunctive relief pending arbitration reinforces rather than detracts from the FAA’s policy of enforcing arbitration agreements.¹⁸

Second Circuit

The Second Circuit has similarly held that injunctive relief is attainable although the matter is subject to a binding arbitration. In *Roso-Lino Beverage Distributors, Inc. v. The Coca-Cola Bottling Company of N.Y.*,¹⁹ a case involving the termination of the plaintiff’s Coca-Cola distributorship, the distributorship agreement in question required arbitration of all disputes except those relating to the “revision of prices and deposit requirements.”²⁰ The district court believed that its decision to refer the matter to arbitration had stripped it of its power to grant injunctive relief.²¹ The appeals court reversed the district court’s denial of a preliminary injunction and held that “[t]he 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.”²²

Third Circuit

The Third Circuit reached the same result as the First and Second Circuits in *Ortho Pharmaceutical Corp. v. Amgen, Inc.*²³ In that case, the agreement required the parties to submit to arbitration on “all disputes arising under the Agreement.”²⁴ The court held that the arbitration agreement did not constitute a “waiver” by either party of the right to seek preliminary injunctive relief necessary to prevent one party from unilaterally eviscerating the significance of

the agreed-upon procedures.”²⁵ In examining whether the federal district court had “subject matter jurisdiction to entertain a motion for preliminary injunctive relief in a dispute that the parties agree[d] was arbitrable,” the court held that “a district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites of such relief are satisfied.”²⁶

The defendant had claimed that Section 3 of the FAA precluded the district court from issuing emergent relief except to stay other related proceedings.²⁷ Section 3 of the FAA provides:

§3: Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.²⁸

The court held that Section 3 of the FAA does not expressly address the issue of preliminary relief because Section 3 “declares only that the court shall stay ‘the trial of the action’ [but] it does not mention preliminary injunctions or other pre-trial proceedings.”²⁹ The court found that the *Teradyne* court’s rationale of issuing injunctive relief in order to preserve the status quo pending arbitration was convincing and the court concluded that there was no conflict, and therefore, no implicit prohibition to granting a preliminary injunction in an arbitrable dispute.³⁰

Fourth Circuit

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*,³¹ the parties entered into an employment agreement which provided that any controversy arising out of the employment or

the termination of employment “shall be settled by arbitration.” The Fourth Circuit held that “where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties’ dispute.”³² The court found that Section 3 of the FAA “does not preclude a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration.”³³ The court noted that Section 3 does not mention preliminary injunctions and “nothing in the statute’s legislative history suggests that the word ‘trial’ should be given a meaning other than its common and ordinary usage.”³⁴ The court further pointed out 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 undertaking a comprehensive discussion and evaluation of the statute’s effect.”³⁵

Sixth Circuit

In a breach of contract action in which the parties agreed that arbitration would be “the sole and exclusive remedy for resolving any disputes between the parties,” the Sixth Circuit held that in “a dispute subject to mandatory arbitration under the Federal Arbitration Act, a district court has subject matter jurisdiction under § 3 of the [Federal Arbitration] Act to grant preliminary injunctive relief provided that the party seeking the relief satisfies the four criteria which are prerequisites to the grant of such relief.”³⁶ After reviewing the relevant case law, the court adopted the reasoning of the First, Second, Third, Fourth, and Seventh Circuits in reaching its decision.³⁷ The court concluded that allowing courts the power to grant 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 a meaningless or hollow formality because an arbitral award, at the time it [is]

rendered, ‘could not return the parties substantially to the status quo ante.’³⁸ The court further held that “once the arbitration begins, it is for the arbitrators to decide how to maintain the status quo during the pendency of the arbitration process.”³⁹

Seventh Circuit

In a case involving an international commercial contract which required the parties to arbitrate “any and all” contractual disputes, the Seventh Circuit examined “whether one party waive[d] its rights to arbitration by filing suit to enjoin the other party from breaching [the] contract pending arbitration.”⁴⁰ The court held that the plaintiff’s right to seek injunctive relief and its right to arbitrate were not incompatible and plaintiff “need not have abandoned one to pursue the other.”⁴¹

