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## DOSCHER: THE SECOND CIRCUIT FREES ITSELF FROM ITS PRIOR LOOK THROUGH APPROACH, FUELING A CIRCUIT SPLIT

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DOSCHER: THE SECOND CIRCUIT FREES ITSELF FROM ITS PRIOR LOOK THROUGH  
APPROACH, FUELING A CIRCUIT SPLIT

By  
Peter Nelson\*

I. INTRODUCTION

In *Doscher v. Seaport*, the Second Circuit held that the existence of federal-question jurisdiction over a Federal Arbitration Act (FAA) § 10 petition to vacate turns on whether the district court would otherwise possess jurisdiction over the underlying dispute, rather than a “face-of-the-petition” inquiry.<sup>1</sup> This new adoption of the look through approach overturned *Greenberg v. Bear, Stearns*.<sup>2</sup> The Second Circuit determined that the look through approach applies equally to § 10 and § 4 of the FAA by extension of the Supreme Court’s ruling in *Vaden v. Discover Bank*<sup>3</sup> (covering motions to compel arbitration) to vacatur petitions.<sup>4</sup> The Second Circuit reasoned that the jurisdictional context of *Vaden*, arising from underlying disputes, together with the practical consequences of failing to extend the look through approach to jurisdictional inquiries, justifies extending the look through approach to vacatur petitions.<sup>5</sup> Furthermore, the congressional intent of a substantive review of arbitral awards, established in § 10, is satisfied by further application of the look through approach.<sup>6</sup> The Second Circuit’s position is controversial in light of a Third Circuit case issued eleven days after the *Doscher* decision.<sup>7</sup> In *Goldman v. Citigroup*, the Third Circuit held that an extension of the look through approach to § 10 petitions violates the federal interest in promoting the enforceability of arbitration agreements.<sup>8</sup> The two cases differ in their interpretation and extension of *Vaden*, highlighting a need for clarification over the application of the look through approach to § 10 petitions.

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<sup>1</sup> *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372 (2d Cir. 2016)

<sup>2</sup> *See Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 24 (2d Cir. 2000) (holding that courts may not “look through” petitions to determine if the underlying dispute involves substantial questions of federal law).

<sup>3</sup> *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

<sup>4</sup> *Doscher*, 832 F.3d at 388.

<sup>5</sup> *Id.* at 386.

<sup>6</sup> *Id.*

<sup>7</sup> *See Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d 242 (3d Cir. 2016).

<sup>8</sup> *Id.* at 255-56.

## II. BACKGROUND

On October 22, 2013, a Financial Industry Regulatory Authority (FINRA) arbitral panel awarded Drew Doscher nearly \$2.3 million against his former employers.<sup>9</sup> Doscher was a former co-head of sales and trading for The Seaport Group, LLC and Sea Port Securities, LLC (jointly called Seaport). He commenced arbitration against the two founders of Seaport, his counterpart co-head of sales and three other Respondents.<sup>10</sup> Seaport and Doscher are “Associated Persons” under FINRA rules and “engaged in the investment banking or securities business who [are] directly or indirectly controlled by a FINRA member” and subsequently bound to arbitration under FINRA rule 13200.<sup>11</sup> Doscher’s first statement of claim accused Respondents of retaliatory discharge, unjust enrichment and breach of contract, but was amended to include securities fraud under the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b), and Rule 10b–5 of the Securities and Exchange Commission (SEC), 17 C.F.R. § 240.10b–5.<sup>12</sup> The arbitral panel’s award was significantly less than the \$15 million Doscher sought, and on January 20, 2015, Doscher filed a 9 U.S.C. § 10<sup>13</sup> petition following the panel’s award.<sup>14</sup>

Doscher filed his § 10 petition in the United States District Court for the Southern District of New York and included two grounds for vacatur of the arbitral panel’s award.<sup>15</sup> First, under § 10(a)(3),<sup>16</sup> Doscher claimed that the arbitral panel neglected to ensure that documentary evidence was made available to him.<sup>17</sup> Second, he claimed the

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<sup>9</sup> See generally *Doscher v. Sea Port Grp. Sec., LLC*, No. 15-CV-384 JMF, 2015 WL 4643159 (S.D.N.Y. Aug. 5, 2015), *vacated*, 832 F.3d 372 (2d Cir. Aug. 11, 2016).

