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NOTES

You Promised You Wouldn't Tell: Modifying Arbitration Confidentiality Agreements to Allow Third-Party Access to Prior Arbitration Documents

*Gotham Holdings, LP v. Health Grades, Inc.*¹

I. INTRODUCTION

To facilitate the speed, cost-effectiveness, and casual atmosphere² of arbitration, it has long been thought that parties must trade in the usual features of the courts, such as precedent, appellate review, and certain evidentiary rules. With the increasing use of arbitration, many parties have begun to demand that some of the comforts that have long accompanied litigation be merged with the benefits of arbitration. Courts have, for the most part, denied such demands. Nevertheless, the Seventh Circuit in *Gotham Holdings* allowed such a demand by ruling that third parties must have the opportunity to obtain prior arbitration awards and use them as evidence of precedent in a subsequent arbitral or judicial proceeding. Any concern that arbitration will lose its appeal, as such a procedure will drive up the cost for arbitration and bring arbitration closer to being like litigation, is misguided. Providing information about prior arbitral awards and related documents offers precedential value and will only lead to a faster and more cost-effective process. Similarly, giving parties the opportunity to offer evidence and testimony other than their own voice will allow them to provide better support for their claims and permit arbitration to become even more of a “necessary legal remedy.”³

II. FACTS AND HOLDING

In 2005, Health Grades Incorporated (Health Grades) entered into a contract with Hewitt Associates LLC (Hewitt). Health Grades was to develop online applications for Hewitt’s clients to allow the clients’ access to specific health care

1. 580 F.3d 664 (7th Cir. 2009).

2. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citing H.R. REP. NO. 97-542, at 13 (1982)); *see also* S. REP. NO. 536, at 3 (1924).

3. *Teamsters Nat’l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir. 2003).

information provided by Health Grades.⁴ The contract contained an arbitration confidentiality agreement.⁵ This agreement stated that “[a]ll aspects of the arbitration shall be treated as confidential. Neither the parties nor the arbitrators may disclose the existence, content or results of the arbitration, except as necessary to comply with legal or regulatory requirements.”⁶

Unfortunately, in 2006, a dispute arose between Health Grades and Hewitt, which resulted in arbitration before an American Arbitration Association (AAA) panel.⁷ Pursuant to this arbitration, the parties entered into a Stipulated Protective Order and Confidentiality Agreement (Stipulated Protective Order), which required the parties to destroy any confidential documents within forty-five days after the entry of final judgment.⁸ However, unbeknownst to Health Grades, as argued in their appellate brief, Hewitt did not destroy the confidential documents.⁹

At the same time Health Grades was engaged in arbitration with Hewitt, Gotham Holdings, LP (Gotham Holdings) filed suit against Health Grades in the Southern District of New York.¹⁰ Gotham Holdings then served Hewitt with a subpoena in U.S. District Court for the Northern District of Illinois,¹¹ seeking to obtain the confidential documents from the arbitration between Hewitt and Health Grades.¹² While Hewitt did not object to disclosing the documents, Health Grades moved to quash the subpoena when it ultimately learned that Hewitt did not destroy the confidential, arbitration documents.¹³ Health Grades argued that because of the strong, federal policy favoring arbitration, the court must enforce the arbitration confidentiality agreement agreed to by the parties and not allow a third-party to obtain these confidential documents, which, according to Health Grades, should have been destroyed pursuant to the Stipulated Protective Order.¹⁴

However, because Health Grades was unable to produce a copy of the Stipulated Protective Order between Hewitt and Health Grades, the District Court for the Northern District of Illinois rejected Health Grades’ claims and enforced the subpoena against Hewitt. This resulted in Health Grades’ appeal.¹⁵ Unfortunately for Health Grades, the Seventh Circuit also rejected Health Grades’ assertions, finding that absent a specific privilege, arbitration confidentiality agreements protect solely against voluntary disclosures made by the parties to the agreement, not to third parties who have a legal right of access to the documents, such as through a subpoena.¹⁶

4. Opening Brief and Required Short Appendix of Defendant-Appellant, Health Grades, Inc., *Gotham Holdings*, 580 F.3d 664 (2009) (No. 09-2377), 2009 U.S. 7th Cir. Briefs LEXIS 186, at *10.

5. *Id.* at *7.

6. *Id.* at *10-*11.

7. *Id.* at *11.

8. *Id.* at *7. Final judgment was entered on June 4, 2007. *Id.*

9. *Gotham Holdings*, 2009 U.S. 7th Cir. Briefs LEXIS 186, at *8.

10. *Id.* at *9.

11. This is where Hewitt’s principal place of business is located. *Gotham Holdings*, 580 F.3d at 665.

12. *Gotham Holdings*, 2009 U.S. 7th Cir. Briefs LEXIS 186, at *5-*6.

13. *Id.* at *8-*9.

14. *Id.* at *20-*21.

15. *Gotham Holdings LP v. Health Grades, Inc.*, 580 F.3d 664, 665 (7th Cir. 2009). The District Court issued a stay pending Health Grades’ appeal. *Id.*

16. *Id.* at 666.