In a later case, the Seventh Circuit affirmed its holding in *Sauer-Getriebe* that “district courts are not precluded as a general matter from issuing preliminary injunctive relief pending arbitration.”⁴² The court cautioned, however, that the authority of district courts to grant preliminary relief does not extend indefinitely.⁴³ The court noted that “courts are ill-advised to extend the injunction once arbitration proceeds.”⁴⁴ The court held that the district court erred in extending the temporary restraining order after arbitration proceedings in the matter had commenced and noted that an arbitration panel, once assembled, could “enter whatever temporary injunctive relief it deems necessary to maintain the status quo.”⁴⁵

Courts Not In Favor Of Preliminary Relief Pending Arbitration

Eighth Circuit

The Eight Circuit Court of Appeals has held that federal courts do not have jurisdiction to grant preliminary injunctive relief in an arbitrable dispute pursuant to the FAA. In *Merrill Lynch, Pierce, Fenner & Smith v. Hovey*,⁴⁶ former Merrill Lynch employees sought arbitration

pursuant to the FAA based on New York Stock Exchange Rule 347 which stated that “[a]ny controversy . . . arising out of the employment or termination of employment . . . shall be settled by arbitration.”⁴⁷ In relying on U.S. Supreme Court precedent which stood for the proposition that Congress intended the FAA to facilitate quick and expeditious arbitration, the court held that the district court abused its discretion in granting a preliminary injunction because “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.”⁴⁸ The court noted that “where the Arbitration Act is applicable and no qualifying contractual language has been alleged, the district court err[ed] in granting injunctive relief.”⁴⁹ The court stated that it was sustaining not only “the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”⁵⁰

In *Hovey*, the court indicated that its decision may have been different had the parties included qualifying contractual language to allow for preliminary relief pending arbitration.⁵¹ In a later case, the Eighth Circuit found that the contract at issue contained qualifying contractual language permitting injunctive relief and held that the district court erred in refusing to issue an injunction ordering the parties to continue performance of the contract pending arbitration proceedings. In *Peabody Coalsales Co. v. Tampa Electric Co.*,⁵² the court found the term “qualifying contractual language” to mean “language which provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute.”⁵³ The agreement between the parties stated that “[u]nless otherwise agreed in writing . . . performance of their respective obligations under [the] Agreement shall be continued fully by the parties during the dispute resolution process.”⁵⁴ The court held that the contract clearly required

continued performance during the arbitration process.⁵⁵ The court found that the judicial inquiry involved in ordering performance was limited because the court “need only read the contract and order arbitration according to its provisions. Such an inquiry does not implicate *Hovey*’s concern with becoming entangled in the merits of the underlying dispute.”⁵⁶ Because ordering continued performance of the contract did not require the court to reach the merits, a preliminary injunction should have been granted.⁵⁷

Ninth Circuit

A decision of the Ninth Circuit Court of Appeals indicates that a federal court’s issuance of a preliminary injunction may be inappropriate where the underlying dispute is subject to mandatory arbitration and where the rules applicable to the arbitration proceeding provide for the arbitrators’ to award injunctive relief. In *Simula, Inc. v. Autoliv, Inc.*,⁵⁸ the parties entered into an agreement containing an arbitration provision mandating that “[a]ll disputes arising in connection with this Agreement” shall be finally resolved under the arbitration rules of the International Chamber of Commerce (“ICC”).⁵⁹ The district court subsequently granted defendant’s motion to compel arbitration filed in response to plaintiff’s request for injunctive relief, having construed the broad language of the arbitration clause as reaching “every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract.”⁶⁰

On appeal, plaintiff argued that the district court abused its discretion in denying the request for a preliminary injunction. As specifically stressed by plaintiff, “preliminary injunctive relief should have been granted by the district court because the arbitrators cannot grant such relief.”⁶¹ The court of appeals noted, however, that the district court had “correctly concluded that all of [plaintiff’s] claims were arbitrable and the ICC arbitral tribunal is authorized to grant

the equivalent of an injunction *pendente lite*” under the ICC arbitration rules.⁶² Consequently, the court of appeals affirmed the district court’s denial of plaintiff’s request for injunctive relief having determined that there was no abuse of discretion on this record.⁶³

Simula raises some interesting questions regarding the propriety of court ordered injunctive relief in arbitrable disputes which are governed by rules providing an arbitral tribunal the right to award injunctive relief. Indeed, the arbitration rules published by the American Arbitration Association, JAMS and the ICC all contain provisions allowing for an arbitrator to award “interim” relief or measures and to require the posting of security for such interim relief. Clearly, an argument can be made that only an arbitral tribunal, once empanelled, has the authority to grant injunctive relief in arbitrable disputes governed by these arbitration entities.