<sup>10</sup> See *Doscher*, 832 F.3d at 374.

<sup>11</sup> *Doscher, LLC*, No. 15-CV-384 JMF, 2015 WL 4643159, at \* 1 (citing FINRA Rule 13200, *available at* [http://fmra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4203](http://fmra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4203)).

<sup>12</sup> *Doscher*, 832 F.3d at 374.

<sup>13</sup> See 9 U.S.C. § 10(a) (2012) (“In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”).

<sup>14</sup> *Doscher*, 832 F.3d at 374-75.

<sup>15</sup> *Id.* at 375.

<sup>16</sup> See 9 U.S.C. § 10(a)(3) (2012) (stating that vacatur is appropriate “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced”).

<sup>17</sup> *Doscher*, 832 F.3d at 375.

arbitral panel violated FINRA Rule 13505 requiring the parties to cooperate in discovery.<sup>18</sup> FINRA Rule 13505 is a federal law; therefore, Doscher claimed that his petition facially stated a federal question granting federal-question jurisdiction.<sup>19</sup> Additionally, Doscher asserted that his § 10(b)<sup>20</sup> claim automatically granted federal-question jurisdiction.<sup>21</sup>

The District Court dismissed Doscher's jurisdictional arguments.<sup>22</sup> The court maintained that no question of federal law was presented by violations of internal FINRA rules.<sup>23</sup> Furthermore, the court held that the *Greenberg* decision rejected reliance on a § 10(b)<sup>24</sup> claim for jurisdiction.<sup>25</sup> Consequently, the District Court dismissed Doscher's petition for a lack of subject matter jurisdiction.<sup>26</sup> Doscher later appealed to the Second Circuit to contest both the ruling of a lack of subject matter jurisdiction and the continuing validity of *Greenberg*.<sup>27</sup>

### III. Court's Analysis

#### *A. Doscher Presented No Facial Claim Regarding Manifest Disregard of Federal Law.*

The Second Circuit dismissed Doscher's first jurisdictional argument concerning the arbitral panel's violation of federal FINRA rules.<sup>28</sup> Although federal law imposes obligations on self-regulatory organizations (SRO's) (including FINRA), the law imposes no obligations on arbitral panels when applying those rules.<sup>29</sup> Because Doscher's claim

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<sup>18</sup> *Doscher*, 832 F.3d at 375.

<sup>19</sup> *Id.*

<sup>20</sup> 9 U.S.C. § 10(b) (2012) ("If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators").

<sup>21</sup> *Doscher*, 832 F.3d at 375.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* 9 U.S.C. § 10(b) (2012) (stating that "if an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators").

<sup>25</sup> *Doscher*, 832 F.3d at 375.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 375-76.

<sup>29</sup> *Id.* at 376.

implicated the arbitral panel rather than FINRA, the asserted violation was too attenuated to trigger federal-question jurisdiction on its own.<sup>30</sup> Cementing the conclusion that Doscher’s petition failed to present a facial claim regarding manifest disregard of federal law was the *Merrill Lynch v. Manning* case.<sup>31</sup> In *Manning*, the Supreme Court held that a violation of an SRO rule grants federal question jurisdiction under 15 U.S.C. § 78(a)(a) in two instances: (1) those asserting an Exchange Act cause of action; and (2) where the Exchange Act was breached or another federal statute requirement was infringed.<sup>32</sup> Importantly, the Exchange Act “imposes no duty to comply with FINRA rules either on the arbitrators or non-SRO parties to arbitration,” disqualifying Doscher’s initial jurisdictional claim.<sup>33</sup>

*B. The Look Through Approach Applies to Both § 4 and § 10 of the FAA.*

In *Greenberg v. Bear Stearns*, the Second Circuit rejected the look through approach for § 10 petitions based exclusively on the holding of *Westmoreland v. Findlay*, which denied the look through approach to § 4 petitions.<sup>34</sup> *Westmoreland* held that the “save for” clause<sup>35</sup> in § 4 repudiated the “ouster theory,”<sup>36</sup> displaying Congress’ intention to preserve federal court jurisdiction despite the presence of an agreement to arbitrate.<sup>37</sup> Furthermore, provisions lacking the “save for” clause had previously been interpreted to exclude jurisdiction in favor of the greater federal interest of promoting arbitration.<sup>38</sup> *Greenberg* maintained that:

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<sup>30</sup> *Doscher*, 832 F.3d at 376.