III. LEGAL HISTORY

A federal policy in favor of arbitration began to take shape in the Supreme Court's 1967 decision, *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*¹⁷ In *Prima Paint*, one party alleged that the entire contract, including the arbitration agreement, had been induced by fraud and thus filed suit in the Southern District of New York.¹⁸ However, the other party moved to arbitrate the fraud claim pursuant to the arbitration agreement contained in the contract, despite the fact that the entire contract was alleged to be fraudulent.¹⁹ In response, the Court found that the issue of fraudulent inducement to contract was in itself an arbitrable claim.²⁰

In interpreting section 4 of the Federal Arbitration Act (FAA),²¹ the Court found that arbitration should be ordered "once it is satisfied that the making of the agreement for arbitration . . . is not in issue."²² Therefore, the Court concluded that a federal court may only hear a claim of fraud pertaining to the arbitration agreement itself, not a general claim of fraud relating to the entire contract.²³ Such a claim must be heard in arbitration.²⁴

Since *Prima Paint*, the courts of appeals have consistently held that "[federal law requires that] questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."²⁵ Moreover, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* the Court interpreted section 2 of the FAA²⁶ as creating a "liberal federal policy favoring arbitration" the effect of which "is to create a body of federal substantive law of arbitrability, applicable to any arbitration within the coverage of the Act."²⁷ This requires that any concerns relating to the arbitrability of certain issues "and ambiguities as to the scope of the arbitration clause itself [be] resolved in favor of arbitration."²⁸ This federal policy in favor of arbitration is merely to guarantee that arbitration agreements are enforced according to their own terms.²⁹

17. 388 U.S. 395 (1967).

18. *Id.* at 398.

19. *Id.* at 399.

20. *Id.* at 403-04.

21. 9 U.S.C. § 4 (2006).

22. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (citing 9 U.S.C. § 4).

23. *Id.* at 404.

24. *Id.*

25. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

26. 9 U.S.C. § 2, reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

27. *Moses H. Cone*, 460 U.S. at 24.

28. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989).

29. *Id.* at 476.

A. Enforcing Confidentiality Agreements

In *Jepson, Inc. v. Makita Electric Works, Ltd.*, the Seventh Circuit began to tackle the issue of enforceability of confidentiality agreements when it first faced such an issue in the area of litigation.³⁰ In *Jepson*, Makita Electric Works, Ltd. (Makita) was involved in an anti-trust action with Jepson, Inc.³¹ As a result of this litigation, Makita deposed a representative of Black & Decker Corp. (Black & Decker) for the purpose of obtaining information relating to the United States power tools market.³² Prior to the deposition, Makita and Black & Decker agreed to a Stipulated Protective Order (SPO), making the information disclosed in the deposition confidential.³³

Later, Black & Decker filed a claim with the International Trade Commission (ITC) alleging that Makita was selling professional power tools in the U.S. market at less than fair market value in violation of 19 U.S.C. § 1673.³⁴ During the ITC proceedings, a president of Black & Decker gave testimony which Makita believed was contrary to Black & Decker's earlier deposition.³⁵ After the president's testimony, Makita's counsel offered to provide evidence of the previous deposition with Black & Decker, but in so doing Makita's counsel gave a brief description of the deposition.³⁶ In response, Black & Decker alleged that such a description violated the SPO and it moved to enforce the SPO and sanction Makita for describing the deposition.³⁷

On appeal, the Seventh Circuit found that the district court may issue a protective order only by a showing of "good cause," something that was not found by the district court.³⁸ Even if both parties agree to a protective order, the district court must make an independent showing of "good cause"³⁹ as such information in future cases may ease "the tasks of courts and litigants, and [speed] up what may otherwise be a lengthy [discovery] process."⁴⁰ Furthermore, a refusal to modify an SPO to force a party to disclose relevant information often subsequently results in wasteful, duplicate discovery as such initial disclosure from the modification of the SPO may have resulted in the disclosure of relevant information.⁴¹ However, duplication of discovery is necessary when such information may "tangibly prejudice substantial rights of the party opposing modification."⁴²

30. 30 F.3d 854 (7th Cir. 1994), *rev'g*, 143 F.R.D. 657 (N.D. Ill. 1992).

31. *Id.* at 855.

32. *Id.*

33. *Id.* at 856.

34. *Id.*; 19 U.S.C. § 1673 (2006).

35. *Jepson, Inc.*, 30 F.3d at 856.

36. *Id.* at 856-57.

37. *Id.* The District Court for the Northern District of Illinois "granted Black & Decker's motion and sanctioned Makita's counsel \$5,000" and Makita appealed. *Id.* (citing *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 143 F.R.D. 657 (N.D. Ill. 1992), *rev'd*, 30 F.3d 854 (7th Cir. 1994)).

38. *Jepson, Inc.*, 30 F.3d at 859.

39. *Id.*

40. *Id.* at 861 (citing *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980), *superseded by rule*, FED. R. CIV. P. 5(d) (2000 amendment), *as recognized in* *Bond v. Utreras*, 585 F.3d 1061, 1068 (7th Cir. 2009)).

41. *Id.* at 861.

42. *Id.* at 858 (quoting *Wilk*, 635 F.2d at 1299).