III. UNDER WHAT CIRCUMSTANCES WILL A FEDERAL COURT GRANT AN EXPEDITED DISCOVERY REQUEST ADVANCED IN CONNECTION WITH INJUNCTIVE PROCEEDINGS WHERE THE UNDERLYING DISPUTE IS SUBJECT TO MANDATORY ARBITRATION?

A. Considerations Governing Grant Of An Expedited Discovery Request Generally

Unless authorized by a particular rule, court order or agreement of the parties, “a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)” of the Federal Rules of Civil Procedure.⁶⁴ Unfortunately, however, the Federal Rules of Civil Procedure do ‘not provide a standard under which a court should decide expedited discovery motions.’⁶⁵ Nevertheless, and while there “is scant authority on the standards governing the availability of expedited discovery before the Rule 26(f) scheduling conference in civil cases,”⁶⁶ it is uniformly recognized that federal courts “have wide discretion with respect to discovery” matters and that “[e]xpedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings.”⁶⁷

Numerous courts have considered the following four (4) factors enunciated in *Notaro v. Koch* as the standard to evaluate the propriety of expedited discovery requests:

- (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.⁶⁸

As is readily apparent, the aforementioned standard utilizes “factors similar to those used for injunctive relief or specific performance”⁶⁹ the only differences being “that causation is considered and the public interest is not considered.”⁷⁰ In this regard, the *Notaro* standard has been criticized as an inappropriate standard where expedited discovery is sought to prepare for a preliminary injunction hearing.⁷¹

Some courts have rejected the stringent *Notaro* standard, opting instead to evaluate an expedited discovery request by way of a “reasonableness” standard. The “reasonableness” standard is recognized as “less demanding than the *Notaro* factors”⁷² and requires a court to review “the entirety of the record to date and the *reasonableness* of the request in light of all of the surrounding circumstances....”⁷³ The factors utilized to evaluate an expedited discovery request under the “reasonableness” standard have been articulated to include:

- (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.⁷⁴

As such, “[w]hether or not a preliminary injunction hearing is pending, then, has become one factor to be evaluated among many, rather than an outcome determinative fact” in deciding expedited discovery requests under the “reasonableness” standard.⁷⁵

Federal courts may also employ an amorphous “good cause” standard to analyze an expedited discovery request. Unlike the *Notaro* and “reasonableness” standards, courts have found “good cause” for the granting of expedited discovery requests “where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.”⁷⁶

The foregoing discussion makes it abundantly clear that, while federal courts across the country recognize their inherent discretion to grant or deny an expedited discovery request, the appropriate standard to be applied and precise factors to be considered in determining how best to exercise that discretion varies. What does not appear open for debate, however, is that, regardless of the standard to be applied, it is incumbent upon the requesting party to “make some *prima facie* showing of the *need* for the expedited discovery” insofar as “[e]xpedited discovery is not the norm.”⁷⁷ As it specifically relates to expedited discovery requests in connection with preliminary injunction proceedings, the requesting party’s failure “to tailor the discovery sought to the time constraints proposed by the plaintiff, or to the specific issues that will be determined at the preliminary injunction hearing” may prove fatal.⁷⁸

B. The Arbitration “Variable” In An Expedited Discovery Request

The question remains as to what impact, if any, the existence of a parallel arbitration proceeding may have on whether and to what extent a federal court exercises its inherent discretion to grant an expedited discovery request in connection with injunctive proceedings. Like the varying judicially-created standards used to evaluate an expedited discovery request generally, there is no hard and fast rule as to how a federal court accounts for the arbitration variable in disposing of an expedited discovery request. However, a review of several decisions involving the three components of this issue—i.e. a federal court injunction proceeding; an

expedited discovery request advanced in connection with that proceeding; and a mandatory arbitration provision governing the underlying dispute—reveals that the existence of a pending arbitration proceeding may be a factor considered by a federal court in determining whether the grant of an expedited discovery request is appropriate.

