UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRETT BERKOWITZ, TREVOR BERKOWITZ, AND AARON BERKOWITZ,	)	
Petitioners,	)	**Case No. 1:17-cv-00148-RJL**
	)	**EMERGENCY MOTION**
v.	)	
REPUBLIC OF COSTA RICA,	)	
Respondent.	)	

PETITIONERS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION STAYING THE ARBITRATION PROCEEDINGS

The petitioners, Brett Berkowitz, Trevor Berkowitz, and Aaron Berkowitz (collectively the "Berkowitz Claimants"), through their undersigned counsel and pursuant to Fed. R. Civ. P. 65 and LCvR 65.1(c), submit this Emergency Motion for a Preliminary Injunction Staying the Arbitration Proceedings (the "Motion to Stay"), and in support state as follows:

PRELIMINARY STATEMENT

About seven months ago, the arbitration tribunal (the "Tribunal") issued its Interim Award. Around six months ago, the deadline expired for the Tribunal or the parties to make any corrections to the Interim Award under Article 38 of the UNCITRAL Arbitration Rules, the arbitration rules that apply to the underlying dispute. Almost four months ago, the Berkowitz Claimants filed their Motion to Vacate, laying out the grounds under which the Tribunal exceeded its powers by relying on unproven facts, which are exactly the facts at issue below. Now, approximately a week ago, the Tribunal decided, without the full consent of the parties, to apply Article 38 to fix an error that goes to the heart of the Interim Award's jurisdictional

findings. The Tribunal has said a corrected award is coming in weeks, and as a result the Berkowitz Claimants are compelled to request that this Court enjoin the Tribunal's work on the corrected award for the reasons stated herein.

FACTUAL BACKGROUND

1. As described in the Motion to Vacate, the Tribunal dismissed the Berkowitz Claimants' claims with respect to two parcels of property—known as Lots B1 and B8—based on the finding that it lacked jurisdiction. *See* ECF No. 1-11, ¶¶ 288-89. This decision was issued on October 25, 2016.

2. On April 17, 2017, the Tribunal sent letters to both the Berkowitz Claimants and the Republic of Costa Rica ("Costa Rica") advising that there was "an error or omission of a factual nature" regarding Lot B1 concerning documents that the parties originally declined to submit in the proceedings. *See* ECF No. 21-3. The Tribunal invited comment from the parties as to how to proceed, and indicated that it was considering amending the award. *See id.*, p. 2.

3. In its letter, the Tribunal cited Article 38 of the UNCITRAL Arbitration Rules (titled "Correction of the Award") as its authority for amending the Interim Award. *See id.*, p. 2.

4. Article 38 provides, in relevant part: "The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative."[1]

5. Under Article 38, the Tribunal's authority to amend the October 25, 2016 award terminated on November 24, 2016—months before the Tribunal's letter.

6. On May 1, 2017, the Berkowitz Claimants responded, reminding the Tribunal that, by the Tribunal's own order denying a stay of the arbitration proceedings, only this Court

[1] The Berkowitz Claimants have already submitted a copy of the UNCITRAL Arbitration Rules to the Court as an exhibit to their Petition to Vacate. ECF No. 1-3. In the interest of keeping the record uncluttered, a copy of the Rules is not included with this Motion.

can evaluate the Tribunal's findings at this stage. *See* Exhibit A, p. 1, Letter from the Berkowitz Claimants dated May 1, 2017 (the "May 1 Letter").[2]

7. In the May 1 Letter, the Berkowitz Claimants explained that the Tribunal's defective award was legally vitiated, not merely factually mistaken, and as such, the matter is now properly before the Court. *See* Ex. A, p. 3. The Berkowitz Claimants then requested that the proceedings be terminated, as the Tribunal was without authority to continue the matter any further. *See id.*

8. On May 1, 2017, Costa Rica also responded to the Tribunal. *See* ECF No. 25-2. Costa Rica likewise requested termination, but advised that it had no objection to a factual amendment of the award, provided that the legal outcome did not change. *See generally id.*

9. On May 9, 2017, the Tribunal replied. *See* ECF No. 26-2. Without commenting on the limitations of its authority raised in the Berkowitz Claimants' letter, the Tribunal advised that it would "proceed to correct the Interim Award as appropriate" and that an amended award would be issued "in the coming weeks." *See id.*

LEGAL STANDARD

In considering a motion for preliminary injunction, the District Court is required to weigh four factors together: "(1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (citing *CFGC v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)); *see also Winter v. Nat. Res. Def.*

[2] *See also* Tribunal's Decision Denying a Stay of the Proceedings, dated February 28, 2017, ¶33, *publicly available at* https://www.italaw.com/sites/default/files/case-documents/italaw8478.pdf ("The grounds advanced in the Claimants' Set Aside Petition to the U.S. District Court are a matter for the U.S. District Court, not for the Tribunal[.]").