Additionally, in *Baxter International, Inc. v. Abbott Laboratories*,⁴³ the Seventh Circuit added additional requirements for confidentiality agreements in litigation by stating that “a litigant must do more than just identify a kind of information and demand secrecy. . . .”⁴⁴ A party cannot demand that a document be kept confidential solely by claiming that “the agreement is, by its terms, confidential.”⁴⁵ The party must “analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.”⁴⁶

Thus, the court found that, in spite of any previous agreement, documents that are crucial to the decision in any litigation must be made available to the public.⁴⁷ “Only trade-secrets, information covered by a recognized privilege . . . and information required by statute” are to remain confidential and struck from the public record.⁴⁸ Likewise, the court found that a party does not have the right to keep third parties from learning the nature of the litigation.⁴⁹ The court offered an alternative to the openness of litigation by stating that if a party desires complete confidentiality, that party should turn to arbitration.⁵⁰

B. Subpoenas and Arbitration

The Seventh Circuit first faced the relationship between subpoenas and arbitration in *Teamsters Negotiating Committee v. Troha*, which involved a collective bargaining agreement (CBA).⁵¹ In *Troha*, the union sought to enforce an arbitration subpoena against a non-signatory third-party to the CBA, which contained the arbitration agreement.⁵² In response to the enforcement action in district court, the third-party alleged that the court lacked subject matter jurisdiction under section 301 of the Labor Management Relations Act (LMRA),⁵³ because unlike section 1331,⁵⁴ which allows for any suit “arising under the laws of the United States,”

Rule 26(c) of the Federal Rules of Civil Procedure permits the district court, “[u]pon motion by a party or by the person from whom discovery is sought, and *for good cause shown* . . . [the court may] make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . .

(7) that a trade-secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way”

Jepson, 30 F.3d at 858.

43. *Baxter Int'l, Inc. v. Abbot Lab.*, 297 F.3d 544 (7th Cir. 2002).

44. *Id.* at 546 (citing *Composite Marine Propellers Inc. v. Van Der Woude*, 962 F.2d 1263, 1266).

45. *Id.* at 547.

46. *Id.* at 548.

47. *Id.* at 546. (“[S]tudents of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing.”). Information that is “vital to claims made in litigation . . . must be revealed.” *Id.* at 547.

48. *Id.*

49. *Baxter*, 297 F.3d at 548.

50. *Id.* (“Baxter, whose refusal to accept the result of the arbitration is the cause of the current problem, has no claim to keep a lid on its own documents It had, and spurned, a sure path to dispute resolution with complete confidentiality: accept the result of the closed arbitration.”); see also *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (“People who want secrecy should opt for arbitration.”).

51. 328 F.3d 325 (7th Cir. 2003).

52. *Id.* at 327.

53. Labor Management Relations Act § 301(a), 29 U.S.C. 185(a) (2006).

54. 28 U.S.C. § 1331(a) (2006).

section 301 only allows “suits for violations of contracts.”⁵⁵ Thus, the third-party argued that a court only has jurisdiction under section 301 over the parties to the CBA, as they are the only ones who are capable of violating such a contract.⁵⁶

The Seventh Circuit agreed that no jurisdiction existed under section 301, as such a rule had been firmly established by the Supreme Court only a few years earlier.⁵⁷ However, the court found that jurisdiction was proper under section 1331, because “when the purpose of the lawsuit effectuates the goals of section 301 . . . it is appropriate for federal common law to embrace such suits.”⁵⁸ The court found that the lawsuit effectuated the goal of section 301, because the reason the union needed the information from the third-party was to prove that the other party had in fact breached the CBA.⁵⁹

The court explained that the reason for such a ruling is that arbitration “cannot provide the ‘necessary legal remedy’ if the parties to the arbitration have no means of securing valuable evidence other than their own testimony.”⁶⁰ Further, enforcement of a CBA is powerless if the parties “cannot present evidence in the form of third person testimony or documents possessed by third parties.”⁶¹ Moreover, moving to enforce an arbitration subpoena has a great effect on the arbitration process and is necessary to effectuate the purpose of agreeing to arbitrate in the first place.⁶²

1. Third Parties Using Subpoenas to Obtain Prior Arbitration Documents

Moving from subpoenas issued in arbitration to subpoenas seeking the records of a prior arbitration, the Eastern District of New York established, in *Fireman’s Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*,⁶³ that a previous arbitration award may be discoverable if it is relevant to the current proceeding.⁶⁴ In *Cunningham Lindsey*, the plaintiff sued the defendant for negligence and sought to obtain the records from a very similar claim between the defendant and a third-party that went to arbitration.⁶⁵ In response, the defendant claimed that the prior arbitration award was protected by a confidentiality agreement and that parties who have chosen to pursue arbitration must have their “expectations of confidentiality” respected.⁶⁶

55. *Teamsters Nat’l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 327-28 (7th Cir. 2003); see also *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. UAW*, 523 U.S. 653, 656 (1998).

56. *Troha*, 328 F.3d at 329.

57. See *Textron*, 523 U.S. 653, 661-62 (1998).

58. *Troha*, 328 F.3d at 330; see *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957).

59. *Troha*, 328 F.3d at 329.

60. *Id.* at 330.

61. *Id.*

62. *Id.* (“It is therefore appropriate to apply the reach of federal common law to ensure that such subpoenas do not go unenforced.”).

63. *Fireman’s Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, No. 03CV0531 (DLI) (MLO), 03CV1625 (DLI) (MLO), 2005 WL 1522783 (E.D.N.Y. June 28, 2005) (mem.).

64. *Id.* at *3 (citing FED. R. CIV. P. 26(b)(1)).

65. *Id.* at *1.

66. *Cunningham Lindsey*, 2005 WL 1522783, at *3.