<sup>31</sup> *Id.* at 377.

<sup>32</sup> *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016)).

<sup>33</sup> *Doscher*, 832 F.3d at 377.

<sup>34</sup> *See Greenberg*, 220 F.3d at 24 (holding that district courts have federal-question jurisdiction over § 10 petitions only if the petition states a substantial federal question on its face; essentially, a district court may not “look through” the petition to determine if the underlying dispute that was subject to arbitration involved substantial questions of federal law—the claim must state on its face that an arbitral panel disregarded a federal law).

<sup>35</sup> *See* 9 U.S.C. § 4 (2012) (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, *save for* such agreement, would have jurisdiction under Title 28, in a civil action . . . for an order directing that such arbitration proceed in the manner provided for in such agreement” (emphasis added)).

<sup>36</sup> *See Doscher*, 832 F.3d at 379 (mentioning that the “ouster theory” is a “common law principle that an agreement to arbitrate would oust the federal courts of jurisdiction”).

<sup>37</sup> *Id.* (citing *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 268 (2d Cir. 1996), *abrogated by* *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009)).

<sup>38</sup> *See Doscher*, 832 F.3d at 379 (quoting *Westmoreland*, 100 F.3d at 268).

As with a motion under § 4, the only federal rights that a motion under § 10 necessarily implicates are those created by the FAA itself, which rights do not give rise to federal question jurisdiction. In both contexts, there is no necessary link between the requested relief and the character of the underlying dispute.<sup>39</sup>

Crucially, *Vaden* holds that “[a] federal court may ‘look through’ a § 4 petition to determine whether it is predicated on an action that ‘arises under’ federal law.”<sup>40</sup> The *Westmoreland* case was expressly overruled by *Vaden*, holding that the “save for” clause of § 4 properly indicates a district court’s assumption of the absence of an arbitration agreement, requiring the determination of whether jurisdiction exists over the “substantive conflict between the parties.”<sup>41</sup> The central issue in *Vaden* was whether a § 4 petition to compel arbitration established federal question jurisdiction by seeking to enforce a state law arbitration obligation.<sup>42</sup> The question was whether federal question jurisdiction exists where the underlying dispute raises a federal question, but the § 4 petition does not.<sup>43</sup> Under *Vaden*, this jurisdictional determination requires a court to examine the “underlying dispute,” despite the fact that the purpose of § 4 petitions to compel arbitration is to have arbitrators resolve the merits, rather than the courts.<sup>44</sup>

*C. Greenberg is Inconsistent with the Supreme Court’s Ruling in Vaden.*

Despite lacking the “save for” language of § 4, the Second Circuit reasoned that § 10 is to be construed in favor of the look through approach because of (1) the jurisdictional context of *Vaden* and (2) the practical consequences of barring the approach to only one section.<sup>45</sup> In *Vaden*, the basis for jurisdiction was 28 U.S.C. § 1331 federal question jurisdiction, as it was in *Doscher*.<sup>46</sup> Furthermore, the federal question, required by § 1331, “arose from the underlying dispute, not the face of the petition” in *Vaden*.<sup>47</sup> Additionally, the Second Circuit argued that a federal court’s jurisdiction cannot differ

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<sup>39</sup> See *Greenberg*, 220 F.3d at 26.

<sup>40</sup> *Doscher*, 832 F.3d at 380 (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009)).

<sup>41</sup> *Vaden*, 556 U.S. at 62.

<sup>42</sup> *Id.* at 49.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 62-63.

<sup>45</sup> *Doscher*, 832 F.3d at 382-83.

<sup>46</sup> *Id.* at 383.

