UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THERESA HURSH, ET AL,
PLAINTIFFS-APPELLEES

V.

DST SYSTEMS, INC.,
DEFENDANTS-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI (CIV NOS. 4:21-CV-09017, ET AL.)
(THE HONORABLE NANETTE K. LAUGHREY, J.)

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE

Consistent with the Congressional policy favoring arbitration, the FAA requires that on application for an order confirming an arbitration award, the court "must grant" the order "unless the award is vacated" as prescribed in § 10.

In this case, DST does not allege *any* of the grounds prescribed in § 10. Instead, DST asserts that because a court in New York certified a mandatory class, the FAA's *enforcement* mechanism was sealed off. DST is wrong. Rule 23(b)(1) only applies to new or parallel actions on the issues of liability and damages and precludes only those actions sharing typical claims. Just last month, the Supreme Court made clear that although confirmation grows out of the parties' underlying dispute, an application to confirm presents *different claims*, turning on *different law. Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022). Indeed, confirmation merely makes *what is already a final award* the judgment of the court. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). It is precisely for this reason that review of an award is limited to the *non-merits* exceptions set forth in the Act.

Accordingly, since DST does not allege *any* of the grounds prescribed in § 10, and since the district court did not otherwise abuse its discretion, the judgments below should be affirmed.

Given the straightforward application of the FAA, the Appellees believe oral argument is unwarranted.

RULE 26.1 DISCLOSURE STATEMENT

All of the Plaintiffs-Appellees are natural persons.

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INTRODUCTION

These appeals are the latest effort by DST Systems, Inc. ("DST"), to undo hundreds of arbitrations that *it demanded* and *compelled*. Having first sought and obtained an order *enforcing* its arbitration and class action waiver agreements, DST is now attempting to invalidate the arbitrations, to nullify the judgments of the court below, and to destroy the rights—and hard-earned *awards*—of employees and retirees whom it *induced* to arbitrate. App. 150; 4:12-cv-09017, R. Doc. 1-6.

Make no mistake, DST sought and obtained an order from the court below declaring that the Arbitration Agreement was "valid" and that "claims for breach of fiduciary duty fall within the Arbitration Agreement's scope." Then, in the four years since, hundreds of arbitrations have progressed, with DST's full, voluntary participation, through written discovery, depositions, motion practice, and merits hearings. Now, after having lost in a vast majority of those arbitrations, DST wants a "do over." This, of course, is not permitted. If a party dissatisfied with an award were left free to pursue another judicial proceedings on the same claim, "arbitration would be substantially worthless." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 832 (10th Cir. 2005).

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), the Supreme Court held that when parties agree to resolve their disputes by individualized arbitration, those agreements are

fully enforceable under the Federal Arbitration Act ("FAA"). Courts are not free to disregard or "reshape traditional individualized arbitration" by applying rules that demand collective or representational adjudication of certain claims. *Epic*, 138 S.Ct. at 1623.

Consistent with the Congressional policy favoring arbitration, the FAA requires that "[o]n application for an order confirming [an] arbitration award, the court 'must grant' the order 'unless the award is vacated' as prescribed in § 10 of the Act." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008). As the Supreme Court stated, "[t]here is nothing malleable about 'must grant.'" *Id.* at 587. The FAA unequivocally requires that courts grant confirmation of arbitral awards "in all cases, except when one of the 'prescribed' exceptions applies." *Id.*

In this case, DST does not allege *any* of the exceptions prescribed in § 10 of the Act. In fact, rather than engage with the FAA, DST devotes the entirety of its brief to playing fast and loose with the facts while avoiding binding and controlling authority that dooms its position.

In light of the clarity with which the FAA requires courts to enforce the terms of the parties' agreements, the clarity with which the FAA requires that courts confirm arbitration awards, and the clarity with which binding precedent establishes that these principles apply here, this is an open-and-shut case.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 since the Appellees' applications to confirm and DST's motions to vacate implicated significant federal issues. *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) ("federal-question jurisdiction will lie over state-law claims that implicate significant federal issues."); *Badgerow v. Walters*, 142 S. Ct. 1310, 1316 (2022) (holding that federal courts have jurisdiction if "federal law (beyond Section 9 or 10 itself) entitles the applicant to relief").

In the proceedings below, DST asserted that the "arbitration award[s] run[] afoul of basic ERISA law and cannot be confirmed." App. 214; 4:21-cv-09017, R. Doc. 16, at 18. DST argued that the "arbitration awards should be vacated" because "the claims asserted by [the Appellees] are not arbitrable." App. 215; 4:21-cv-09017, R. Doc. 16, at 19; App. 908; 4:21-cv-09017, R. Doc. 19, at 6. DST further insisted that by "issuing decisions with respect to [the Appellees'] claims," the "arbitrators exceed[ed] their powers" since the claims are not arbitrable. App. 215; 4:21-cv-09017, R. Doc. 16, at 19.

The district court resolved the federal question by deciding that the claims asserted by the Appellees *are arbitrable*. App. 914-15; 4:21-cv-09017, R. Doc. 19, at 12-13. The court further declared, anticipating this appeal, that "[t]he resolution of these issues may carry significant ramifications for the arbitrability of ERISA

Plan claims and therefore it is in the interest of all parties, and the judicial system at large, that the issues be fully aired." App. 1073; 4:21-cv-09133, R. Doc. 13, at 12.

The district court also had jurisdiction under 28 U.S.C. § 1332(a)(2) over certain of the Appellees' applications since the matter in controversy exceeds the sum or value of $75,000 and is between citizens of different States.

The Appellees incorporate by reference the filing dates establishing timelines set forth in the "Statement of Jurisdiction" at page 6 of the Brief of Appellant DST Systems, Inc.

This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE CASE

I. The Arbitration Agreement

In 2008, DST implemented an "Arbitration Program and Agreement" (the "Agreement") requiring that disputes covered by the Agreement be resolved in arbitration. App. 0014; 4:21-cv-09017, R. Doc. 1-2, at 4. The Agreement broadly covers "all legal claims arising out of or relating to employment, application for employment, or termination of employment[.]" *Id.* The Agreement also prohibits any form of class or representative action and provides that "[a]ll claims must be asserted, heard and resolved on a single Associate basis" and that no Associate may "assert claims on behalf of multiple Associates or as a class or collective action." *Id.*

In addition, the Agreement states that its provisions are severable. App. 0016; 4:21-cv-09017, R. Doc. 1-2, at 6. "That means that if any provisions are found invalid or unenforceable by a court, it shall not affect the application and enforcement of the rest of this *Arbitration Program and Agreement.*" *Id*.

Finally, the Agreement requires that the "arbitration hearing be held in the county of the Associate's principal place of employment" and that "the substantive law applied to the claims shall be the state or federal substantive law that would be applied by a federal district court judge sitting in the county of the place of the Associate's employment[.]" App. 0012; 4:21-cv-09017, R. Doc. 1-2, at 2.

II. The DST Profit Sharing Plan

During the relevant period, DST sponsored, administered, and was the "designated fiduciary" of the DST 401(k) Profit Sharing Plan (the "Plan"). On February 26, 2016, DST amended the "Plan" to "make clear that the Arbitration Policy applies to all claims arising out of or relating to the Plan other than those claims for benefits due under the terms of the Plan[.]" App. 138; 4:21-cv-09017, R. Doc. 1-4, at 116. Section 9.11 of the Plan now states as follows:

> **9.11. MANDATORY ARBITRATION AND CLASS ACTION WAIVER**
>
> Unless prohibited by ERISA, any and all claims arising out of or related to the Plan…are subject to mandatory arbitration and class action waiver as provided under (i) the DST Arbitration Program Agreement, effective July 1, 2016, as amended, (ii) any predecessor arbitration and class action waiver policy, including that in effect as part of the DST Systems, Inc. Associate Handbook or any addendum or amendment thereto, or (iii) any successor arbitration and class action waiver policy (collectively, the "Arbitration Policy") to the extent applicable to Company Employees, the terms of which are incorporated herein by reference.

App. 107; 4:21-cv-09017, R. Doc. 1-4, at 85.[1]

[1] The Arbitration Agreement and Section 9.11 of the Plan are referred to herein collectively as the "Arbitration Program."

III. Relevant Procedural History

A. The *DuCharme* Litigation – DST Successfully Enforced the Arbitration Program and Class Action Waiver

On March 14, 2016, Clive Cooper, a participant in the Plan, filed a class action complaint against DST and Ruane, Cunniff & Goldfarb, Inc. ("Ruane") in the Southern District of New York. *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 178 (2d Cir. 2021). DST advised Cooper of its binding Arbitration Program. *Id*. Thereafter, on June 17, 2016, Cooper voluntarily dismissed his claims against DST and its affiliates, leaving Ruane as the sole defendant. *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 1:16-cv-01900, ECF No. 41 (S.D.N.Y.).