Faced with a confidentiality agreement, the court recognized that such agreements must be protected as they advance “federal policy and [encourage] ADR by ensuring that parties in an arbitration proceeding get the protections for which they contracted.”⁶⁷ The court found that this federal policy favoring ADR, chiefly arbitration, was established by the Alternative Dispute Resolution Act of 1998⁶⁸ and the FAA.⁶⁹ In recognition of this policy favoring arbitration and the confidentiality of such proceedings, the court acknowledged that “[a]n overzealous quest for ADR” may end up “suppressing admissible evidence in the name of confidentiality” and not grant a litigant “the opportunity to . . . discover information in support of its case.”⁷⁰

Realizing the balance between protecting confidentiality provided by ADR and protecting admissible evidence, the court looked to an established rule in the Second Circuit asserting that there is a presumption that the terms and monetary amount of a settlement agreement made pursuant to litigation are not discoverable, “absent extraordinary circumstances or a compelling need.”⁷¹ Applying this rule to the arbitral setting, the court established that arbitration awards are discoverable, but in order for a party to obtain the terms and monetary value of an arbitration award, it must show that “the information sought is compelling enough to outweigh the privacy interests that are involved.”⁷²

In a very similar situation to *Cunningham Lindsey and Gotham Holdings*, the Federal District Court of Colorado recognized the cost-effectiveness of enforcing third-party subpoenas in *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*⁷³ In *Jaffe*, the court held that unless substantial prejudice is shown, “policy considerations favoring the efficient resolution of disputes justify modification” of the confidentiality agreement so that costly duplication of discovery is avoided.⁷⁴ The court continued its support of efficient dispute resolution by stating that even if substantial prejudice is shown, a “court has broad discretion in determining whether the injury outweighs the benefits of modification.”⁷⁵

67. *Id.* at *3.

68. 28 U.S.C. § 651 (2006).

69. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2006); *Cunningham Lindsey*, 2005 WL 1522783, at *3.

70. *Cunningham Lindsey*, 2005 WL 1522783, at *3 (citation omitted).

71. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n.8 (2nd Cir. 2004) (citing *Martindell v. Int'l Telephone & Telegraph Corp.*, 594 F.2d 291, 296-97 (2nd Cir. 1979)).

72. *Cunningham Lindsey*, 2005 WL 1522783, at *4; see also *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 458-59 (E.D.N.Y. 2005)

Settlement of claims without judicial intervention contrasted with public interest in an open judicial system implicate public policy interests. Public policy interests in the speedy resolution of conflicts and judicial efficiency are involved. There may be a countervailing public interest in open discovery in support of a claim or defense. Finally, the defendants have a private interest in full discovery of information relating to defending their claim.

Id.

73. No. Civ.A. 04-N-1228 (CBS, 04-X-0057), 2004 WL 1821968 (Dist. Colo. Aug. 13, 2004).

74. *Id.* at *2.

75. *Id.*

2. Restricting Disclosure to Third Parties to Certain Situations

Not all courts have been so supportive of the free flow of information from prior arbitrations to third parties. In *Malibu Consulting Corp. v. Funair Corp.*, the Western District of Texas found that documents specifically protected by a confidentiality agreement may not be disclosed to third parties.⁷⁶ Nonetheless, the court held that the documents sought by the third-party in that particular instance should be disclosed for two reasons.⁷⁷ First, the SPO only protected “confidential information,” which was not the type of information sought by the third-party.⁷⁸ Second, the SPO provided that upon completion of the arbitration, all confidential information must be returned to the parties.⁷⁹ Thus, even if confidential information was disclosed to the third-party, it would only be confidential information possessed by the party facing the subpoena, therefore, negating any breach of the SPO.⁸⁰

Furthermore, the Fifth Circuit in *ITT Educational Services, Inc. v. Arce*, held that a prior arbitration decision may be discoverable, but not in all situations.⁸¹ In *Arce*, a group of students went to arbitration over a dispute pursuant to their enrollment agreement with ITT Educational Services, Inc. (ITT).⁸² After the group received a favorable ruling, a student who retained the same counsel as the first group chose to arbitrate the same claim a year later using much of the same evidence and findings from the previous arbitration.⁸³ In response, ITT sought to permanently enjoin the group of students from disclosing the documents of the prior arbitration to the individual student, arguing that such disclosure would violate the confidentiality agreement.⁸⁴

After the district court granted the permanent injunction sought by ITT, the students alleged that ITT had failed to show that any irreparable injury would occur and that invoking the confidentiality agreement to conceal evidence of wrongdoing from the second arbitration violated public policy.⁸⁵ In response, the Fifth Circuit found that ITT actually would suffer an irreparable injury as “there is ‘no cure for the breach of the confidentiality agreement’” and, as such, that infor-

76. *Malibu Consulting Corp. v. Funair Corp.*, No. SA-06-CV-735-XR, 2007 WL 173668, at *5 (W.D. Tex. Jan. 18, 2007).

77. *Id.* at *4.

78. *Id.*

79. *Id.*; *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. Civ.A. 04-N-1228 (CBS, 04-X-0057), 2004 WL 1821968 (Dist. Colo. Aug. 13, 2004).

80. *Funair Corp.*, 2007 WL 173668, at *4; *see also Jaffe*, 2004 WL 1821968.

81. *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 346 (5th Cir. 2008).

82. *Id.* at 344.

83. *Id.*

84. *Id.*

85. *Arce*, 533 F.3d at 347.

To obtain permanent injunctive relief, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be dis-served by a permanent injunction.