<sup>47</sup> *Id.*

between § 4 and other sections considering that “§ 4 of the FAA does not enlarge federal-court jurisdiction.”<sup>48</sup>

The Second Circuit identified a “tension” between the two controlling principles of *Vaden*: first, the emphasis on the text of § 4 when concluding a court has federal-question jurisdiction over the underlying dispute, and second, that the provisions of the FAA do not affect a federal court’s jurisdiction.<sup>49</sup> If the first point of emphasis leads to the conclusion that the absence of the “save for” clause in § 10 justifies the *Greenberg* ruling, then § 4 is used as an expansion of jurisdiction, which is forbidden by *Vaden*.<sup>50</sup> Therefore, the Second Circuit reasoned that *Greenberg* must be rejected in favor of allowing the jurisdictional inquiry to extend to the underlying dispute.<sup>51</sup> Furthermore, the court claimed that the “save for” clause<sup>52</sup> is construed to define the availability of the remedy instead of jurisdiction, due to Congress’ intent to broadly compel arbitration in § 4’s authorization of arbitration in “every dispute over which Title 28 confers jurisdiction.”<sup>53</sup> The Second Circuit reasoned that the FAA’s other sections establish their authorizing language according to geography and not the jurisdiction of the issuing court.<sup>54</sup>

The Second Circuit cited Congress’ intent to “create a body of federal substantive law of arbitrability, *applicable to any arbitration agreement within the coverage of the Act*” when construing *Vaden*’s support of the look through approach in § 4 to § 10.<sup>55</sup> Additionally, the FAA constrains the role of courts where arbitration agreements exist; however, the Second Circuit maintains that courts still have an ability to enforce legislative remedies for arbitral disputes in which they would otherwise have jurisdiction.<sup>56</sup>

Finally, the Second Circuit held that a broader application of the look through approach “prevents absurd and illogical discrepancies.”<sup>57</sup> The “face-of-the-petition”

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<sup>48</sup> *Doscher*, 832 F.3d at 383 (quoting *Vaden*, 556 U.S. at 66).

<sup>49</sup> *Id.* at 384.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See* 9 U.S.C. § 4 (2012).

<sup>53</sup> *Doscher*, 832 F.3d at 384.

<sup>54</sup> *Id.* at 384-85 (asserting that the FAA section compelling attendance of witnesses (9 U.S.C. § 7) uses a “geographical hook” by limiting its authorization to district courts for the district in which arbitrators sit and where an award was granted).

<sup>55</sup> *Id.* at 385 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (emphasis added).

<sup>56</sup> *Doscher*, 832 F.3d at 386 (citing *Moses H. Cone*, 460 U.S. at 25 n.32).

<sup>57</sup> *Id.*

approach identified in *Vaden* resulted in the failure to accommodate § 4 petitioners with the ability to remove a suit to federal court.<sup>58</sup> Importantly, enforcement was not the only goal of Congress in passing the FAA according to the court.<sup>59</sup> The Second Circuit maintained that Congress intended a “substantive-albeit limited-review” of arbitration awards by enacting rules for vacatur and modification.<sup>60</sup> The court cautioned that under a face-of-the-petition approach, lawyers are encouraged to preserve access to federal courts for potential disputes arising in arbitration by filing parallel federal suits.<sup>61</sup> This perverse incentive flies in the face of Congress’ intent to promote arbitration as an efficient alternative to litigation in the context of § 4 petitions, but extends to § 10 petitions according to the Second Circuit.<sup>62</sup>

*Doscher* holds that courts faced with § 10 petitions may “look through the petition to the underlying dispute, applying to it the ordinary rules of federal-question jurisdiction and the principles laid out by the majority in *Vaden*,” by adopting the following rules: first, where a district court has jurisdiction over the underlying dispute under § 1331 standards, federal-question jurisdiction exists for an FAA petition; second, the § 4 “save for” clause displays congressional authorization for compulsory arbitration in any district court possessing jurisdiction; and third, the FAA’s other sections do not affect the jurisdictional inquiry.<sup>63</sup>

#### IV. SIGNIFICANCE

The Second Circuit’s holding in *Doscher* effectively expands the appealability of arbitration decisions whose petitions may not facially implicate federal rules.<sup>64</sup> While adopting the look through approach for § 4 motions to compel arbitration ensures the enforceability of arbitral agreements,<sup>65</sup> allowing the same approach to § 10 vacatur petitions has the opposite effect. The adoption of the look through approach removes a barrier to federal question jurisdiction in § 10 proceedings, making it easier for federal courts to assess the legitimacy and procedure of arbitral awards. Section 2 of the FAA

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<sup>58</sup> *Doscher*, 832 F.3d at 386.