Council, Inc., 555 U.S. 7, 20 (2008). "The four factors have typically been evaluated on a 'sliding scale.' If the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis*, 571 F.3d at 1291–92 (citing *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999)); *see also Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 505 (D.C. Cir. 2016) (holding that the four factors must be "taken together"); *Sterling Commercial Credit--Michigan, LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 12 (D.D.C. 2011) ("An injunction may be issued with either a high probability of success and some injury, or vice versa.") (quotation omitted). The Berkowitz Claimants readily meet all four factors for an injunction to issue in this case.

ARGUMENT

I. The Berkowitz Claimants have a substantial chance to succeed on the merits of their claim because the Tribunal admits that the Interim Award contained an error that goes directly to one of the grounds of vacatur identified in the Motion to Vacate.

A party demonstrates a "substantial likelihood of success on the merits" where it "demonstrate[s] that [it] has a 'fair ground for litigation'" and that its claims "are worthy of 'more deliberative investigation.'" *Wise v. United States*, 128 F. Supp. 3d 311, 317 (D.D.C. 2015) (quoting *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). The Berkowitz Claimants have not only met, but have exceeded this standard.

By the Tribunal's own admission, the Interim Award contains an error, and this error goes directly to one of the grounds for vacatur identified and relied upon by the Berkowitz Claimants. As mentioned in the Motion to Vacate, the Tribunal had the obligation to apply the UNCITRAL Arbitration Rules to the proceedings, and those rules require each of the parties to prove the facts upon which it relies. *See* UNCITRAL Arbitration Rules, Art. 27; *see also* ECF

No. 1, ¶ 15. There is no power granted to the Tribunal to take as proven a fact not submitted, or to arrive at a factual finding through a mistake, oversight, or intentional concealment of a fact by a party. The Tribunal found that it had erred regarding its analysis, at least as to the documentation concerning Lot B1. *See* ECF No. 21-3, p. 3 ("[t]he documentation concerning Lot B1 discloses an error or omission of a factual nature in the Interim Award[.]"); *see also* ECF 26-2, p. 3 (advising that the award would be "corrected"). This error goes to the basis for the lack of jurisdiction over Lot B1, *see* ECF No. 1-11, ¶¶ 288-89, and it derived from the absence of the documentation in the record. When the Tribunal decided the jurisdictional issue, it found, as a fact, that no court proceedings existed as to Lot B1 within the relevant time period, relying on this "fact" to conclude that it lacked jurisdiction. That factual finding was not proven by Costa Rica. In fact, Costa Rica had essentially taken the opposite position by not disclosing the existence of the relevant court proceedings before the issuance of the Interim Award or until forced to do so by the Tribunal. When the Tribunal then identified the factual error, the Tribunal's statement showed that the Interim Award made a key factual finding relying on, in its best light, a mistake by Costa Rica in not providing the relevant documents. In a more critical light, Costa Rica intentionally failed to disclose the documents that would have shown jurisdiction existed—that is, even by the standard artificially and wrongly fabricated by the Tribunal—which militates even more strongly in favor of annulling the Interim Award. As such, the Berkowitz Claimants can demonstrate far more than a "fair ground for litigation" and have a strong likelihood of success on the merits.

II. The Berkowitz Claimants will be irreparably harmed if they are required to submit to interminable arbitration proceedings that the Tribunal has no authority to conduct.

To show "irreparable harm," the movant's injury "must be both certain and great and, in all events, beyond remuneration." *Econ. Research Servs., Inc. v. Resolution Econ., LLC*, 140 F.

Supp. 3d 47, 52 (D.D.C. 2015) (quotation omitted). Furthermore, "[t]o show irreparable harm, plaintiff must demonstrate that the harm has occurred in the past and is likely to occur again, or that the harm is certain to occur in the near future. Plaintiff must also show the alleged harm will 'directly result' from the action that plaintiff seeks to enjoin." *Safari Club Int'l v. Jewell*, 47 F. Supp. 3d 29, 32–33 (D.D.C. 2014) (quotation omitted); *see also Jones v. D.C.*, 177 F. Supp. 3d 542, 545 (D.D.C. 2016) (holding that the injury must also be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.") (quotation omitted). If the Tribunal is allowed to continue and correct the Interim Award under the basis it has identified, there is little question that the Berkowitz Claimants would suffer irreparable harm in the immediate future.