Id. (quoting *eBay, Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006)).

mation could be used against ITT, not only in the second arbitration, but in countless others as well.⁸⁶

Regarding the students' claims that the student in the second arbitration would be at a disadvantage by not being able to prove his case, the court found that he would not be burdened, as he would still be free to make his case, just without the documents from the prior arbitration.⁸⁷ He would be in the same position as any other litigant who must start at square one and without confidential information, not otherwise discoverable,⁸⁸ to prove their case.⁸⁹

In response to the students' assertion that denying prospective students knowledge of the arbitrator's findings would violate public policy, the court cited *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*,⁹⁰ which stated "[i]f arbitration were required to produce a publicly available, 'precedential' decision . . . one would expect that parties contemplating arbitration would demand . . . all of the procedural accoutrements that accompany a judicial proceeding."⁹¹ Further, the intention of arbitration "is that one 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"⁹²

Notwithstanding different circuit interpretations, such an emphatic denial by the Fifth Circuit of a party's ability to use a prior arbitration award to its advantage seemed to shut the door for one to use a prior decision as evidence of precedent. However, these cases involved parties who were signatories to the confidentiality agreement and who desired to voluntarily disclose the arbitration decision without facing a subpoena. Nevertheless, the effect on a party to the confidentiality agreement who received a subpoena by a third-party was unknown until the Seventh Circuit ruled on this matter in *Gotham Holdings, LP v. Health Grades, Inc.*⁹³

IV. INSTANT DECISION

In *Gotham Holdings*, the court first noted that the confidentiality agreement between Health Grades and Hewitt specifically allowed for the materials from the arbitration to be disclosed when faced with a subpoena.⁹⁴ However, the court found that such information would still have to be disclosed even if explicit language was included in the agreement that would have blocked disclosure in the face of a subpoena.⁹⁵

The court found that contracts "bind only the parties" and the rights of a third-party "may be affected only with their consent."⁹⁶ Additionally, by citing its ruling in *Troha*, the court stated that it would be strange to treat arbitration sub-

86. *Id.* at 347 (quoting *Toon v. Wackenhut Corrs. Corp.*, 250 F.3d 950, 954 (5th Cir. 2001)).

87. *Id.*

88. FED. R. CIV. P. 26.

89. *Arce*, 533 F.3d at 347.

90. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 159 (5th Cir. 2006).

91. *Id.* at 175-76.

92. *Id.* at 176 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

93. 580 F.3d 664.

94. *Id.* at 665.

95. *Id.*

96. *Id.* at 665-66.

poenas as a “one-way street” in the sense that parties to an arbitration may forcibly obtain information through a subpoena, but may not divulge that information when they themselves are faced with a subpoena.⁹⁷

As an additional point, the court noted that there is no federal policy favoring arbitration.⁹⁸ The FAA merely eliminated hostility to ADR and placed “arbitration agreements upon the same footing as others contracts.”⁹⁹ If there is such a policy favoring arbitration, then that “policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”¹⁰⁰ The court concluded by noting that arbitration agreements are enforced just like any other contract and any federal policy in favor of arbitration is simply a policy in favor of contracts in general.¹⁰¹

Moreover, in reference to *ITT Educational Services, Inc. v. Arce*,¹⁰² the court agreed with the Fifth Circuit’s holding that a party to an arbitration confidentiality agreement must “not voluntarily disclose any information related to the arbitration.”¹⁰³ The court recognized that the key is that the party would not voluntarily disclose the information, not that the party would not disclose the information when a third-party “had a legal right of access,” such as through a subpoena.¹⁰⁴

In addition, the court recited the rule in *Baxter International* that in litigation, one’s “[preference] for secrecy does not create a legal bar to disclosure.”¹⁰⁵ In reference to this rule, the court established that the same conclusion should be reached for arbitration confidentiality agreements, and that only trade-secrets, privileges, and statutes or rules requiring confidentiality should impede one’s access to that information.¹⁰⁶

V. COMMENT

The Seventh Circuit in *Gotham Holdings* may not have been the first to hold that, notwithstanding the confidentiality agreement, the prior arbitration decision must be disclosed to the third-party.¹⁰⁷ Nevertheless, it is an important decision as it is one of the first federal circuit courts to make such a ruling. Moreover, it is an important decision in the sense that increased disclosure of prior arbitration awards and documents may force courts and parties to reassess the pervasive belief that arbitration must be accompanied with limited procedure.

97. *Id.* at 666.

98. *Id.*

99. *Gotham Holdings*, 580 F.3d at 666 (quoting *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1901 (2009)).

100. *Id.* (quoting *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 476 (1989)).

101. *Id.*

102. 533 F.3d 342 (5th Cir. 2008).

103. *Gotham Holdings*, 580 F.3d at 665 (citing *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347-48 (5th Cir. 2008)) (emphasis in original) (alteration in original).

104. *Id.* at 665-66. “That’s what ¶ 6 of this agreement does: The parties promised to keep their mouths (and files) shut unless a subpoena required a turnover.” *Id.* at 666.

105. *Id.* at 665 (citing *Baxter Int’l, Inc. v. Abbot Lab.*, 297 F.3d 544, 544 (7th Cir. 2002)).

106. *Id.* (citing FED. R. CIV. P. 45(c)(3)(A)(iii)).

107. The District of Colorado made a similar ruling in *Jaffe*. See *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*, No. Civ.A. 04-N-1228 (CBS, 04-X-0057), 2004 WL 1821968, at *2 (Dist. Colo. Aug. 13, 2004).

A. The Stipulated Protective Order Entered into by Health Grades Clearly Allowed the Information to be Disclosed

In analyzing the court's decision, the court was correct to find that the information sought by Gotham Holdings from Hewitt was not protected by the SPO that was entered into between Hewitt and Health Grades.¹⁰⁸ The SPO specifically stated that a party may disclose information that would otherwise be protected in order "to comply with legal or regulatory requirements."¹⁰⁹ As a subpoena is a legal requirement, Hewitt was permitted under the SPO to disclose the arbitration documents to Gotham Holdings. As the court noted, Hewitt and Health Grades simply "promised to keep their mouths . . . shut unless a subpoena required a turnover."¹¹⁰

However, it is worth noting that perhaps the documents in Hewitt's possession should not have even existed in the first place. Health Grades argued that the SPO required all confidential information to be destroyed within forty-five days of the completion of the arbitration proceedings.¹¹¹ In response, the court remained silent in regards to Health Grades' assertion.¹¹² The court was likely hesitant to rule that one could destroy confidential documents when faced with required disclosure.