<sup>59</sup> *Id.* at 387 (asserting that if enforcement were Congress’ only goal, it would only have passed § 2 and § 3).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Doscher*, 832 F.3d at 388.

<sup>64</sup> *Id.* at 388-89.

<sup>65</sup> *See generally Vaden*, 556 U.S. at 65.

references the validity, irrevocability, and enforcement of arbitral agreements.<sup>66</sup> *Vaden*'s effective expansion of jurisdiction for § 4 motions to compel enhances the validity, irrevocability, and enforcement of agreements to arbitrate by increasing the probability that a federal court hears motions to compel arbitration.<sup>67</sup> However, the "irrevocability" of arbitration agreements established by § 2 comes into question where courts' jurisdiction to rule on vacatur petitions is expanded. Additionally, the limited statutory grounds for vacatur in § 10 indicate by their limited number a congressional policy favoring enforcement of arbitral awards,<sup>68</sup> which may be frustrated by an expansion of federal question jurisdiction with the new application of the look through approach.

Nevertheless, the drafters of the FAA provided a remedy to the dangers of both fraud and prejudiced proceedings in arbitral proceedings through § 10. Extending the look through approach to § 10 petitions strengthens the § 10 remedy in allowing a deeper consideration of the merits of a dispute. Courts have consistently lost jurisdiction over threshold inquiries of arbitration to the arbitrators themselves.<sup>69</sup> The *Doscher* decision seems to be a response to that trend by tightening the Second Circuit's grasp over the appealability of arbitral decisions. Today, federal courts in the Second Circuit may penetrate deep into the record to salvage federal question jurisdiction. Practitioners in the Second Circuit must understand that arbitral awards are now susceptible to an expanded review and potential interference from courts. It is unlikely that parties may contract out of the look through approach in their arbitral clauses, considering that the Supreme Court has held that private parties may not contractually impose their own standards on courts reviewing arbitration awards.<sup>70</sup> However, this prohibition exists only in reference to the text of the FAA, which makes no specific mention of the look-through approach.<sup>71</sup>

## V. CRITIQUE

The Third Circuit recently tried a case significantly similar to *Doscher*, but with an irreconcilable holding.<sup>72</sup> In *Goldman v. Citigroup*, a FINRA arbitration proceeding

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<sup>66</sup> See 9 U.S.C. § 2 (2012) ("[A]n 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").

<sup>67</sup> See generally *Vaden*, 556 U.S. at 65.

<sup>68</sup> See THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 90 (7th ed. 2015).

<sup>69</sup> See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (U.S. 1995) (holding that jurisdictional claims may be sent to the arbitrator by contract); see also *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (U.S. 2013) (holding that questions of class arbitrability are decided by the arbitrator).

<sup>70</sup> See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (U.S. 2008) (holding that §9-11 of the FAA are exclusive and cannot be expanded through contractual agreement).

<sup>71</sup> *Id.*

<sup>72</sup> See *Goldman*, 834 F.3d at 242.

alleged securities fraud against Citigroup under the Securities Exchange Act.<sup>73</sup> The arbitral panel dismissed the Plaintiffs' claims after an initial mediation failed.<sup>74</sup> Plaintiffs filed a § 10 motion to vacate the arbitration award and asserted that the arbitral panel exhibited partiality in favor of defendants.<sup>75</sup> The district court granted dismissal for lack of jurisdiction, which became the issue on appeal.<sup>76</sup>