The Tribunal's authority to preside over the matters finally decided in the Interim Award expired long ago. When the Tribunal declined jurisdiction in the Interim Award, Article 38 of the UNCITRAL Arbitration Rules only allowed for correction of the Interim Award within 30 days, that is, by November 24, 2016. The Tribunal has found as much in its ruling on the Request for Suspension filed by the Berkowitz Claimants.[3] Now, the Tribunal has stated it will apply Article 38 outside the bounds of the deadline in the Rule. This action would essentially short-circuit the Berkowitz Claimants' attempt to seek judicial review of the Interim Award, even though the Tribunal has affirmed that this action is now properly before the Court.[4] The Berkowitz Claimants have not consented to the Tribunal extending its jurisdiction beyond the boundaries of the UNCITRAL Arbitration Rules, and the Tribunal cannot impose its own

[3] The Tribunal has even denied Costa Rica's request to prohibit the Berkowitz Claimants from seeking a stay of the arbitration proceedings in this Court.

[4] *See also* Tribunal's Decision Denying a Stay of the Proceedings, dated February 28, 2017, ¶33, *publicly available at* https://www.italaw.com/sites/default/files/case-documents/italaw8478.pdf

version of an amended award on the Berkowitz Claimants. The only body with any authority to review the Interim Award is this Court, and any attempt to usurp that authority without the consent of the Berkowitz Claimants is a stark example of irreparable harm.

Indeed, if the Tribunal is permitted to pursue its course of action, it is difficult to see what the limits of its authority truly are. It is currently attempting to exceed the bounds of Article 38 by approximately six months. Acquiescing to the Tribunal's jurisdiction means the Berkowitz Claimants could be stuck in interminable arbitration proceedings to which they do not consent, litigating and re-litigating issues which were finalized long ago under the applicable rules. Moreover, if the Tribunal improperly "corrects" the Interim Award now, there is no means to stop it from doing so again in another six months. As the corrected proceedings continue, the Tribunal will be able to keep making decisions outside the bounds of the parties' consent, characterizing the facts and law as it deems fit, in a never-ending attempt to reach whatever conclusion it desires.

In addition, the Berkowitz Claimants are undoubtedly faced with imminent harm. The Tribunal's letters clearly and unequivocally state that a "corrected Interim Award…will be finalized for transmission to the Parties in the coming weeks." ECF No. 26-2, p. 3. This is not a contingent or speculative matter. The Berkowitz Claimants' protests have gone unheeded by the Tribunal, and at this point it is clear that the only means available to halt the Tribunal's march is an injunction staying the arbitration proceedings. Accordingly, the Berkowitz Claimants have demonstrated an irreparable and imminent harm.

III. Costa Rica cannot articulate any genuine harm that it would suffer as a result of a stay of the arbitration proceedings.

The third prong of preliminary injunction analysis requires a weighing of potential harm to the nonmovant. *See Davis*, 571 F.3d at 1291. It is difficult to identify any material harm that

could befall Costa Rica. While Costa Rica did not object to the Tribunal making factual corrections to the Interim Award, it also submitted (as did the Berkowitz Claimants) that the proceedings were due to be terminated. *See* ECF No. 25-2. Costa Rica, like the Berkowitz claimants, has an inherent interest in seeing that the Tribunal adheres to the scope of its authority and the UNCITRAL Arbitration Rules. Costa Rica might prefer a more favorable iteration of the Interim Award, but it can hardly claim to be harmed if the Court prohibits the Tribunal from acting outside its authority. As such, Costa Rica can show no material harm to it that would result from the injunction requested by the Berkowitz Claimants.

IV. The public interest strongly disfavors the Tribunal's overreach and its usurpation of the District Court's jurisdiction.

When considering a motion for preliminary injunction, "courts of equity should [have] particular regard for the public consequences[.]" *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 82 (D.D.C. 2013), *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014) (quoting *Winter*, 555 U.S. at 24). The consequences at issue here weigh in favor of the Berkowitz Claimants.