Additionally, the SPO may have been modified by the district court so as to make the forty-five day provision moot. If that was so, it would appear to be contrary to *Funair*, where the court modified the SPO only because there was no evidence that any confidential information was not returned to each party pursuant to the SPO after the arbitration. Thus, in *Funair* there was no possibility that the third-party seeking access to the documents would obtain confidential information, resulting in the SPO being breached.¹¹³ If this same analysis were used by the court in *Gotham Holdings*, the court may have reached a different conclusion, as there was evidence that a party did not follow the SPO, at least that is what Health Grades claimed.¹¹⁴ Thus, there was a risk that the material sought by Gotham Holdings could contain confidential information protected by the SPO.

B. There Is a Federal Policy Favoring Arbitration

Further, it grabs one's attention that the court emphatically denied any suggestion that there is a federal policy favoring arbitration.¹¹⁵ Numerous courts have explicitly stated that there is such a policy. The Supreme Court specifically stated in *Moses H. Cone* "that questions of arbitrability must be addressed with a healthy

108. *Gotham Holdings*, 580 F.3d at 665-66.

109. *Id.* at 665.

110. *Id.* at 666.

111. Opening Brief and Required Short Appendix of Defendant-Appellant, Health Grades, Inc., *Gotham Holdings*, 580 F.3d 664 (2009) (No. 09-2377), 2009 U.S. 7th Cir. Briefs LEXIS 186, at *11-*12.

112. *Gotham Holdings*, 580 F.3d at 665-66.

113. *Malibu Consulting Corp. v. Funair Corp.*, No. SA-06-CV-735-XR, 2007 WL 173668, at *5 (W.D. Tex. Jan. 18, 2007).

114. *Gotham Holdings*, 2009 U.S. 7th Cir. Briefs LEXIS 186, at *11-*12.

115. *Gotham Holdings*, 580 F.3d at 666.

regard for the federal policy favoring arbitration.”¹¹⁶ Further, the Court noted that the FAA provided that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”¹¹⁷

In particular, the court in *Cunningham Lindsey* noted that “protecting confidentiality agreements . . . promotes federal policy and encourages ADR by ensuring that parties in an arbitration proceeding get the protection for which they contracted.”¹¹⁸ However, the court warned that “[a]n overzealous” support of ADR may result in the suppression of otherwise admissible evidence solely for the cause of confidentiality.¹¹⁹ Along with the federal policy favoring confidentiality, there is also “a countervailing public and private interest” in allowing a party the opportunity to obtain relevant information needed to support its argument.¹²⁰

Regardless of whether the court denied the existence of a federal policy favoring arbitration, the court was correct in recognizing the key feature of that policy by stating that such a policy is merely “to place [arbitration] agreements upon the same footing as other contracts.”¹²¹

Thus, if there is such a policy favoring arbitration, it is merely a policy favoring contracts in general.¹²² With this policy favoring contracts, the court noted that it has long been established that contracts bind only those who sign them, not third parties.¹²³ Furthermore, if confidentiality agreements bound third parties, arbitration would no longer be viewed as a “necessary legal remedy” if parties were unable to secure any other evidence or testimony other than their own.¹²⁴

116. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 192 (2009) (“We have said many times that federal law requires that “questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration.”).

117. *Moses H. Cone*, at 24-25; see also 9 U.S.C. § 2 (“The effect of [§ 2] is to create a body of federal substantive law of arbitrability.”).

118. *Fireman's Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, No. 03CV0531 (DLI (MLO), 03CV1625 (DLI) (MLO), 2005 WL 1522783, at *3 (E.D.N.Y. June 28, 2005) (mem.). Such federal policy, created by the ADR Act of 1998 and the FAA, is in favor of ADR, and in particular arbitration. *Id.*

119. *Id.* (citing *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993)).

120. *Id.* (citing *Hasbrouck v. America Hous. Servs.*, 187 F.R.D. 453, 459 (N.D.N.Y. 1999)).

121. *Gotham Holdings v. LP v. Health Grades, Inc.*, 580 F.3d 664, 666 (7th Cir. 2009) (citing *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1901 (2009)).

122. *Id.*

123. *Id.* at 665 (“No one can ‘agree’ with someone else that a stranger’s resort to discovery under the Federal Rules of Civil Procedure will be cut off.”); see also *Baxter Int’l, Inc. v. Abbot Lab.*, 297 F.3d 544, 548 (7th Cir. 2002); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 854 (7th Cir. 1994), *rev’g*, 143 F.R.D. 657 (N.D. Ill. 1992).

124. *Teamsters Nat’l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir. 2003).

A collective bargaining agreement that requires arbitration is powerless if the parties to the arbitration cannot present evidence in the form of third person testimony or possessed by third parties. Enforcement of an agreement to arbitrate cannot provide the “necessary legal remedy” if the parties to the arbitration have no means of securing valuable evidence other than their own testimony.

Id.