Indeed, in *Independence Blue Cross v. Health Systems Integration, Inc.*, the defendant argued that plaintiff’s motion for expedited discovery should be denied because the underlying dispute was subject to “a currently pending arbitration proceeding” and, as such, “all decisions concerning the availability and scope of discovery” were within the arbitration panel’s authority and “should not be usurped” by the court.⁷⁹ While putting off for another day the question regarding the court’s jurisdiction over the injunction proceeding in light of the mandatory arbitration agreement, the United States District Court for the Eastern District of Pennsylvania denied the expedited discovery request because the requested discovery “is irrelevant as to maintaining the status quo” and is “beyond what is needed in a motion for injunctive relief and appears to delve into the merits of the underlying dispute between the parties.”⁸⁰ This holding is consistent with the holding in *A.G. Edwards & Sons, Inc. v. Marcolla et al.* where the United States District Court for the Central District of Illinois permitted expedited discovery, but only to the extent “necessary to aid in preparation for the hearing on the preliminary injunction” and not in relation to the merits subject to the arbitral proceeding.⁸¹

The decision in *Lentjes Bischoff GmbH v. Joy Environmental Technologies, Inc.* is likewise instructive. In that case, the United States District Court for the Southern District of New York had to decide whether expedited discovery was appropriate in a preliminary injunction action where the underlying dispute was subject to a pending arbitration proceeding before the International Court of Arbitration. Applying the *Notaro* standard, the *Lentjes* court

denied the expedited discovery request because plaintiff failed to establish “a threat of irreparable injury or that it has a significant probability of success on the merits.”⁸² Notably, however, the *Lentjes* court further explained that expedited discovery was “completely unnecessary” due to plaintiff’s failure to assert, let alone demonstrate, “that discovery taken pursuant to the arbitral proceeding will be inadequate.”⁸³

IV. CONCLUSION

Although there is no federal case law on point relating specifically to whether a federal district court has the authority to grant emergent relief to parties that are subject to a binding arbitration agreement in a public works construction contract, the general principles of the decisions from the various circuits are applicable regardless of the subject matter of the contract. As the foregoing discussion makes clear, the majority of the circuits (excepting the Eighth and possibly the Ninth Circuits) have concluded that federal district courts have the authority to entertain suits by parties seeking emergency, interim relief pending arbitration. Therefore, parties should likely be able to file suit in federal court seeking emergent relief to maintain the status quo pending a binding arbitration.

The existence of a pending arbitration may also impact a federal court’s analysis of an expedited discovery request advanced in connection with an injunction proceeding. While there is no uniform standard or rule governing such a situation, *Independence* and *A.G. Edwards* make clear that a federal court may be reluctant to intervene in matters of procedure more appropriate for an arbitral panel to decide, especially where a party fails to tailor an expedited discovery request to the precise issues to be decided in the injunctive proceeding. *Lentjes* further suggests that some courts may demand an additional offer of proof (i.e. above and beyond satisfaction of the *Notaro* or “reasonableness” test factors) that discovery in the arbitration proceeding will be

inadequate for purposes of the injunctive proceeding before the court. Of course, all of these judicially crafted considerations attendant to an expedited discovery request are rendered moot in the event a court first determines that injunctive relief is improper in light of a mandatory arbitration provision governing the parties' dispute.⁸⁴

¹ 9 U.S.C. §§ 1 *et seq.* (2007).

² Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002), *quoting* Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

³ Id., *quoting* AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986).

⁴ Id. at 83-84.

⁵ Id. at 84, *quoting* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964).

⁶ The FAA generally governs arbitration proceedings where the arbitration agreement involves “any maritime transaction or a contract evidencing a transaction involving commerce” and where the parties have not expressly agreed to conduct the arbitration pursuant to the arbitration laws of a particular state. 9 U.S.C. § 2 (2007); *see also* Pro Tech Industries, Inc. v. URS Corporation et al., 377 F.3d 868, 871 (8th Cir. 2004).

⁷ Dockser et al. v. Schwartzberg, 433 F.3d 421, 425 (4th Cir. 2006).

⁸ Pro Tech, 377 F.3d at 871, *quoting* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); *see also* 9 U.S.C. § 3 (2007).

⁹ Dockser, 433 F.3d at 425, *quoting* Moses H. Cone, 460 U.S. at 24-25.

¹⁰ Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52 (1st Cir. 1986).

¹¹ Bradshaw v. Veneman, 338 F. Supp. 2d 139, 141 (D.D.C. 2005).

¹² Id.

¹³ Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806, 813 (3d Cir. 1989).

¹⁴ New Jersey Hosp. Ass'n v. Waldman, 73 F.3d 509, 513 (3d Cir. 1995) (citation omitted).

¹⁵ 797 F.2d 43, 44 (1st Cir. 1986).

¹⁶ Id. at 51.

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Id.

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Id.

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749 F.2d 124, 125 (2d Cir. 1984).