Five months later, after DST had been voluntarily dismissed from *Cooper*, James DuCharme (an Appellee) filed a class action complaint against DST in the Western District of Missouri. *DuCharme v. DST Systems, Inc.*, 4:17-cv-00022, ECF No. 1 (W.D.Mo.). Rather than answer the complaint, DST moved "to compel Mr. Ducharme to arbitrate his ERISA claims with DST on an individual basis in accordance with the terms of the Arbitration Program and Agreement." App. 547; 4:12-cv-09017, R. Doc. 18-1. DST argued that individual arbitration was required "because (1) Mr. Ducharme entered into a valid agreement to arbitrate with DST and (2) his breach of fiduciary duty claims under ERISA fall within the scope of that agreement." App. 558; 4:12-cv-09017, R. Doc. 18-2, at 6.

DST also argued that the Plan, itself, "incorporates the terms of DST's Arbitration Agreement into the Plan, and thereby explicitly binds the Plan to the terms of that Agreement." App. 581; 4:12-cv-09017, R. Doc. 18-4, at 1. DST insisted that "[t]he Plan ... expressly provides for arbitration" and that "the Plan makes clear that the scope of the Arbitration Agreement covers claims arising out of or related to the Plan—such as the claims Mr. DuCharme seeks to assert." App. 569; 4:12-cv-09017, R. Doc. 18-3, at 1. Breach of fiduciary duty claims "are explicitly covered by the language of the Plan," DST exclaimed, and "subject to mandatory arbitration and class action waiver as provided under DST's Arbitration Policy." App. 689; 4:12-cv-09017, R. Doc. 1-5, at 6 (quotation marks omitted).

In response, Mr. DuCharme argued that because he was "not suing on his own behalf, the arbitration agreement between him (individually) and DST is irrelevant." *DuCharme*, ECF No. 33 at 2. Relying on this Court's decision in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), Mr. DuCharme also insisted that, even if the Arbitration Program otherwise applied, it was invalid as to claims under ERISA since such claims "must be brought in a representative capacity on behalf of the Plan as a whole." *Id.* at 2-3, 4-5.

In reply, DST asserted that "Mr. Ducharme's argument that he can avoid arbitration because he is bringing suit in a representative capacity is mistaken." App. 25; 4:21-cv-09017, Doc. 1-4, at 3. DST argued that because *the Plan* was amended

to include the Arbitration Program, breach of fiduciary duty claims are *explicitly covered* by the mandatory arbitration provisions. *Id.* at 6.

> Contrary to Mr. Ducharme's assertions, neither the Amendment nor the Arbitration Agreement eliminates any of the Plan's substantive rights under ERISA or forecloses the Plan's ability to 'vindicate [its] statutory cause of action in the arbitral forum.' *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). For example, ***neither the Arbitration Agreement nor the Amendment prohibits Mr. Ducharme or any other party to the Arbitration Agreement from arbitrating a breach of fiduciary duty claim in connection with purported losses to their individual accounts***.

App. 146; 4:21-cv-09017, Doc. 1-5, at 3 (emphasis added).

On June 23, 2017, the court below agreed with DST and ordered that the Arbitration Program is "valid" and that "claims for breach of fiduciary duty fall within the Arbitration Agreement's scope." *Ducharme*, 2017 WL 7795123, at *1.

Thereafter, on June 18, 2018, DST sent a notice to each Plan participant advising them of the allegations in *DuCharme* and instructing that they could "initiate an individual arbitration proceeding under the Arbitration Program by submitting a written request to the DST Systems, Inc." App. 150; 4:21-cv-09017, R. Doc. 1-6.

B. The Kansas City Arbitration Proceedings

In the months that followed the order in *DuCharme* and the notice by DST, hundreds of Plan participants (or their beneficiaries) commenced individual arbitration proceedings against DST. Each arbitration was initiated by the filing of a

"Joint Submission for Arbitration," signed on behalf of the individual Claimant and DST, with the American Arbitration Association ("AAA"). *See e.g.,* App. 153-186; 4:21-cv-09017, R. Doc. 1-8. "To date, the claims of at least 342 claimants have been tried; at least 214 claimants have received awards in their favor; and approximately 60 other claimants are awaiting awards." App. 909; 4:21-cv-09017, R. Doc. 19, at 7. "All of the arbitration hearings at issue, albeit virtual, were conducted in Missouri." *Id.*

In April and June 2021, the Western District confirmed the first six arbitration awards.[2] "In at least one of those cases, DST expressly stated … that it did not oppose the confirmation of the Arbitration Award." App. 910; 4:21-cv-09017, R. Doc. 19, at 8 (internal quotation and alteration omitted). DST then agreed to pay final arbitration awards, waiving any further confirmations.

However, on August 20, 2021, DST ceased its participation in the arbitrations and refused to pay any additional awards. App. 312-13; 4:21-cv-09017, R. Doc. 16-5, at 2-3 ¶ 4. Accordingly, to access the FAA's streamlined mechanism for enforcing an award, the Appellees filed their applications for confirmation pursuant to 9 U.S.C.

[2] App. 643-44, 4:21-cv-09017, R. Doc. 18-10; App. 645-46, 4:21-cv-09017, R. Doc. 18-11; App. 647-48, 4:21-cv-09017, R. Doc. 18-12; App. 649-50, 4:21-cv-09017, R. Doc. 18-13; App. 651-52, 4:21-cv-09017, R. Doc. 18-14; App. 653-54, 4:21-cv-09017, R. Doc. 18-15.

§ 9. The Western District has now confirmed an additional 177 final arbitration awards. Those 177 awards are the subject of this consolidated appeal.

C. The *Ferguson* Case (2017-2021): The SDNY *Denies* All Efforts to Stay the Kansas City Arbitration Proceedings

On September 1, 2017, more than two months after the order in *DuCharme*, three individuals (the "*Ferguson* plaintiffs") filed a complaint in the Southern District of New York. *Ferguson v. Ruane Cuniff & Goldfarb Inc.*, No. 17-cv-06685, ECF No. 1 (S.D.N.Y. Sept. 1, 2017). However, unlike the complaints in *Cooper* and *DuCharme*, the *Ferguson* plaintiffs did *not* allege a class action. *Id.* Moreover, the *Ferguson* plaintiffs each purport not to have been employed at DST after the adoption of the Arbitration Agreement.

More than two years later, on April 10, 2020, the *Ferguson* plaintiffs filed simultaneous motions to (1) amend their complaint to add class allegations, and (2) to certify a mandatory class. *Ferguson*, ECF Nos. 124, 126. Then, on July 10, 2020, on the eve of the first arbitration hearings, and while the motions were still pending, DST announced that it had "entered into a settlement agreement in principle" with the *Ferguson* plaintiffs that was "contingent on certification of a mandatory non-opt-out class." *Ferguson*, ECF No. 161, at 1. DST then requested that the Southern District "enter an order staying the Kansas City arbitration proceedings." *Id.* at 8.

Later that same day, the Southern District *denied* DST's request for a temporary restraining order, *Ferguson*, ECF No. 164, and later, in a "Minute Entry"

entered on July 15, 2020, it *denied* DST's request for a preliminary injunction. And so, the arbitrations continued unabated with DST's full participation.

Six months later, while the motions to amend and to certify a mandatory class were still pending, the *Ferguson* plaintiffs filed a motion for the approval of a proposed settlement with DST. *Ferguson*, ECF No. 266. Almost immediately, the U.S. Secretary of Labor (the "Secretary"), "strongly object[ed]" to the settlement. As particularly relevant here, the Secretary insisted that "all participants have the right to pursue private actions whether through federal litigation *or arbitration*." *Ferguson*, ECF No. 269 (emphasis added). Additionally, the Secretary asserted that the "major losses to the Plan [] far exceed the proposed settlement amounts." *Id.*

On March 8, 2021, after the Second Circuit issued a split decision in the *Cooper* case, the Southern District *denied* the *Ferguson* plaintiffs' motion for leave to amend and their motion for class certification without prejudice to allow the parties to address what effect the *Cooper* decision had on the motions. *Ferguson*, ECF No. 296.[3] The *Ferguson* plaintiffs renewed their motions for leave to amend

[3] In *Cooper*, the Panel Majority held that since "Cooper's claims hinge entirely on the investment decisions made by Ruane," his claims against Ruane do not "relate to" his employment. *Cooper*, 990 F.3d at 183-84. The Panel Majority reasoned that, in the context of "generic employment related language," and "in the absence of any such terms" requiring arbitration of claims relating to a Plan, it would not construe an agreement as requiring arbitration of claims against a third-party investment advisor. *Id.* at 176.

and for class certification on April 5, 2021, and the Arbitration Claimants filed their opposition on May 3, 2021. *Ferguson*, ECF Nos. 300; 304.