Citing *Moses H. Cone*, the Third Circuit affirmed the lower court's ruling that the FAA provides no federal cause of action establishing federal question jurisdiction, but instead requires an "independent basis" for federal jurisdiction.<sup>77</sup> The Third Circuit previously held in the *Coastal General* case that to succeed in a § 10 motion to vacate, "[n]ot only must federal jurisdiction exist aside from the Arbitration Act, but the independent basis must appear on the face of the complaint."<sup>78</sup> To overcome *Coastal General's* rejection of the look through approach for § 10 vacatur motions, the plaintiffs pointed to *Vaden* as an intervening change in the law.<sup>79</sup> The Third Circuit admitted that there "may be some superficial appeal to treating a § 10 motion to vacate an arbitration award in the same manner as a § 4 motion," but maintained that "a close reading of *Vaden*" and the FAA forecloses the argument."<sup>80</sup>

According to the Third Circuit, *Vaden* clearly upheld the well-pleaded complaint rule of 28 U.S.C. § 1331 in application to the FAA as a whole.<sup>81</sup> Importantly, the court noted that *Vaden's* relaxation of the well-pleaded complaint rule for § 4 petitions was based on the unique text of § 4's "save for" clause.<sup>82</sup> Section 10 lacks the "save for"

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<sup>73</sup> *Goldman*, 834 F.3d at 242.

<sup>74</sup> *Id.* (noting that allegations of spying during the confidential mediation were made against Citigroup by the Goldmans).

<sup>75</sup> *Id.* (noting that the Goldmans claimed that the "FINRA arbitration panel behaved improperly in that it demanded 'voluminous' and irrelevant discovery from them, did not permit sufficient discovery of CGMI's documents, exhibited partiality towards CGMI, and 'refused to resign' at the Goldmans' request").

<sup>76</sup> *Id.* (noting that the district court ruled that the FAA does not create federal subject matter jurisdiction on its own, and that federal question jurisdiction, independent of the FAA, would be required with an absence of diverse parties in this case).

<sup>77</sup> *Id.* at 250 (citing *Moses H. Cone*, 460 U.S. at 25 n.32).

<sup>78</sup> *Goldman*, 834 F.3d at 252 (citing *Virgin Islands Hous. Auth. v. Coastal Gen. Const. Servs. Corp.*, 27 F.3d 911 (3d Cir. 1994)).

<sup>79</sup> *Id.* (referencing the Plaintiffs' argument that *Vaden's* validation of the look through approach should be applied to § 10 vacatur motions).

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 252-53 (noting that under the well-pleaded complaint rule, "a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law]'").

<sup>82</sup> *Id.* at 253 (quoting *Vaden*, 556 U.S. at 62) ("[t]he text of § 4 drives our conclusion that a federal court should determine its jurisdiction by 'looking through' a § 4 petition to the parties' underlying substantive controversy").

clause of § 4, excluding *Vaden's* textual consideration from application to § 10.<sup>83</sup> Furthermore, *Vaden's* identification of “practical consequences” (the incentive to file a parallel suit prior to arbitration to preserve federal jurisdiction) does not apply to § 10 because the section makes “no reference to the subject matter of the dispute” in its vacatur provision.<sup>84</sup> In essence, § 10 makes no demand for a court to consider whether it has jurisdiction over the “subject matter of a suit arising out of the controversy between the parties” as referenced in § 4, according to the Third Circuit.<sup>85</sup>

The Third Circuit’s position is buttressed by the Seventh Circuit’s ruling, prior to *Vaden*, that “there was ‘no reason to artificially import the language’ of § 4 into § 10.”<sup>86</sup> The Seventh Circuit determined that Congress intended to treat motions to compel and motions to vacate differently because “[t]he central federal interest was enforcement of agreements to arbitrate, not review of arbitration decisions.”<sup>87</sup> This interest rationalizes granting jurisdiction to courts otherwise having jurisdiction only in the enforcement of arbitral clauses. However, once the arbitral agreement is enforced, “there exists no compelling need for the federal courts to be involved, unless a federal question is actually at issue.”<sup>88</sup>

Examining *Vaden's* “practical consequences” argument for a second time, the Third Circuit praises the Seventh Circuit’s policy rationale for “mesh[ing] exactly” with *Vaden*.<sup>89</sup> Extending the look through approach to § 4 efficiently compels arbitration and dis-incentivizes filing preliminary federal suits; but this approach is inapplicable to § 10 petitions challenging the “procedural propriety of the arbitration,” wholly unrelated to the underlying subject matter of the issue.<sup>90</sup> *Goldman* forbids the look through approach for § 10 motions to vacate, instead opting for the traditional well-pleaded complaint rule for the establishment of federal question jurisdiction.<sup>91</sup>

*Goldman* potentially criticizes the Second Circuit’s decision in *Doscher*. Critical to both opinions is the “save for” clause of § 4. The Second Circuit’s argument for

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<sup>83</sup> *Goldman*, 834 F.3d at 253.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 254 (citing *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999)).