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Id. at 125-26.

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Id. at 125.

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Id.

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882 F.2d 806 (3d Cir. 1989).

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Id. at 808.

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Id. at 812.

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Id. at 811-12.

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Ortho, 882 F.2d at 811.

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9 U.S.C.S. §3.

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Ortho, 882 F.2d at 812, *quoting* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1052 (4th Cir. 1985); *Cf.* PMS Distrib. Co. v. Huber & Suhner, A.G., 863 F.2d 639, 641-42 (9th Cir. 1988)(Ninth Circuit relied on decisions from First, Second, and Seventh Circuits which allowed injunctive relief pending arbitration in holding that Section 4 of FAA did not strip court of authority to grant writ of possession pending arbitration). However, and as discussed later in this article, the Ninth Circuit more recently held that it was inappropriate for a district court to grant preliminary injunctive relief pending arbitration where the arbitral panel in that case was empowered by the International Chamber of Commerce Rules of Arbitration to order such interim relief. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 725-26 (9th Cir. 1999).

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Id.

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756 F.2d 1048, 1051 (4th Cir. 1985).

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Id. at 1053.

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Id. at 1052.

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Id.

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Bradley, 756 F.2d at 1052.

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³⁶ Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1376-80 (6th Cir. 1995).

³⁷ Id. at 1380.

³⁸ Id., quoting Bradley, 756 F.2d at 1053.

³⁹ Id. at 1386.

⁴⁰ Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 349 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070, 104 S. Ct. 976, 79 L. Ed. 2d 214 (1984).

⁴¹ Id. at 351.

⁴² Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214 (7th Cir. 1993).

⁴³ Id. at 215.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Merrill Lynch, Pierce, Fenner & Smith v. Hovey, 726 F.2d 1286, 1292 (8th Cir. 1984).

⁴⁷ Id. at 1288.

⁴⁸ Id. at 1292.

⁴⁹ Id.

⁵⁰ Hovey, 726 F.2d at 1292, quoting Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270, 1277 (1967).

⁵¹ Id.

⁵² Peabody Coalsales Co. v. Tampa Electric Co., 36 F.3d 46, 47-48 (8th Cir. 1994).

⁵³ Id. at 47 n.3.

⁵⁴ Id. at 47.

⁵⁵ Id. at 48.

⁵⁶ Peabody, 36 F.3d at 48.

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⁵⁷ Id. The court further noted: “Though the parties have characterized the requested relief as a preliminary injunction, it is not ‘preliminary’ in the traditional sense. It is not preliminary to the court’s ultimate resolution of the merits. The merits are properly left to the arbitrators and *Hovey* directs that we avoid the delay that would result from application of the [standards to be considered in granting a preliminary injunction].” Id. at 48 n.7. *See also* RGI, Inc. v. Tucker & Assocs., Inc., 858 F.2d 227, 230 (5th Cir. 1988)(holding that contract provision clearly contemplated that status quo of performance of contract continue pending arbitration and reconciling *Hovey* with *Teradyne* in stating that when a court “need not be concerned with the merits of the case, the reasoning of *Hovey* is not in conflict with that of *Teradyne*”).

⁵⁸ 175 F.3d 716 (9th Cir. 1999).

⁵⁹ Id. at 720.

⁶⁰ Id. at 721.

⁶¹ Id. at 725.

⁶² Simula, 175 F.3d at 726.

⁶³ Id.

⁶⁴ Fed.R.Civ.P. 26(d). *See also* Dimension Data North America, Inc. v. Netstar-1, Inc. et al., 226 F.R.D. 528, 530 (E.D. N.C. 2005)(noting that Rules 26(d), 30(a), 33(b), 34(b) and 36 of the Federal Rules of Civil Procedure provide courts ““the power to adjust the timing requirements imposed under Rule 26(d) and if warranted, to expedite the time for responding to the discovery sought””), *quoting* Physicians Interactive v. Lathian Sys., CA-03-1193-A, 2003 U.S. Dist. LEXIS 22868, *11-12 (D. Va. Dec. 5, 2003).

⁶⁵ Entertainment Technology Corporation v. Walt Disney Imag-ineering et al., No. 03-3546, 2003 U.S. Dist. LEXIS 19832, at *5 (E.D. Pa. Oct. 2, 2003).

⁶⁶ Yokohama Tire Corporation v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 613 (D. Ariz. 2001).