The Arbitration Claimants argued that *Cooper* was inapposite since, in *Cooper*, the Second Circuit was unaware that DST had duly amended the Plan to "make clear that [the] Arbitration Policy applies to all claims arising out of or relating to the Plan." *Ferguson*, ECF No. 304 at 3.[4] Additionally, the Arbitration Claimants asserted that, unlike in *Cooper*, "there is no disputing that the parties in arbitration have agreed to arbitrate." *Id.* at 10. "By jointly submitting their disputes to AAA arbitration, the parties have created an independent, post-dispute arbitration agreement, enforceable under the FAA." *Id.*

D. The *Ferguson* Case (August 2021): The SDNY Certifies a Mandatory Class, but Again *Denies* a Request that it Stay the Kansas City Arbitration Proceedings

On August 17, 2021, the Southern District granted the *Ferguson* plaintiffs' motions to amend and for class certification but denied approval of the proposed settlement. *Ferguson*, 2021 WL 3667979. The Southern District stated it was "not in the position to question what was before the Second Circuit" in *Cooper* and reasoned that since Cooper was not "require[d]" to arbitrate with Ruane, others could not *voluntarily* arbitrate with DST. *Id.* at *2.

[4] The Court in *Cooper* apparently was also unaware of the decision in *DuCharme* and of the more than 580 arbitrations that were initiated in reliance thereon.

The court did not address *Concepcion* or *Epic*, or the substantive rights afforded by the FAA as determined in the final, *prior* order in *DuCharme*.[5] And while the court acknowledged the Kansas City arbitrations, it did not address those who had *already won* in arbitration, nor did it address the limits of its jurisdiction over actions pending *or completed* outside the Southern District.

Moreover, the court's entire analysis of the requirements of Rule 23(b)(1) for certifying a mandatory class consists of just two conclusory paragraphs that failed to address any of the objectors' detailed arguments. *Compare Ferguson*, 2021 WL 3667979, at *7 *with Ferguson* ECF No. 308, at 9-21.

On August 23, 2021, DST moved for a temporary restraining order and preliminary injunction "enjoining the Arbitration Claimants … from instituting new actions or litigating in arbitration or other proceedings matters arising out of or relating to the facts or transactions alleged in the Ferguson amended complaint." *Ferguson*, ECF No. 313, at 16. DST argued that by filing their applications for an order confirming their awards, the Appellees had "defied" the SDNY. *Id.* at 3.

On August 31, 2021, the Southern District *denied* DST's request for a temporary restraining order. It ordered the parties to brief DST's request for a

[5] There is no meaningful distinction between the class action in *Concepcion*, the collective action in *Epic*, and the "representative" *Ferguson* case. Each involves a plaintiff who insists that the right to assert a representative claim on behalf of others trumps an agreement to arbitrate. Each is preempted by the FAA.

preliminary injunction. *Ferguson*, ECF No. 318. In particular, the court requested that the parties address the doctrine of judicial estoppel. *Id.*

E. The *Ferguson* Case (November 2021): The Court Enjoins New and Pending Actions Against DST that Arise Out of or Relate to the Facts or Transactions Alleged in the *Ferguson* Amended Complaint

On November 18, 2021, the Southern District entered an Order enjoining the Arbitration Claimants from "instituting new actions or litigating in arbitration or other proceedings against the DST Defendants matters arising out of or relating to the facts or transactions alleged in the Ferguson amended complaint." App. 900; 4:21-cv-09017, R. Doc. 10-1, at 2.

In the hearing preceding the court's order, at which the parties were not permitted to argue their respective positions, the court stated that the doctrine of judicial estoppel "is ultimately not relevant here." App. 891; 4:21-cv-09017, R. Doc. 11-2, at 10. The court reasoned that although DST "did previously support the position that the Plan's claim should be adjudicated in arbitrations," its position in support of the injunction was "necessarily different" since the Southern District had since decided that the claims were "not arbitrable." *Id.* at 8-10.

As for Western District of Missouri's earlier ruling that DST is barred by the doctrine of judicial estoppel from seeking to avoid the arbitrations in Missouri, the court stated: "I also acknowledge the decisions of the Western District of Missouri confirming arbitration awards for claims at issue here, and I certainly do not mean

to disrespect that court's authority and jurisdiction. However, our circuit has spoken clearly on this matter, compelling me to issue this ruling." *Id.* at 10 (referencing *Cooper*).

At the hearing's conclusion, counsel for the Appellees asked whether the court's injunction applies to those matters pending in the Eighth Circuit Court of Appeals. *Id.* at 14. The court responded: "Obviously, if the Eighth Circuit orders you to do something, that's different than you -- whatever. I won't make any sort of speculative rulings on what the Eighth Circuit might or might not do, but you should notify them and the Eighth Circuit will do what it will do." *Id.* at 15.

F. The *Ferguson* Case (February 2022): The *Ferguson* Plaintiffs *Finally* File a Class Action Complaint

Although the Southern District granted the *Ferguson* plaintiffs' motion to amend on August 17, 2021, by January 18, 2022, the *Ferguson* plaintiffs had yet to file the amended complaint adding any class allegations. *Ferguson*, ECF No. 357 at 2-3. Accordingly, the Southern District ordered the *Ferguson* plaintiffs to file an amended complaint "no later than January 24, 2022." *Id.* The *Ferguson* plaintiffs, however, did not comply.

Then, on February 4, 2022, some five months *after* the court certified a mandatory class and more than two months *after* the court enjoined the Arbitration Claimants, the *Ferguson* plaintiffs filed an amended complaint adding class allegations. *Ferguson*, ECF No. 370.

SUMMARY OF THE ARGUMENT

For the reasons set forth below, the district court did not abuse its discretion in granting the Appellees' Motions to Confirm.

First, the confirmation of an award is a summary proceeding that merely makes what is *already a final arbitration award* a judgment of the court. Confirmation is the *final step* in the post-arbitration process, not the beginning. At the time the *Ferguson* court certified a mandatory class, the Appellees had already *completed* their arbitrations.

Second, when presented with an application for an order confirming an award, a court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. In *Hall Street*, the Supreme Court instructed that "[t]here is nothing malleable about 'must grant.'" 552 U.S. at 587. Courts *must grant* confirmation "in all cases, except when one of the 'prescribed' exceptions applies." *Id.* In this case, DST no longer claims that *any* of the prescribed exceptions apply, having elected not to appeal the district court's findings regarding the "arbitrability" of the claims that Appellees pursued in arbitration. Thus, the court below "ha[d] no choice but to confirm." *Hall Street*, 552 U.S. at 587.

Moreover, even when one of the prescribed exceptions is alleged, "[c]ourts have no authority to reconsider the merits of an arbitration award[.]" *Med. Shoppe*

Int'l, Inc. v. Turner Invs., Inc., 614 F.3d 485, 488 (8th Cir. 2010). Thus, under no circumstance could the district court have been called upon to separately litigate the liability and damage issues certified in *Ferguson*.

Third, applications to confirm are not a "civil action" subject to transfer under 28 U.S.C. § 1404(a). And, even if they were, the Southern District is *not* a more convenient forum. In any event, the parties here *agreed* to bring motions under 9 U.S.C. §§ 9 and 10 in the Western District of Missouri.

Fourth, consistent with the policy of expedited judicial action, the FAA does not authorize a district court to stay an application for an order confirming an arbitration award. "Belated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it at all, nonetheless *significantly disappoints* the expectations of the parties and frustrates the clear purpose of their agreement." *Piper Funds, Inc., Inst. Gov't Income Portfolio Litig.*, 71 F.3d 298, 303 (8th Cir. 1995) (emphasis added).

Fifth, DST's policy arguments that confirmation of the awards risks "inconsistent adjudications" or presents "an unnecessary impediment to the prosecution and resolution of the class" are baseless; neither DST nor the Southern District has ever articulated a theory of how the awards prejudice the class, the Western District correctly rejected this argument on the merits. In any event, "even the most formidable policy arguments cannot overcome a clear statutory directive."

BP p.l.c. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1542 (2021). The FAA contains a clear directive *requiring* that courts enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings* and requires that on application for an order confirming an arbitration award, the court must grant the order unless the award is vacated as prescribed in § 10 of the Act. Accordingly, DST's policy arguments fail.

Sixth, the Southern District entered the injunction *after* the Appellees had *already filed* and *fully briefed* their applications for an order confirming their arbitration awards. "[R]elief by injunction operates *in futuro*." *Landgraf v. USI Film Prods*., 511 U.S. 244, 273–74 (1994). Thus, the injunction cannot bar or prohibit the acts *already completed.* And DST *admitted* to the court below that the injunction "does not … operate against the Court." Appellees' Add. 9 (9:1-2). Thus, the injunction did not prohibit confirmation of any awards.