<sup>87</sup> *Id.* (citing *Minor v. Prudential Sec., Inc.*, 94 F.3d 1103, 1107 (7th Cir. 1996)).

<sup>88</sup> *Goldman*, 834 F.3d at 254 (citing *Minor*, 94 F.3d at 1107).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 255 (holding that “the motion to vacate must, on its face, “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities”).

extension of the look through approach, despite the absence of the “save for” clause in § 10, seems to disqualify the Third Circuit’s assertion that the absence of the clause forbids the extension of the look through approach. Because the FAA cannot expand jurisdiction according to *Vaden*,<sup>92</sup> the Second Circuit correctly assumes that the presence of the “save for” clause in § 4 is not controlling in the prescription of the look through approach.

The Third Circuit’s reading of § 10 establishes that the underlying subject matter of the dispute is not mentioned in the statutory grounds for vacatur.<sup>93</sup> This creates a presumption of congressional intent to keep courts from assessing the subject matter of a dispute when making jurisdictional inquiries. However, the Second Circuit’s emphasis that Congress’ intent with the FAA was to create federal law “applicable to any arbitration agreement within the coverage of the Act”<sup>94</sup> competes with the Third Circuit’s position if it is presumed that the look through approach should itself apply broadly. The Third Circuit’s position is at its strongest when referencing congressional intent to enforce arbitration agreements, rather than their review. Despite this point, it is unclear from the express language of § 10 how far a court may look into a dispute for the purpose of determining whether federal question jurisdiction exists.

Notably, in *Hall Street v. Mattel*, the Supreme Court declared that a limited review of arbitration decisions is necessary to preserve the expediency and efficiency of arbitration, distinct from its previous assertions that Congress’ intent was the enforcement of arbitration agreements under the FAA.<sup>95</sup> Neither purpose is served by the Second Circuit’s insistence on penetrating deeper into records to salvage federal question jurisdiction. Proceedings are lengthened where appeal provisions are relaxed, and the expediency of arbitration proceedings vanishes with the threat of additional litigation. Moreover, the enforceability of arbitral agreements comes into question where a lax vacatur policy looms over arbitration awards. However, the look through approach attempts to address the perverse incentive of filing parallel court proceedings with arbitration to preserve federal question jurisdiction.<sup>96</sup> Unfortunately, the look through approach merely substitutes excess litigation after an award has been rendered in hopes of avoiding parallel litigation at the outset of arbitration. The look through approach thus fails to avoid the surplus litigation contemplated by the Second Circuit.

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<sup>92</sup> *Doscher*, 832 F.3d at 384.

<sup>93</sup> See 9 U.S.C. § 10(a) (2012).

<sup>94</sup> *Doscher*, 832 F.3d at 385.

<sup>95</sup> See generally *Hall St. Assocs*, 552 U.S. 576 (U.S. 2008); but see *Moses H. Cone*, 460 U.S. at 29 (holding that “[t]he Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses”).

<sup>96</sup> *Doscher*, 832 F.3d at 387.

## VI. CONCLUSION

The Supreme Court's *Vaden* decision left unresolved questions regarding the scope of the look through approach beyond § 4 petitions to compel arbitration. *Doscher* results in a deeper focus on the underlying dispute for the determination of federal question jurisdiction in § 10 vacatur petitions by rejecting a face-of-the-petition inquiry for federal question jurisdiction. The Second Circuit now extends the look through approach to § 10 petitions for vacatur in what has become a controversial interpretation of *Vaden*. The *Doscher* decision is irreconcilable with the Third Circuit's position in the recent *Goldman* case. These differing holdings display a glaring need for clarification in the wake of *Vaden*.