The Berkowitz Claimants are not seeking relief unique to this case; rather, they are seeking relief of fundamental importance to the arbitration-judiciary dynamic. Put simply, the Berkowitz Claimants are requesting an injunction that fortifies the longstanding orderly relationship between the judiciary and arbitration tribunals. It cannot be disputed that an arbitral tribunal's authority begins and ends with the applicable rules of arbitration and with the consent of the parties. From there, the modification and annulment of a tribunal's awards are subject to the exclusive jurisdiction of the courts. *Hill v. Wackenhut Servs. Int'l*, 971 F. Supp. 2d 5, 12 (D.D.C. 2013) ("[O]nce an arbitrator has made and published a final award[,] his authority is exhausted and he is *functus officio* ['having performed his office'] and can do nothing more in regard to the subject matter of the arbitration." (*quoting Washington–Baltimore Newspaper*

Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1238 (D.C. Cir. 1971)); *see also United Bd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 277 (2d Cir. 2015) ("The functus officio doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended, and the arbitrators have no further authority, absent agreement by the parties, to redetermine th[ose] issue[s].").

As explained in the foregoing sections, the Tribunal is insisting on making substantive rulings that are not permitted under the applicable arbitration rules, and without both parties' consent. In short, the Tribunal is seeking to exceed its authority, infringe on the jurisdiction of this Court, and preclude the Berkowitz Claimants from exercising their constitutional right to petition the judiciary and challenge an arbitral award that became final months ago. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."); *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (finding that the right to access the courts is grounded the Article IV Privileges and Immunities clause, the First Amendment Petition Clause, the Fifth and Fourteenth Amendment Due Process Clauses, and the Fourteenth Amendment Equal Protection Clause). Surely, public policy comes squarely into play in all such cases of overreach. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Klayman v. Obama*, 957 F. Supp. 2d 1, 42 (D.D.C. 2013), vacated on other grounds, 800 F.3d 559 (D.C. Cir. 2015); (quoting *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 84 (D.D.C. 2012)). As such, the advantages of halting the Tribunal so that the Berkowitz Claimants can pursue their constitutional right to challenge

the Interim Award in the courts tips the scale in favor of granting the preliminary injunction requested herein.

CONCLUSION

For the reasons stated above, the Berkowitz Claimants have shown a substantial likelihood of success on the merits, irreparable harm, a lack of harm to Costa Rica, and a compelling public interest that would be served by a preliminary injunction. Considering these four factors together, the Berkowitz Claimants are entitled to a preliminary injunction staying the arbitration proceeding.

Accordingly, the Berkowitz Claimants respectfully request that this Court enter an order:

(a) Granting a preliminary injunction prohibiting the Tribunal from issuing an amended Interim Award, or any further awards of any kind;

(b) Staying any further proceedings in the arbitration between the Berkowitz Claimants and Costa Rica, with the exception that the Tribunal may enter an order terminating the proceedings;

(c) Notifying the issuance of the preliminary injunction to the Secretariat of the International Centre for Settlement of Investment Disputes so that it can inform the Tribunal; and

(d) Granting any other such relief that the Court deems fair or equitable under the circumstances.

STATEMENT PURSUANT TO LCvR 7(m)

Pursuant to LCvR 7(m), undersigned counsel for the Berkowitz Claimants contacted counsel for Costa Rica by telephone the day prior to filing this motion in a good-faith effort to determine whether the Motion was opposed and, if so, to narrow the areas of disagreement. At the time, Counsel for Costa Rica did not affirm whether they opposed the motion, and they have made no further response. Given time constraints, the Berkowitz Claimants proceeded with this motion, and will keep the Court apprised of opposing counsel's position.

Respectfully Submitted,

Megan C. Connor (DCB# 996991)
mconnor@pilieromazza.com
Paul W. Mengel III (DCB# 457207)
pmengel@pilieromazza.com
PILIEROMAZZA PLLC
888 17th Street, N.W., 11th Floor
Washington, D.C. 20006
Telephone: (202) 857-1000
Facsimile: (202) 857-0200

/s/ *Quinn Smith*
Quinn Smith
quinn.smith@gstllp.com
Admitted Pro Hac Vice
Diego Gosis
diego.gosis@gstllp.com
Admitted Pro Hac Vice
Katherine A. Sanoja
katherine.sanoja@gstllp.com
Admitted Pro Hac Vice
GST LLP
175 SW 7th Street, Suite 2110
Miami, Florida 33130
Telephone: (305) 856-7723
Facsimile: (786) 220-8265

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, I electronically filed the foregoing Reply in Support of Motion for Default Judgment with the Clerk of the Court of the U.S. District Court of the District of Columbia by using the CM/ECF system.

By: /s/ Katherine A. Sanoja
Katherine A. Sanoja