Finally, DST does not seek review of the district court's findings and conclusions concerning the arbitrability of the claims that Appellees pursued in arbitration, including the ruling that DST is judicially estopped from contesting arbitrability in the Western District of Missouri. As these are independent and adequate grounds for affirming the judgments, DST would still lose even if its arguments on appeal had any merit.

ARGUMENT

I. Standard of Review

When reviewing an order confirming an arbitral award on the grounds that none of the exceptions prescribed in 9 U.S.C. § 10 apply, the Court reviews *de novo* questions of law, but accepts the district court's factual findings unless clearly erroneous. *Med. Shoppe*, 614 F.3d at 488. In this case, however, DST no longer alleges that *any* of the exceptions in § 10 apply.[6] Rather, DST appeals only on the grounds that the court below erred by failing to dismiss, transfer, or stay for reasons having to do with the certification of a mandatory class in the SDNY.

A district court's denial of a motion to transfer is reviewed for abuse of discretion. *Rolscreen Co. v. Pella Prod. of St. Louis, Inc*., 64 F.3d 1202, 1208 (8th Cir. 1995). Likewise, a district court's denial of a motion to dismiss or to stay "in deference to federal action pending in another court," is reviewed for abuse of discretion. *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co*., 920 F.2d 487, 489 (8th Cir. 1990). Thus, all the issues presented on appeal are reviewed for an abuse of discretion.

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[6] In the court below, DST asserted that the Appellees' claims were not arbitrable under ERISA, App. 213-14; 4:21-cv-09017, R. Doc. 16, at 17-18. The district court treated DST's assertion as alleging that the arbitrators abused their power and proceeded to resolve whether ERISA permits individual arbitration. App. 914-15; 4:21-cv-09017, R. Doc. 19, at 12-13. On appeal, however, "DST does not seek review of the district court's finding and conclusions concerning the arbitrability of the claims that Appellees pursued in arbitration." *See* DST's Brief at 23.

II. The District Court Did Not Err in Granting the Applications to Confirm Final Arbitration Awards

Throughout its brief, DST states that "a member of a mandatory class may not separately litigate class-certified issues," *see* DST's Brief at at 4, that "[a]n order certifying a mandatory class … precludes class members from litigating class-certified issues in other courts," *id*. at 23, that "parties to a mandatory class are not free to initiate actions in other courts to litigate class certified issues," *id* at 25, 35, and that "a member of a mandatory class may not initiate or prosecute individual claims on class-certified issues." *id*. at 26, Thus, the crux of DST's appeal is that by filing their applications to confirm, the Appellees initiated an action to separately litigate the issues subsumed by the *Ferguson* class.[7] DST is wrong. Binding precedent and the FAA clearly establish that when confirming an award, neither the court nor the parties are called upon to litigate *any* of the issues subsumed by the class.

A.

"[C]onfirmation of an arbitration award [i]s the *final step* in arbitration proceedings under the FAA," not the beginning. *Teamsters Loc. 177 v. United Parcel Serv.*, 966 F.3d 245, 253 (3d Cir. 2020) (emphasis added). Indeed, "[t]he

[7] In the district court, below, DST also argued that the awards should be vacated "because ERISA § 502(a) claims cannot be brought in individual arbitration," and that arbitration "runs afoul of basic ERISA law." App. 213-14, 4:21-cv-09017, R. Doc. 16, at 17-18. On appeal, DST no longer makes these assertions.

confirmation of an arbitration award is a summary proceeding that merely makes what is *already a final arbitration award* a judgment of the court." *Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 160 (2d Cir. 2021) (emphasis added, quotation omitted).

An "award need not actually be confirmed by a court to be valid." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984); *see also Kentucky River Mills v. Jackson*, 206 F.2d 111, 120 (6th Cir.1953). An unconfirmed award is, itself, an enforceable "contract right" that "has the same effect under the rules of res judicata as a judgment of a court." *Florasynth*, 750 F.2d at 176; *MACTEC*, 427 F.3d at 831 (10th Cir. 2005) ("As for finality, a valid and final award by arbitration generally has the same effect under the rules of res judicata as a judgment of a court.").

However, consistent with the emphatic federal policy in favor of arbitral dispute resolution, judicial confirmation of an award augments the remedies otherwise available under the common law and provides the winning party a judgment "that may be enforced" against a party unwilling to abide by the award. 9 U.S.C. § 13. As the Second Circuit put it: "A party, successful in arbitration, seeks confirmation by a court generally because he fears the losing party will not abide by the award. Armed with a court order the winning party has a variety of remedies available to enforce the judgment." *Florasynth,* 750 F.2d at 176.

That is *exactly* what has happened here. While DST had previously agreed to pay arbitral awards without the need for judicial confirmation, the Appellees sought judicial confirmation of their *already final arbitration awards* from the court below because they feared (correctly) that DST would no longer abide by the awards.

Thus, rather than "separately litigate class-certified issues," the Appellees merely sought to enforce the awards that, by virtue of the FAA, were already fully and *finally* litigated on the merits. *See Badgerow*, 142 S. Ct. at 1316 ("Recall that the two are now contesting not the legality of Badgerow's firing but the enforceability of an arbitral award."). And, in the absence of an enumerated ground for vacating the awards, the court below was *required* to grant confirmation.

B.

On application for an order confirming the arbitration award, a court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. In *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, the Supreme Court instructed that "[t]here is nothing malleable about 'must grant.'" 552 U.S. at 587. Courts *must* grant confirmation "in all cases, except when one of the 'prescribed' exceptions applies." *Id. See also Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) ("Absent a statutory basis for modification or vacatur, the district court's task was to confirm the arbitrator's final award as mandated by

section 9 of the Act."); *Med. Shoppe*, 614 F.3d at 489 (holding that "an arbitral award may be vacated only for the reasons enumerated in the FAA").

The statutory requirement that courts grant confirmation except when one of the prescribed exceptions applies "further[s] the Act's policy of expedited judicial action because they prevent a party who has lost in the arbitration process from filing a new suit in federal court and forcing relitigation of the issues." *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). It also "substantiat[es] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street*, 552 U.S. at 588.

Additionally, even when one of the prescribed exceptions is alleged, "[c]ourts have no authority to reconsider the merits of an arbitration award[.]" *Med. Shopp*, 614 F.3d at 488. Indeed, "Congress did not authorize de novo review of [an arbitration] award on its merits; it commanded that when the exceptions do not apply, a federal court has no choice but to confirm." *Hall Street*, 552 U.S. at 587.

In this case, DST no longer argues that *any* of the prescribed exceptions apply. Thus, the court below "ha[d] no choice but to confirm." *Hall Street*, 552 U.S. at 587. As for DST's contention that confirmation nevertheless violates the rule prohibiting members of a certified class from separately litigating class-certified issues, DST is plainly wrong. As evidenced above, under no circumstance would the parties below

have to "litigate class-certified issues." *Id. See also Badgerow*, 142 S. Ct. 1318 (holding that confirmation of an arbitral presents "different claims," and "turn[s] on different law" than the underlying dispute).

And while it is true in all cases that courts may not reconsider the merits of an arbitration award, the rule is *especially* true here since DST *did not even allege* that the awards rest on factual errors or on a misinterpretation of the underlying contract.

Thus, even if the court below were permitted to consider non-cognizable grounds for refusing confirmation, it would not have erred in concluding that the Appellees' applications for an order confirming their *already final arbitration awards* did not separately litigate the class-certified issues.

C.

Finally, for largely the same reasons, DST's reliance on this Court's decisions in *In re Fed. Skywalk Cases* and *Goff v. Menke* is mistaken.

In *Federal Skywalk*, this Court was called upon to determine whether an order certifying a mandatory class was appealable as an injunction under 28 U.S.C. § 1292(a). 680 F.2d 1175, 1179-80 (8th Cir. 1982). In its decision, the court stated that whether an order is appealable under § 1292(a) "depends upon the substantial effect of the order rather than its terminology." *Id.* at 1180. The Court then determined that since the order certifying a mandatory class "*expressly prohibited* class members

from settling their punitive damage claims," the "substantial effect of the order" was that of an interlocutory order granting an injunction. *Id.* at 1180.

Here, of course, the Court need not decide whether the Southern District's class certification order is appealable under § 1292(a). And *Federal Skywalk* said nothing of the requirements in Rule 65(d).[8] Thus, the Court's reasoning in *Federal Skywalk* has no relevance here. But even if *Federal Skywalk* spoke more broadly about the effects of a mandatory class certification order, it does *not* require that the Appellees' applications be denied.

