

21-3066(L)

22-275(CON)

In the United States Court of Appeals For the Second Circuit

MICHAEL L. FERGUSON, MYRL C. JEFFCOAT, DEBORAH SMITH, on behalf of THE DST SYSTEMS, INC. 401(K) PROFIT SHARING PLAN, *Plaintiffs-Appellees*,

v.

JAMES DUCHARME, *Intervenor-Plaintiff-Appellant*,

ROBERT CANFIELD, BONNIE KARTZ, LATRECIA ONUNKWOR, DIANA WEAVER, DAVID OSTERMEYER, MARK MENDON, JILL PEHLMAN, STEPHANIE OSTRANDER, *individually and as representatives of a class of similarly situated persons*,
Intervenors-Appellants,

(FOR CONTINUATION OF CAPTION SEE INSIDE COVER)

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (CIV. NO. 17-6685)
(THE HONORABLE ANDREW L. CARTER, JR., J.)

REPLY BRIEF FOR INTERVENOR-PLAINTIFF-APPELLANT AND INTERVENORS-APPELLANTS

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v.

DST SYSTEMS, INC., THE ADVISORY COMMITTEE OF THE DST SYSTEMS, INC.
401(K) PROFIT SHARING PLAN, THE COMPENSATION COMMITTEE OF THE BOARD
OF DIRECTORS OF DST SYSTEMS, INC.,

Defendants-Cross-Claimants-Cross-Defendants-Appellees,

RUANE CUNNIFF & GOLDFARB INC., GEORGE L. ARGYROS, TIM BAHR,
JEROME H. BAILEY, LYNN DORSEY BLEIL, LOWELL L. BRYAN, NED BURKE,
JOHN W. CLARK, MICHAEL G. FITT, GARY D. FORSEE, STEVEN GEBBEN,
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BETH SWEETMAN, DOUGLAS TAPP, RANDALL YOUNG,

Defendants-Cross-Defendants-Cross-Claimants.

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INTRODUCTION

The injunction, which bars the orderly resolution of arbitrations pending in Missouri, not only violates the Federal Arbitration Act (FAA), which “embodies a national policy favoring arbitration[,]” *ExxonMobil Oil Corp. v. TIG Ins. Co.*, 44 F.4th 163, 175 (2d Cir. 2022) (quoting *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 179 (2d Cir. 2021) (emphasis added), it is also an egregious abuse of power that operates in derogation of the deeply rooted common law concepts of comity and preclusion.

Five years ago, in *Ducharme v. DST Systems, Inc.*, No. 4:17-CV-00022-BCW, 2017 WL 7795123 (W.D. Mo. June 23, 2017), DST Systems, Inc. sought and obtained a *final judgment* from the U.S. District Court for the Western District of Missouri (the “Western District”) declaring that claims against DST for breach of fiduciary duty under ERISA § 502(a)(2) fall within the scope of DST’s Arbitration Program.¹ *Id.* And yet, though the court below expressed that it “d[id] not mean to disrespect” the Western District’s “authority and jurisdiction,” it certified a “mandatory” class and entered an injunction restraining Appellants on the theory that their claims against DST are “*not arbitrable.*” SPA69-70; *see also* JA812-13.²

¹ The “Arbitration Program” refers to both the “Arbitration Program and Agreement,” JA462-66, and Section 9.11 of the Plan. JA475.

² *Ducharme* was the first case to address the application of the Arbitration Program to the claims against DST. In *Cooper v. Ruane Cunniff & Goldfarb Inc.*, Case No.

In like manner, despite the Western District having *previously decided*—in a valid and final judgment—that the doctrines of waiver and judicial estoppel bar DST from escaping the Missouri arbitrations, *Hursh v. DST Sys., Inc.*, No. 4:21-MC-021-9026, 2021 WL 4526849, *5-10 (W.D. Mo. Oct. 4, 2021), the court below entered an injunction on the basis that DST was *not* estopped from avoiding the Missouri arbitrations. JA814.

What is worse, the court below did not even address the Western District’s *prior* judgments; it simply ignored them. But while courts of coordinate authority are free to disagree, no concept of judicial authority grants the Southern District *carte blanche* to override or disregard the prior judgments of the Western District. Indeed, “once a court has decided the arbitrability of a claim, subsequent courts [are] bound by that decision[.]” *Salerno Med. Assocs., LLP v. Riverside Med. Mgmt., LLC*, 542 F. Supp. 3d 268, 277 (D.N.J. 2021). “The idea is straightforward: Once a court has decided an issue, it is ‘forever settled as between the parties.’ ” *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302 (2015) (quotation omitted).