⁶⁷ Ellsworth Associates, Inc. et al. v. United States of America et al., 917 F.Supp. 841, 844 (D. D.C. 1996); *accord* Philadelphia Newspapers, Inc. v. Gannett Satellite Info. Network, Inc., No. 98-CV-2782, 1998 U.S. Dist. LEXIS 10511, at *4 (E.D. Pa. July 15, 1998).

⁶⁸ Notaro v. Koch, 95 F.R.D. 403, 405 (S.D. N.Y. 1982); *accord* Lentjes Bischoff GmbH v. Joy Environmental Technologies, Inc., 986 F.Supp. 183 (S.D. N.Y. 1997); Gucci America, Inc. v. Daffy’s, Inc., No. 00-4463, 2000 U.S. Dist. LEXIS 16714 (D. N.J. Nov. 14, 2000).

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⁶⁹ BAE Systems Aircraft Controls, Inc. v. Eclipse Aviation Corp., 224 F.R.D. 581, 587 (D. Del. 2004).

⁷⁰ Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor, 194 F.R.D. 618, 624 (N.D. Ill. 2000).

⁷¹ Id. (noting that where “a plaintiff seeks expedited discovery in order to prepare for a preliminary injunction hearing, it does not make sense to use preliminary injunction analysis factors to determine the propriety of an expedited discovery request”); *see also* Dimension Data, 226 F.R.D. at 531.

⁷² BAE Systems, 224 F.R.D. at 587.

⁷³ O'Connor, 194 F.R.D. at 624, *citing* Philadelphia Newspapers, 1998 U.S. Dist. LEXIS 10511 at *4.

⁷⁴ In re Fannie Mae Derivative Litigation, 227 F.R.D. 142, 143 (D. D.C. 2005).

⁷⁵ Entertainment Technology, 2003 U.S. Dist. LEXIS 19832, at *12; *see also* BAE Systems, 224 F.R.D. at 587 (noting that the “reasonableness” standard “generally has been utilized when the purpose of the expedited discovery is to gather evidence for an upcoming preliminary injunction hearing”).

⁷⁶ Semitool, Inc. v. Tokyo Electron America, Inc. et al., 208 F.R.D. 273, 275-276 (N.D. Cal. 2002)(criticizing the rigid factors enunciated in Notaro as “inconsistent” with Rules 1 and 26(d) of the Federal Rules of Civil Procedure and as “unduly circumscrib[ing] the wide discretion normally accorded the trial court in managing discovery”); *see also* Yokohama, 202 F.R.D. at 614.

⁷⁷ O'Connor, 194 F.R.D. at 623; *see also* Better Packages, Inc. v. Zheng et al., No. 05-4477, 2006 U.S. Dist. LEXIS 30119, at *6-7 (D. N.J. May 17, 2006)(noting that the “reasonableness” standard “requires the party seeking the discovery to prove that the requests are reasonable under the circumstances”); *but see* Ellsworth, 917 F.Supp. at 845 (noting that a “party opposing discovery bears the burden of showing why discovery should be denied”).

⁷⁸ Id. at 621; *see also* Dimension Data, 226 F.R.D. at 532 (denying motion for expedited discovery where requesting party had yet to file “a temporary restraining order or a motion for preliminary injunction, setting out in detail the areas in which discovery is necessary in advance of a determination of preliminary injunctive relief” and where the “discovery requested is not narrowly tailored to obtain information relevant to a preliminary injunction determination”).

⁷⁹ Independence Blue Cross v. Health Systems Integration, Inc., No. 96-8216, 1997 U.S. Dist. LEXIS 781, at *3 (E.D. Pa. Jan. 29, 1997).

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⁸⁰ Id. at *5; *but cf.* BAE Systems Aircraft Controls, Inc. v. Eclipse Aviation Corp., 224 F.R.D. 581, 588 (D. Del. 2004)(denying expedited discovery request after first determining that a pending arbitration “should go forward” and that there was “no preliminary injunction hearing to prepare for” before the court).

⁸¹ A.G. Edwards & Sons, Inc. v. Marcolla et al., No. 07-3260, 2007 U.S. Dist. LEXIS 77170 (C.D. Ill. Oct. 17, 2007).

⁸² Lentjes Bischoff GmbH v. Joy Environmental Technologies, Inc., 986 F.Supp. 183, 189 (S.D. N.Y. 1997).

⁸³ Id.

⁸⁴ *See* BAE Systems, 224 F.R.D. at 588.