First, in *Federal Skywalk*, it was clear on the face of the order that class members were prohibited from settling their punitive damage claims. *Fed. Skywalk*, 680 F.2d at 1180 ("the district court expressly prohibited class members from settling their punitive damage claims"). But in this case, nothing in the Southern District's class certification order expressly prohibited the Appellees from obtaining judicial confirmation of their *already final arbitration awards.*

[8] Rule 65(d) of the Federal Rules of Civil Procedure requires that "[e]very order granting an injunction ... shall be specific in terms [and] shall describe in reasonable detail ... the act or acts sought to be restrained." The Rule "is designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed, to avoid the possible founding of contempt citations on an order that is too vague to be understood, and to ascertain that the appellate court knows precisely what it is reviewing." *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir.1987).

Indeed, the Southern District clearly did not consider its certification order to be an injunction, because it *denied* DST's request for an immediate TRO and ordered further briefing on whether it should grant a preliminary injunction. On August 31, 2021, two weeks *after* the Southern District granted the motion for class certification, the same court expressly denied DST's request that it enter an immediate TRO restraining the Appellees "from instituting new actions or litigating in arbitration or other proceedings against the DST Defendants matters arising out of or relating to the facts or transactions alleged in the *Ferguson* amended complaint." *Ferguson*, ECF No. 318.[9] Thus, rather than "effectively enjoin the arbitrations," the Southern District watched them continue unabated.

Moreover, the Southern District noted in the order that as of February 11, 2021, "the arbitration claimants have prevailed in 73 cases and lost 9 cases." *Ferguson*, 2021 WL 3667979, at *5. The court made this observation without ever suggesting that those 73 who had *already prevailed* must relinquish their *already final arbitration awards* (or forgo the protections that attend judicial confirmation), or that those awaiting awards were now immediately enjoined from completing their arbitrations against DST. In fact, in a separate order entered just five months earlier,

[9] And though DST has avoided providing the Court an accurate account of the procedural history in New York, the *Ferguson* plaintiffs did not file an amended complaint adding class allegations until February 4, 2022. *Ferguson*, ECF No. 370.

the Southern District held that the Western District of Missouri was "charged with reviewing arbitral agreements and awards," and that the Western District, *not the Southern District*, was "authorized to preside in some capacity over" the arbitration proceedings. *Canfield v. SS&C Techs. Holdings, Inc.*, No. 18-CV-10252 (ALC), 2021 WL 1022698, at *3, *4 (S.D.N.Y. Mar. 17, 2021).

Second, the Court made clear in *Federal Skywalk* that orders certifying a mandatory class can "effectively" enjoin (for purposes of applying § 1292) only those actions seeking to litigate class-certified issues. *Fed. Skywalk*, 680 F.2d at 1180 ("It is true that parties to a mandatory class are not free to initiate actions in other courts to litigate class certified issues."). But here, for the reasons explained above, the Appellees' applications do *not* separately litigate class-certified issues.

Finally, the Court in *Federal Skywalk* held that an order certifying a mandatory class, however explicit, applies only to actions commenced *after* the certification of a class; not to those that were commenced (and here, completed) *before* the certification order. *Id.* Indeed, the Court echoed the longstanding tradition that whenever a judgment is rendered in a prior action, "the effect of that judgment is to be determined by the application of the principles of res adjudicata" in the latter. *Id.* at 1183 (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977). *See also Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 n.8 (11th Cir. 1988) (noting "the strong policy favoring the finality of awards and judgments"); *Wellons,*

Inc. v. T.E. Ibberson Co., 869 F.2d 1166, 1169 (8th Cir. 1989) ("[I]t is clear that an arbitration award may operate as a final adjudication for the purposes of collateral estoppel."). Thus, insofar as *Federal Skywalk* is relevant, it confirms that the court below was *correct*.

DST's reliance upon *Goff v. Menke*, is similarly misplaced. In *Goff*, the plaintiff was a prisoner and a member of an *already-certified* class that had obtained a preliminary injunction against the defendants. Nevertheless, after the class was certified, he commenced a separate, individual action seeking the same relief. 672 F.2d 702, 703 (8th Cir. 1982). This Court held that since the primary purpose of Rule 23 is to avoid "duplicative litigation and inconsistent standards," "a class member should not be able to prosecute a separate equitable action once his or her class has been certified." *Id.* at 704. But while this rule is generally applicable, it does *not* apply here for a myriad of reasons.

First, the Supreme Court has made clear that Rule 23 does *not* "establish an entitlement to class proceedings for the vindication of statutory rights." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). And the Supreme Court's decision in *Epic* "made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation." *Epic*, 138 S. Ct. at 1627.

Rather, regardless of the costs of duplicative litigation or the risks of inconsistent standards, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis added). *See also Piper Funds*, 71 F.3d at 303 (holding that the "statutory right to arbitrate may not be sacrificed on the altar of efficient class action management").

Indeed, the "principal purpose" of the FAA, "readily apparent from [its] text," is to ensure that private arbitration agreements are enforced "according to their terms." *Concepcion*, 563 U.S. at 344. As the Supreme Court has repeatedly made clear, that overriding congressional purpose is evident in multiple sections of the FAA that compel courts, long hostile to arbitration, not just to respect arbitration agreements, but to "enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*." *Epic*, 138 S. Ct. at 1619.

And claims under ERISA are no exception. Every circuit to consider the issue, including this one, has concluded claims under ERISA may be vindicated through arbitration. *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988); *Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116 (2d Cir. 1991); *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021); *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1112 (9th Cir. 2019); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Kramer v. Smith Barney*, 80

F.3d 1080, 1084 (5th Cir. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993).[10]

Second, unlike in *Goff* (where there was no arbitration agreement), there is no ambiguity here about whether the parties agreed to resolve their disputes through individual arbitration. Even now, DST does not challenge "the arbitrability of the claims that Appellees pursued in arbitration." *See* DST's Brief at 23. And even if it had, the doctrine of judicial estoppel prevents DST from asserting that claims under ERISA must be brought in a representative capacity or that ERISA prohibits individual attempts at conciliation. *Scudder v. Dolgencorp, LLC*, 900 F.3d 1000, 1006 (8th Cir. 2018); *New Hampshire v. Maine*, 532 U.S. 742 (2001).

Finally, as explained above, the Appellees are *not* requesting that they be permitted to pursue individual actions seeking the same relief as requested by the *Ferguson* plaintiffs; they are merely applying for judicial confirmation of the arbitral

[10] *See also Fisher v. JPMorgan Chase & Co.,* 303 F. App'x 979, 981 (2d Cir. 2008)(observing that in *LaRue v. DeWolff, Boberg & Assocs., Inc*., 552 U.S. 248 (2008), the Supreme Court held that in the defined contribution context, plan-wide recovery was "beside the point"); *Holmes v. Baptist Health S. Fla., Inc.*, No. 21-22986-CIV, 2022 WL 180638, at *3 (S.D. Fla. Jan. 20, 2022) ("individual claimants can each recover the harm to their defined contribution accounts"); *Est. of Smith v. Raytheon Co.*, No. 1:19-CV-10328-DPW, 2021 WL 5605125, at *8 n. 17 (D. Mass. Nov. 30, 2021) (ERISA "allows for an individual participant to seek relief for the loss of value of his or her individual plan account"); *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-CV-2548 (VSB), 2017 WL 1273963, at *13 (S.D.N.Y. Mar. 31, 2017) (ERISA permits plan participants to "seek individual monetary damages").

awards *that are already final*. *Florasynth*, 750 F.2d at 176. Thus, to the extent that *Goff* is relevant at all, it confirms that the court below was correct. Afterall, the essence of *Goff* is that parties cannot relitigate an issue "after it has been resolved." *Goff*, 672 F.2d at 704. The same rule applies in arbitration. Indeed, "[i]f any party dissatisfied with the [arbitration] award were left free to pursue independent judicial proceedings on the same claim or defenses, arbitration would be substantially worthless." *MACTEC*, 427 F.3d at 832.[11]

D.

DST's policy arguments that confirmation of the awards risks "inconsistent adjudications" or presents "an unnecessary impediment to the prosecution and resolution of the class" also fail for largely the same reasons set forth above.

First, as explained above, "the statutory right to arbitrate may not be sacrificed on the altar of efficient class action management" *Piper Funds*, 71 F.3d at 303. Rather, the Supreme Court has repeatedly made clear that the FAA requires courts not just to respect arbitration agreements, but to "enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*." *Epic*, 138 S. Ct. at 1619.

[11] For the same reasons, DST's reliance on *Brown v. Vermillion*, 593 F.2d 321, 322 (8th Cir. 1979), and *United States v. Nolder*, 749 F.2d 1128, 1131 (5th Cir. 1984), both of which are nearly identical to *Goff*, is misplaced.

Second, as explained above, there is no ambiguity about whether the parties *agreed* to resolve their disputes through individualized proceedings. This is not a situation, for example, where one of the parties has consistently maintained their opposition to arbitration.

Third, as explained above, DST is *judicially estopped* from asserting that claims under ERISA must be brought as a class action in order to avoid inconsistent adjudications or potential impediments to class-wide resolution.