C. Gotham Holdings *Essentially Gives Prior Arbitration Awards Precedential Value*

The ruling in *Gotham* essentially allows a third-party to obtain prior arbitration awards along with accompanying documents and use that information as evidence of precedent in the current dispute. In fact, the court did not limit its ruling solely to those arbitration documents and awards involving the party opponent. The court simply stated that confidentiality agreements do not bind third parties, and absent trade-secrets, privileges, or statutes requiring confidentiality, the prior arbitration documents must be disclosed.¹²⁵ Such a ruling appears to go against the ruling in *Funair*, where the court found that confidential information specifically protected by the SPO is not discoverable.¹²⁶ However, like the SPO in *Funair*, which exempted non-confidential information, the agreement in *Gotham Holdings* specifically exempted information from protection that needed to be disclosed in order to meet certain “legal or regulatory requirements.”¹²⁷

Even though the ruling in *Gotham Holdings* may not have been in conflict with the reasoning of the Western District of Texas in *Funair*, such a ruling appears to directly conflict with the findings of the Fifth Circuit in *Iberia*.¹²⁸ Even with the Seventh Circuit in *Gotham Holdings* citing favorably towards *Iberia*'s ruling that a party to the confidentiality agreement may not voluntarily disclose such information to a third-party,¹²⁹ one cannot miss the divergent findings by the courts in giving prior arbitration awards precedential value. In *Iberia*, the court rejected the idea of giving precedential value to arbitration awards, as it found that parties voluntarily trade the procedures and review of the courts in favor of the efficiency, informality, and speed of arbitration.¹³⁰

Further, the Fifth Circuit in *Arce* found that the third-party would not be at a disadvantage in the subsequent proceeding, as it was still free to prove its case and would just be in the same position as any other party who was unable to use confidential or privileged information to prove its case.¹³¹ Nonetheless, the court in *Gotham Holdings* remained silent on these issues, merely stating that parties to a confidentiality agreement, absent a privilege, trade-secret, or statute, may only bind third parties with their consent.¹³² With there being no privilege, trade-secret, or statute demanding confidentiality, even to third parties, the court found the information must be disclosed.¹³³

125. *Gotham Holdings*, 580 F.3d at 665.

126. *Malibu Consulting Corp. v. Funair Corp.*, No. SA-06-CV-735-XR, 2007 WL 173668, at *4 (W.D. Tex. Jan. 18, 2007).

127. 580 F.3d at 665.

128. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 159 (5th Cir. 2006).

129. 580 F.3d at 665-66.

130. 379 F.3d at 175-76 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

131. *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347 (5th Cir. 2008).

132. *Gotham Holdings v. LP v. Health Grades, Inc.*, 580 F.3d 664, 665-66 (7th Cir. 2009).

133. *Id.*

D. The Need for Probative Evidence Outweighs the Policy Interests in Arbitration

However, this leads one to ask not only whether giving arbitration awards precedential value benefits the key advantages¹³⁴ of arbitration, but more broadly, whether there should be an arbitration privilege,¹³⁵ as many states already possess a mediation privilege.¹³⁶ In *Gotham Holdings*, the court cited to *University of Penn. v. EEOC* in referencing the fact that the Supreme Court has been reluctant in recent years in establishing new privileges, as privileges are contrary to the principle that “the public . . . has a right to every man’s evidence.”¹³⁷ However, privileges may be necessary if the interests promoted by the privilege “outweigh the need for probative evidence.”¹³⁸

In fact, some courts have found that the policy interests¹³⁹ of arbitration outweigh the need for any probative evidence, as parties should get the protections

134. The key advantages of arbitration being:

- (1) The opportunity to select a decision maker rather than be subject to an inherently suspect jury process or the whims of a particular judge.
- (2) Informality of the process.
- (3) Can set up a schedule based on the parties' needs rather than the court's schedule.
- (4) Can tailor the proceedings to the parties' needs.
- (5) Certainty of dates.
- (6) The process is quicker and may be substantially cheaper.
- (7) The process belongs to the parties and not to the court.
- (8) The parties can decide where the hearings will be held and what law should apply.
- (9) The United States Supreme Court noted arbitration's benefit compared to litigation, including less expense, simple procedural and evidence rules, less hostility between parties, less disruption of ongoing and future dealings among the parties and more flexible scheduling of times and places for hearings and discovery.
- (10) One of the most significant benefits of arbitration is the ability of the parties to keep the process confidential.

ELISE D. BRENNAN & ROBERT L. BRENT, HEALTH LAW HANDBOOK § 2:8 (2006).

135. The fact that arbitration is confidential “does not necessarily create an evidentiary privilege.” Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 495 (2006). “The ADR Act does not create any evidentiary privilege.” *Id.* at n.173; see also *Pearson v. Miller*, 211 F.3d 57, 68 (3d Cir. 2000) (“[s]tatutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on the courts”).

136. *Babasa v. LensCrafters, Inc.*, 498 F.3d 972 (9th Cir. 2007) (California statutory mediation privilege); *EEOC v. Northlake Foods, Inc.*, 411 F.Supp.2d 1366 (M.D. Fla. 2005) (local rule); *FDIC v. White*, 76 F.Supp.2d 736 (N.D. Tex. 1999) (Texas statutory privilege); *New Horizon Fin. Servs., LLC v. First Fin. Equities, Inc.*, 278 F.Supp.2d 259 (Dist. Conn. 2003) (Connecticut statutory privilege); *U.S. Fidelity & Guar. Co. v. Dick Corp./Barton Malow*, 215 F.R.D. 503 (W.D. Pa. 2000) (Pennsylvania statutory mediation privilege). Notwithstanding various state laws, federal law does not recognize a mediation privilege. *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994). “Laws and administrative rules generally protect confidentiality of non-binding processes because it promotes candor, and therefore efficacy, of these processes.” Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1239 (2006).