Fourth, the usual rules regarding waiver apply. Waiver applies when a party has fully participated in arbitration and prevents the party from complaining about the enforceability of an arbitration award after having participated in the process. *Lewis v. Cir. City Stores, Inc*., 500 F.3d 1140, 1149 (10th Cir. 2007). Indeed, it would be "unreasonable and unjust to allow a party to challenge the legitimacy of the arbitration process in which he had voluntarily participated over a period of several months." *Id.* (internal quotation omitted).

Moreover, to preserve an objection to the arbitrability of a claim, "a party must raise it clearly and explicitly during the arbitration process." *Giordano*, 680 F. Supp. 2d at 129 (internal quotation and citation omitted); *see also Opals on Ice Lingerie v. Bodylines, Inc*., 320 F.3d 362 (2nd Cir. 2003). The requirement that the objection be clear and explicit ensures that the objecting party's opponent has an opportunity "to respond with a petition for an order to compel arbitration under the [FAA]" and

thereby "obtain a judicial determination on arbitrability." *Environmental Barrier Co., LLC v. Slurry Systems, Inc.*, 540 F.3d 598, 606 (7th Cir.2008).

In this case, DST participated in the arbitration proceedings for more than three years and, in all that time, never once expressly challenged arbitrability in *any* of the Appellees' arbitrations. App. 919, 4:21-cv-09017, R. Doc. 19, at 17 fn. 2. Had DST done so, Plaintiffs could have sought and obtained an order compelling arbitration, just as DST had done in *DuCharme.* Thus, since DST failed to challenge the arbitrability of the Appellees' claims, review of the awards "is compressed still further, *to nil*." *Med. Shoppe*, 614 F.3d at 489 (emphasis added).[12]

Finally, as the Supreme Court has explained, "even the most formidable policy arguments cannot overcome a clear statutory directive." *BP p.l.c.*,141 S. Ct. at 1542 (alteration omitted). DST's newfound enthusiasm for class-wide adjudication in the courts rests on the false assumption that the FAA contains no clear directive *requiring* that courts enforce arbitration agreements according to their terms—*including terms providing for individualized proceedings*, and that there is no clear directive that on application for an order confirming an arbitration award,

[12] DST has also waived its objection to confirmation on the grounds that certain of the awards "were within the arbitration agreement's 60-day period for noticing arbitration appeals," and that "at least two dozen of Appellees' awards had not yet been issued" when the *Ferguson* court certified a mandatory class. *See* DST's Brief at 14. DST made neither of these objections to the court below and therefore, cannot raise them for the first time on appeal.

the court must grant the order unless the award is vacated as prescribed in § 10 of the Act. Having shown that these directives *do exist*, DST's policy arguments fail.

And in any event, DST oversells the superiority of a class action. When passing the FAA, Congress was driven by the virtues of arbitration: "its speed and simplicity and inexpensiveness[.]" *Epic*, 138 S. Ct. at 1623. Indeed, in the Arbitration Agreement itself, DST encouraged its employees to accept the terms of the Arbitration Program because it "provides a fair, efficient, private and accessible process" through which to resolve their disputes. App. 011; 4:12-cv-09017, R. Doc. 1-2, at 1. And courts have long recognized that "parties choose to arbitrate because they want quick and final resolution of their disputes." *Florasynth,* 750 F.2d at 177; *see Concepcion*, 563 U.S. at 344-45 (stating that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution").

Additionally, while it is true that no participant may collect more than once for the same injury, it does *not* follow that by confirming the awards, the damages available to *other* class members will be reduced. *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019) (unpublished opinion) ("When an individual participant agrees to arbitrate, he does not give up any substantive rights that belong to other Plan participants."). *See also Am. Fed'n of Television & Radio Artists Health & Ret. Funds v. WCCO Television, Inc.,* 934 F.2d 987, 989 (8th Cir. 1991) (finding

that a prior arbitration did not prevent non-arbitrating parties from pursuing their own action under ERISA § 502).

The Secretary of Labor made the same commonsense observation two years ago in the matter of *Ruane, Cunniff & Goldfarb, Inc. v. Payne, et al.*, 1:19-cv-1129, ECF No 40. There, the Secretary explained that the "individual arbitration proceedings may [] occur simultaneously without diminishing the independent rights of action of other plan participants or the Secretary." *Id.*, at 8. *See also Carr v. Int'l Game Tech.,* No. 3:09-CV-00584-ECR, 2012 WL 909437, at *7 (D. Nev. Mar. 16, 2012) ("[I]ndividual adjudications of the matter would not be dispositive of the interests of absent members in light of *LaRue.*").

Instead, should the class certification order survive on appeal, the court in New York will simply offset any amounts payable to the Appellees' individual accounts by the amount they recovered in arbitration. *See Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991) ("appellants are not subject to double recovery because the judgment merely decreases the amounts recouped by the Plans by the sums recovered by the private plaintiffs.").

Finally, the possibility that DST may be found liable to some participants but not to others is inherent in every type of litigation and does not justify a departure from clear statutory directive. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d

1180, 1193 (9th Cir.), *op. amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001); *Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986).

III. The District Court did Not Err in Declining to Transfer These Actions to the Southern District of New York

DST asserts that the district court abused its discretion in declining to transfer these summary proceedings to the Southern District. As a threshold matter, this issue is moot because the district court has already entered final judgments. DST is also wrong on the merits for several reasons.

A.

First, § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any *civil action* to any other district or division where it might have been brought." 28 U.S.C § 1404(a) (emphasis added). In this case, however, applications for an order confirming an arbitration award are *not* civil actions. Rather than authorizing the filing of a "civil action," section 9 permits the recipient of an arbitration award to "*apply* to the court … for an order confirming the award[.]" 9 U.S.C. § 9 (emphasis added). Section 6 further instructs that "[a]ny application to the court … shall be made and heard in the manner provided by law for the making and hearing of *motions*[.]" 9 U.S.C. § 6 (emphasis added).

Thus, as a formal matter, applications for an order confirming an arbitration award *do not* commence a separate "civil action." *See PG Publ'g, Inc. v. Newspaper*

Guild of Pittsburgh, 19 F.4th 308, 313 (3d Cir. 2021) ("Unlike civil actions under the LMRA, which are formal civil proceedings to which the Federal Rules of Civil Procedure are fully applicable, FED. R. CIV. P. 1, FAA Section 9 motions to confirm an arbitration award are addressed through summary proceedings, which are shorn of certain formalities such as pleadings."); *Photopaint Techs., LLC v. Smartlens Corp*., 335 F.3d 152, 159 (2d Cir. 2003) ("An action at law is not identical to the summary confirmation proceeding established by the FAA, which was intended to streamline the process and eliminate certain defenses.").

And while the law does not inflexibly elevate form over substance, in this case, the rules proscribed by the FAA are intended to further the Act's policy of expedited judicial confirmation and of resolving arbitrations straightaway. *Hall Street*, 552 U.S. at 582. Thus, the fact that an application to confirm an arbitration award is not a civil action *is* essential and deliberate.

Second, although DST asserts that "[c]ourts regularly transfer cases, including motions to confirm arbitration awards," *see* DST's Brief at 44, fn. 7, the court—and the parties—in *U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd*., 357 F. Supp. 2d 924 (E.D. Va. 2005), simply assumed, without deciding, that motions to confirm were transferrable under § 1404(a). But as we have shown here, they are not.

In any event, the court in *Maersk Line* utilized the "look-through" approach, reasoning that since the underlying dispute related to claims then pending in the

District of Columbia, transfer was in the interest of justice. DST uses the same approach here, claiming that New York is an appropriate venue because "a substantial part of the conduct alleged in Appellees' underlying claims occurred in the Southern District of New York." *See* DST's Brief at 42. But in *Badgerow*, the Supreme Court held that, when presented with an application to confirm, courts may *not* "look though" to the underlying dispute. *Badgerow*, 142 S. Ct. at 1318. Thus, *Maersk Line* is no longer persuasive authority and DST's appeal to the relatedness of the Appellees' underlying claims to those pending in New York fails.

B.

Even if § 1404(a) applied to applications made pursuant to § 9 of the FAA, the Southern District of New York is *not* a more convenient forum. Section 1404(a) permits transfer of a civil action "[f]or the convenience of parties and witnesses." But here, there are *no witnesses*. Indeed, the FAA states that a party moving for an order confirming an award need only file the arbitration agreement, the award, and "[e]ach notice, affidavit, or other paper used upon an application to confirm[.]" 9 U.S.C. § 13(a)-(c). "[T]hereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11." 9 U.S.C. § 9.

But even if the confirmation of an award were not always so straightforward, DST never offered a witness or suggested that it would have called a witness had the

applications been transferred to New York. In fact, DST did not address this factor at all in the court below. App. 211-12; 4:21-cv-09017, R. Doc. 16, at 15-16.

As for the parties, DST has its principal place of business in Kansas City, Missouri. The Appellees, meanwhile, most of whom also reside in Kansas or Missouri, actively sought confirmation of their awards in the Western District of Missouri. Thus, the Western District is clearly the most convenient forum.

Moreover, the parties here *agreed* that the Western District of Missouri was the proper venue for confirming final arbitration awards. The parties' Agreement states that the "arbitration hearing shall be held in the county of the Associate's principal place of employment" (i.e., Kansas City, Missouri) and that "[a]fter the conclusion of the arbitration process…DST or the Associate may … enforce, vacate, modify, and/or appeal the final decision and award…in the federal district court with jurisdiction over the county in which the hearing was held." App. 672; 4:21-cv-09185, R. Doc. 1-3, at 4.

"A forum selection clause is a significant factor in deciding a motion to transfer." *Terra Int'l, Inc. v. Mississippi Chem. Corp*., 119 F.3d 688, 697 (8th Cir. 1997) (internal quotation marks omitted). Indeed, the Supreme Court held that § 1404(a) "provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district," *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 59 (2013), and that "a proper application of § 1404(a)

requires that a forum-selection clause be given controlling weight in all but the most exceptional cases." *Id*. (Internal quotation omitted.)

In this case, since the hearings were each held in Kansas City and since the awards were each made in Kansas City, the court below did not abuse its discretion by refusing to transfer the Appellees' applications to New York.

C.

DST's appeal to the first-filed rule is equally futile. The first-filed rule is a comity-based, forward-looking, discretionary doctrine that "gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Nw. Airlines, Inc. v. Am. Airlines, Inc*., 989 F.2d 1002, 1006 (8th Cir. 1993). "Courts use this rule to maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might substantially duplicate those raised by a case pending in another court." *Cadle Co. v. Whataburger of Alice, Inc*., 174 F.3d 599, 604 (5th Cir. 1999).

But here, for the reasons set forth above, since these summary proceedings may *not* be transferred under § 1404(a), and since they do not raise issues that might duplicate those raised in *Ferguson*, the first-filed rule does not apply.

However, even the first-filed rule mitigates in favor of denying transfer to New York. The *Ferguson* case was not filed until September 1, 2017, some nine

months after *DuCharme* and more than two months after the Western District had *already ordered* that the Arbitration Program is valid and that claims for breach of fiduciary duty fall within the Arbitration Program's scope. *Ferguson*, ECF No. 1.

Thus, even assuming the first-filed rule applied, the court in New York should have refused to hear the *Ferguson* case, not the other way around. *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) ("it is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected."). In fact, the court in *Ferguson* did not address the Arbitration Program or the suitability of a mandatory class until August 2021. In the interim, the Appellees relied on the Western District's *final judgment* in *Ducharme* (finding the Arbitration Program valid and applicable) and on DST's express agreement to arbitrate their claims individually in the Western District of Missouri.[13]

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[13] It is disingenuous for DST to claim that the *Ferguson* court was the first to determine the validity its Arbitration Program or the suitability of a class. It is also irrelevant since DST now *concedes* the arbitrability of the claims that the Appellees pursued in arbitration.

It is also wrong for DST to claim that the district court's determination in *Ostrander v. DST Sys., Inc.,* should have applied below. In *Ostrander*, the plaintiff sought to bring claims against DST for breach of fiduciary duty as a class action on behalf of the entire Plan. 2018 WL 10799300 (W.D. Mo. 2018). The court reasoned that since the *Ferguson* case, filed six days earlier, *also* asserted "claims on behalf of the Plan against Defendants for breach of fiduciary duties," the first-filed rule applied. *Id.* at *2. But here, unlike in *Ostrander*, DST did *not* move to dismiss the arbitrations on the grounds that *Ferguson* was the first-filed case. In fact, DST *enforced* its

D.

Finally, transfer to the Southern District of New York, even if it were allowed, would *thwart* the FAA's policy of expedited judicial confirmation and of resolving arbitrations straightaway. The Southern District has essentially punted on the issue, stating only that the status of the awards already entered against DST "will be determined at final judgment, either after trial or after settlement." Add. 233a. But as of today, there is no trial date, no settlement, and no indication *at all* that the parties are nearing the end of litigation. The sluggish pace of the proceedings in New York bears absolutely no resemblance to the speed contemplated by the FAA.

IV. The District Court did Not Err in Declining to Stay the Applications for an Order Confirming the Arbitral Awards

DST asserts that the court below should have delayed a ruling on the applications for confirmation. Once again, DST is mistaken.

Consistent with the policy of expedited judicial action, the FAA does not authorize a district court to stay an application for an order confirming an arbitration award. *See Kallen v. Dist. 1199, Nat. Union of Hosp. & Health Care Emp., RWDSU,*

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arbitration agreement, then it notified all participants, *after* the *Ferguson* case was filed, of the right to file claims for breach of fiduciary duty in individual arbitrations, then it fully participated in each arbitration. Thus, the court's analysis in *Ostrander* is completely inapplicable.

In any event, Judge Wimes, who presided in *Ostrander*, transferred numerous of the cases below to Judge Laughery *after* she confirmed the arbitration awards, evidencing his intent that the applications *not* be transferred to New York. *See e.g., Eisenberger v. DST Systems, Inc.*, No. 4:21-cv-09022, ECF No. 8.

AFL-CIO, 574 F.2d 723, 727 (2d Cir. 1978) ("neither the Arbitration Act nor any precedent cited by appellant justifies delaying confirmation of a valid award"). Indeed, as this Court stated, "[b]elated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it at all, nonetheless *significantly disappoints* the expectations of the parties and frustrates the clear purpose of their agreement." *Piper Funds*, 71 F.3d at 303 (quotation omitted, emphasis added).

Thus, the FAA permits a stay only in the event a suit or proceeding is brought in federal court upon an issue referable to arbitration. 9 U.S.C. § 3. In other words, the *Ferguson* case should have been stayed (since it was filed *after* the Western District referred the matters to arbitration), not the other way around.

Accordingly, the court below did not abuse its discretion in refusing to stay the applications for an order confirming the arbitration awards.

V. The Injunction Did Not Apply to "Certain" of the Appellees' Applications

DST asserts that the court below erred in granting "certain" Appellees' applications because the court in New York had entered a preliminary injunction. DST is wrong.

On November 18, 2021, the court in New York entered an Order enjoining the Arbitration Claimants from "instituting new actions or litigating in arbitration or other proceedings against the DST Defendants matters arising out of or relating to

the facts or transactions alleged in the Ferguson amended complaint." Add. 226a. By its plain terms, the injunction barred only the "litigation" of matters arising out of or relating to the facts or transactions alleged in the *Ferguson* amended complaint.

But, here, as explained above, by seeking confirmation of their awards, the Appellees were *not* "instituting new actions or litigating in arbitration or other proceedings against the DST Defendants matters arising out of or relating to the facts or transactions alleged in the Ferguson amended complaint;" rather, they are merely applying for judicial confirmation of the arbitral awards *that were already final.* As explained in *Badgerow*, applications to confirm do *not* relitigate the underlying dispute; they grow out of "different claims" and "turn[] on different law." 142 S. Ct. at 1316, 1318.

In any event, "relief by injunction operates *in futuro.*" *Landgraf*, 511 U.S. at 273–74 (quotation omitted). An injunction cannot bar or prohibit an act already *completed.* In this case, at the time the court in New York entered the preliminary injunction, each of the Appellees had *already filed* and *fully briefed* their applications for an order confirming their arbitration awards. Thus, *even if* the injunction applied to the *filing* or the *briefing* of an application under 9 U.S.C. § 9 (it does not), it would not have applied to the applications below.

Moreover, while DST now argues that the injunction also operates against the courts, *see* DST's Brief at 56, DST stated *the exact opposite* to the court below.

When pressed by the court below, counsel for DST stated that the injunction was "directed to the parties and their counsel *but not the Court*[.]" Appellees' Add. 8 (8:18-20.) "So it operates against the arbitration claimants, but it does not … operate against the Court." Appellees' Add. 9 (9:1-2). Thus, DST cannot now claim that the injunction *does* operate against the courts.

Moreover, Rule 65(d)(1) provides, in relevant part, that "[e]very order granting an injunction … must: … (B) state its terms specifically; and (C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). The order here falls far short of satisfying either prerequisite.

The order does *not* state its terms specifically; nor can it be said that the order describes "in reasonable detail--*and not by referring to the complaint* or other document--the act or acts restrained or required." In fact, the order does *exactly* what the rule prohibits: it vaguely describes the acts restrained by referring to the complaint (which, at the time of the order, was *not* a class action complaint). Add. 226a.