137. *Gotham Holdings*, 580 F.3d at 666; see also *Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990). “We do not create and apply an evidentiary privilege unless it ‘promotes sufficiently important interests to outweigh the need for probative evidence . . . any privilege must ‘be strictly construed.’” *Id.* (quoting *Trammel v. U.S.*, 445 U.S. 40, 51 (1980)).

138. *Univ. of Penn.*, 493 U.S. at 189.

139. *Fireman’s Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt., Inc.*, No. 03CV0531 (DLI (MLO), 03CV1625 (DLI) (MLO), 2005 WL 1522783, at *3 (E.D.N.Y. June 28, 2005) (mem.) (citing *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004) (“There are important policy interest[s] involved in protecting the expectations of confidentiality belonging to parties who have chosen an alternative means of dispute resolution.”). “Federal policy, as evidenced by the enactment of the Alternative Dispute Resolution Act of 1998 and the Federal Arbitration Act, favors alternative dispute

for which they bargained.¹⁴⁰ Even in *Baxter Int'l.*, where the Seventh Circuit determined that confidentiality agreements signed as part of an overall settlement agreement in litigation did not extend to the prying eyes of third parties, the court stated that the path of complete confidentiality is that of arbitration.¹⁴¹ Furthermore, courts have found the appeal of arbitration has traditionally been its simplicity, informality, speed, and cost-effectiveness.¹⁴² If third parties start demanding the procedures associated with courts, i.e., giving prior arbitral awards precedential value, then arbitration would become indistinguishable from litigation, thus destroying its appeal.¹⁴³

Nonetheless, this reasoning for not allowing certain procedures, such as not permitting third parties to obtain relevant prior arbitrations awards and documents, is misguided. As the court noted in *Jaffe*, allowing such information to be discoverable would actually make arbitration cheaper, quicker, easier, and more efficient, because money would not have to be spent on wasteful, duplicative discovery.¹⁴⁴ Furthermore, unlike judicial review, another proposed procedure that has been attacked in recent years, the resolution of the dispute would not drag on, creating further expense.¹⁴⁵ In fact, such relevant information may aid the arbitrator in reaching a quicker decision, thus shortening the dispute resolution process. Additionally, as arbitrators are generally paid by the hour or by the day,¹⁴⁶ such expedited decision-making would lead to lower costs.

However, what is the result when something such as subpoenas issued during arbitration and the disclosure of prior arbitration awards and documents, which most likely would lead to quicker, cheaper, and more efficient resolutions, clashes with the longstanding idea that arbitration lacks certain procedures so as to assure that it remains cost-effective? Those involved must decide whether it is the lack of procedure and informality that is the hallmark of arbitration or whether it is arbitration's cost-effectiveness. And whether anything that makes arbitration more cost-effective should be implemented, or whether there is an ideal medium where arbitration remains efficient but adopts certain legal procedures to assure

resolution ("ADR"), and particularly arbitration." *Id.* (citing *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2d Cir. 2004)).

140. *Cunningham Lindsey*, 2005 WL 1522783 at *3 ("[P]rotecting confidentiality agreements . . . promotes federal policy and encourages ADR by ensuring that parties in an arbitration proceeding get the protections for which they contracted.").

141. *Baxter Int'l, Inc. v. Abbot Lab.*, 297 F.3d 544, 548 (7th Cir. 2002).

142. *Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 280 (1995).

143. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175-76; see *Allied-Bruce Terminix Cos.*, 513 U.S. at 280; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

144. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. Civ. A. 04_N-1228 (CBS, 04-x-0057), 2004 WL 1821968, at *2 (Dist. Colo. Aug. 13, 2004).

145. See *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding there is no general review for legal error but that §§ 10 and 11 of the FAA provide the sole grounds under federal law for review, which may be expanded upon by state statutory or common law). "Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . .'" *Id.* at 588 (citing *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 998 (2003)).

146. HENRY S. KRAMER, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* § 10.01[2] (2009).

that it remains an effective legal remedy.¹⁴⁷ Arbitration has long been heralded for its informality and its simplicity—would allowing third parties access to prior arbitration awards and documents really do away with the appeal, the speed, and the cost-effectiveness?

VI. CONCLUSION

The court in *Gotham Holdings* was correct to hold that the SPO entered into between Health Grades and Hewitt did not prevent Gotham Holdings from obtaining the arbitration documents, as the SPO clearly stated that those documents may be disclosed to meet certain legal or regulatory requirements.¹⁴⁸ This ruling essentially gives third parties the opportunity to obtain prior arbitration awards and use them as evidence of precedent in a subsequent arbitral or judicial proceeding. Additionally, any concern that arbitration will lose its appeal, as such a procedure will drive up the cost of arbitration and make arbitration too much like litigation, is unwarranted. Providing prior arbitration awards with precedential value will only lead to a quicker and more cost-efficient process. Likewise, allowing parties to seek evidence and testimony other than their own, will allow parties to provide better support for their claims and permit arbitration to become an even more “necessary legal remedy.”¹⁴⁹

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147. Mitchell A. Orpett, *A Practical Comparison of Arbitration, Mediation and Litigation of Reinsurance Disputes—Publicity and Precedential Value*, in 3 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 41:77 (David Leitner et al. eds., 2009).

148. Opening Brief and Required Short Appendix of Defendant-Appellant, Health Grades, Inc., *Gotham Holdings*, 580 F.3d 664 (2009) (No. 09-2377), 2009 U.S. 7th Cir. Briefs LEXIS 186, at *10.

149. *Teamsters Nat’l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir. 2003).