As the Supreme Court has repeatedly emphasized, "the specificity provisions of Rule 65(d) are no mere technical requirements." *Schmidt v. Lessard*, 414 U.S. 473 (1974). The Rule is intended to "prevent uncertainty and confusion on the part of those faced with injunctive orders." *Id.* "Since an injunctive order prohibits conduct

under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* In this case, the Injunction clearly fails to outlaw the judicial resolution of an application for an order confirming an *already final* arbitration award.

In fact, this Court need look no further than its *own decision* to see that the court below was correct when it concluded that "ruling on the pending motions to confirm arbitration awards will not violate the terms of [the] injunctive order." App. 1072; 4:21-cv-09133, R. Doc. 13, at 11. In response to DST's request that this Court stay these consolidated appeals, the Court declared that "*without a clear statement* by the district court in the Southern District of New York, we do not construe that court's order as enjoining the parties in this court from filing an appellees' brief[.]" *See* Order, dated Jan. 3. 2022 (emphasis added). And while the court in New York has since (unlawfully) modified its injunction,[14] its modification was issued *after* the judgments entered below and, in any event, clarifies only "the injunction's reference to the Complaint" and otherwise left intact that portion of the injunction that prohibits only "*new actions* or litigat[ion] in arbitration or other proceedings against

[14] The SDNY's modification is also in error. A court may *not* modify an injunction pending on appeal. *See Chevron Corp. v. Donziger*, 990 F.3d 191, 210 (2d Cir. 2021).

the DST Defendants *matters arising out of or relating to the" allegations in the amended complaint*. Add. 230a (emphases added).

Finally, DST cites *Celotex Corp. v. Edwards*, for the proposition that the Appellees' applications are a "collateral attack" on the Southern District's class certification. However, DST's reliance upon *Celotex* is, once again, misplaced.

In *Celotex*, the respondents had won a judgment in of Texas against Celotex for their asbestos-related injuries. 514 U.S.at 302. The Fifth Circuit affirmed and issued its mandate on October 12, 1990. That same day, Celotex filed a voluntary petition for relief under the Bankruptcy Code in Florida. *Id.* By virtue of the filing, all proceedings against Celotex were automatically stayed, *including* the enforcement of a "judgment obtained before the commencement of the case;" and "any act to obtain possession of property of the estate." 11 U.S.C § 362(a)(1)-(3). An injunction was then entered by the Middle District of Florida, pursuant to § 105, to augment the automatic stay. 514 U.S. at 302. In pertinent part, the § 105 injunction stayed all proceedings involving Celotex "regardless of ... whether the matter is on appeal and a supersedeas bond has been posted by [Celotex]." *Id.* at 303.

Nevertheless, despite the automatic stay and the explicit injunction, the respondents sought and obtained from the Northern District of Texas an order granting them permission to execute against the supersedeas bond that had been posted by Celotex to stay execution of the judgment pending appeal. *Id.* at 303. On

appeal to the Supreme Court, the respondents *admitted* that the bankruptcy court "prohibited them from attempting to execute … on the supersedeas bond posted by Celotex." *Id.* at 306. However, they argued that the bankruptcy court lacked the authority to enter an injunction since their proceeding to execute on the bond was not "related to" the bankruptcy. *Id.* at 307.

The Supreme Court disagreed and reasoned that allowing the respondents to execute on the bond "would have a direct and substantial effect on Celotex's ability to undergo a successful reorganization." *Id.* at 309. Accordingly, the respondents were required to either comply with the injunction or challenge it in the district court in which the bankruptcy judge was sitting. *Id.* at 313.

Celotex is inapplicable for multiple reasons, most of which are described above. *First*, unlike in *Celotex,* this case has nothing to do the with Bankruptcy Code and thus, does not involve the Code's "automatic stay" of enforcement actions. *Second*, unlike in *Celotex*, the injunction here was entered *after* the Appellees had filed and fully briefed their applications, not before. *Third*, unlike in *Celotex*, the injunction here did not expressly enjoin the underlying applications. *Finally*, unlike in *Celotex*, the applications to confirm do not touch upon the issues over which the SDNY has exerted its authority.

Celotex does, however, instruct that "[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed

for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." *Id.* at 313 (quotation omitted). In this case, that means that DST is to respect the decision in *DuCharme* and the orders based upon that decision. It may *not* collaterally attack that decision in the federal courts in New York. Indeed, if DST is permitted to undermine the order in *DuCharme*, it would "seriously undercut[] the orderly process of the law." *Id. See also United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947) ("an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.").[15]

VI. The Court Should Summarily Affirm the Confirmation of the Awards Since DST Does Not Appeal the District Court's Judgment that "Judicial Estoppel Alone" Warrants Confirmation of the Awards

The district court's judgments rested on two independent grounds. *First*, the district court held that confirmation was required by the FAA since "DST had not argued that corruption, fraud, or partiality affected the award" and since, under ERISA, the claims pursued by the Appellees were capable of resolution through

[15] DST claims that the Appellees described their applications below as a "collateral attack" on the *Ferguson* class certification order. *See* DST's Brief at 2, 4, 22. This is false. The Appellees merely observed that should class members launch a "collateral attack" against an eventual judgment of the *Ferguson* court, it would likely succeed. App. 006; No. 4:21-cv-09017, R. Doc. 1, at 6 n.3. *See Spano v. The Boeing Co.*, 633 F.3d 574, 587 (7th Cir. 2011) (observing that absentee members of a class will not be bound by the final result if they were represented by someone who had a conflict of interest with them).

individual arbitration. *See e.g.,* App. 916; 4:21-cv-09017, R. Doc. 19, at 12-13. *Second*, the district court held that "judicial estoppel *alone* would warrant confirming the award." *Id.* at 14 (emphasis added).

"[W]hen a judgment rests on two independent grounds, a failure to appeal either one of them justifies summary affirmance." *Green v. Mazzucca*, 377 F.3d 182, 183 (2d Cir. 2004); *Reinard v. Crown Equip. Corp.*, 983 F.3d 1064, 1066 (8th Cir. 2020) (stating that "if the appellant waived his objections to a ruling, then we do not review the ruling at all"). In this case, DST does not seek review of the district court's ruling that DST is judicially estopped from avoiding the consequences of the arbitrations. *See* DST's Brief at 23. That being the case, the Court should summarily affirm the judgments below.

VII. The Attorneys' Fee Awards Are Not Implicated by the Certification of a Class

Even if the court below erred in confirming the awards during the pendency of the class and/or the injunction, the court did *not* err in confirming the *separate* awards of attorneys' fees.

An award of attorneys' fees under a fee shifting statute is manifestly *not* an award to the plaintiff. *See Kay v. Ehrler*, 499 U.S. 432 (1991). In fact, a judgment on fees is so divorced from the merits—so "ancillary" to the underlying claims—that the absence of a decision on fees does not deprive the merits judgment of finality for purposes of appeal. *See White v. New Hampshire Dept. of Employment Security*,

455 U.S. 445 (1982). When fees are awarded, they go to counsel; the plaintiff has no claim whatsoever on the money. *See U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 578 (9th Cir. 1996) (once fees are awarded, "the attorneys' right vests, and the defendant's duty becomes fixed").

In this case, individual arbitrators entered *separate* fee awards in each arbitration, using and properly applying the "lodestar" method approved by this Court. *See Brown v. Aventis Pharm., Inc.,* 341 F. 3d 822, 829 (8th Cir. 2003).

Accordingly, *even if* the certification and/or injunction orders vested the court in New York with the sole authority to resolve the claims of the class, they *do not* grant that court sole authority over the *separately awarded* attorneys' fees. *Cty. Of Morris v. Nationalist Movement*, 273 F.3d 527, 534 (3d Cir. 2001); *LaRouche v. Kezer*, 20 F.3d 68, 75 (2d Cir. 1994).

VIII. Joan Horan's Final Arbitration Award is Not Subject to the Class Certification or the Preliminary Injunction Orders

The class certification order, by its express terms, excludes all individuals who are or have ever been a member of the Advisory Committee. *Ferguson*, 2021 WL 3667979, at *2. Appellee Joan Horan served on the Advisory Committee until December 6, 2010. *Canfield*, 2020 WL 3960929, at *3. Therefore, *even if* the certification of the class barred the confirmation of awards, it would not apply to Horan.

CONCLUSION

The district court's judgments should be affirmed.

Respectfully submitted,

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CERTIFICATE OF VIRUS FREE

The undersigned counsel certifies under Eighth Circuit Rule 28A(h)(2) that the Appellees' Brief has been scanned for computer viruses and that the document is virus free.

Dated: April 26, 2022

/s/ *Andrew Schermerhorn*
Andrew Schermerhorn

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f), this motion contains 13,000 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: April 26, 2022

/s/ *Andrew Schermerhorn*
Andrew Schermerhorn

CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2022, a true and correct copy of the foregoing Motion was served with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Dated: April 26, 2022

/s/ *Andrew Schermerhorn*
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