Given the court’s error, Appellees fixate on a series of baseless and vitriolic accusations designed to obscure the district court’s clear error and to distract from

1:16-cv-01900 (S.D.N.Y.), the claims against DST were dismissed *ab initio*. *Cooper*, ECF No. 41.

their own chicanery. For example, DST accuses the Claimants of pursuing “an extraordinary campaign designed to frustrate the district’s orders and undermine its jurisdiction.” DST Br. at 1. But even a cursory examination of the facts show that the only collateral attack here is the one launched by DST in the court below against the Western District.

In every relevant respect, the Southern District’s orders contradict the earlier judgments rendered by the Western District. Well before the court below declared Claimants’ ERISA claims “not arbitrable” (SPA69), the Western District had already held *the opposite* in *Ducharme*. And well before the court below certified a “mandatory” class, the Western District had already begun to *confirm* final arbitration awards. *See Hursh*, 2021 WL 4526849, at *2 (“The Western District of Missouri confirmed at least five of the arbitration awards earlier this year. In at least one of those cases, DST expressly stated just months ago that it ‘did not oppose the confirmation of the Arbitration Award’”) (internal citations omitted). And well before the court below brushed aside the doctrine of judicial estoppel as “not relevant here” (SPA70), the Western District had already held that DST *was* judicially estopped. *Id.* at *5-10.

And of course, it was DST, *not the Claimants*, who sought and procured an order from the Western District declaring that claims for breach of fiduciary duty against DST are arbitrable. Then, to ensure maximal compliance with its Arbitration

Program, DST sent letters to all Plan Participants advising that they could “initiate an individual arbitration proceeding” relating to the “profit sharing account managed by Ruane.” D. Ct. Dkt. No. 172-12.

Then, over the course of more than three years, DST voluntarily participated in more than 500 arbitrations, including more than 345 merits hearings, at which DST presented evidence, examined witnesses, and filed pre- and post-hearing briefing, including extensive appellate briefs. Not only that, but DST also voluntarily *settled* with more than a dozen Claimants. JA381, JA385-86.³ And critically, over the years-long course of the arbitrations, DST *never* sought an order from the Western District staying the arbitrations or declaring that the judgment in *Ducharme*—*which DST procured*—was incorrect.

Meanwhile, as for the class certification order, though Appellees treat it as some sort of non-appealable “pseudo injunction” against the arbitrations, it does not come close to restraining the arbitrations that were *already pending* (or *completed*) in reliance upon the judgment in *Ducharme*.⁴ For starters, in the order itself, there is

³ In addition, 474 Claimants have settled with Ruane. JA385-91. The proceeds have been transferred to the trustee of the Plan and deposited into the Claimants’ individual accounts.

⁴ In *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985), this Court declared that “[a]lthough Rule 65 does not apply to injunctions issued under the All-Writs Act against non-parties whose actions would impair the court’s jurisdiction, we do not abandon the requirements that an injunction be specific and definite enough to apprise those within its scope of the conduct that is being proscribed.”

no demand or instruction directed to the Claimants, nor are the words “stay,” or “stop,” or “halt” or “hold” even uttered. What is more, the court’s own prior and subsequent orders belie the assertion that by continuing the arbitrations in their ordinary course, the Claimants were acting in “frustration” of the certification order.

For example, two weeks *after* certification, DST moved for a TRO, arguing that by continuing to prosecute the arbitrations, the Claimants had “defied” the certification order. JA726; D. Ct. Dkt. 313 at 3. The district court, however, *denied* the TRO and ordered, instead, that the parties submit briefing while it took up whether to grant an injunction. JA318.

The certification order is further muddled by the court’s rejection of the injunctive relief in the proposed settlement. SPA57-58. In the certification order, the court held that it could *not* enjoin non-parties from bringing their claims since that would circumvent their “independent and unqualified right to sue and seek redress for ERISA violations. . .” SPA58. And though the court was specifically referencing the Secretary of Labor, its rationale applies equally to the Claimants, who are also provided an independent and unqualified right seek redress under ERISA § 502(a)(2).

What is more, the Secretary’s action, which the court has allowed to continue, severely undercuts the rationale for certifying a “mandatory” class in the first place. The court declared that certification under Rule 23(b)(1) was appropriate since

allowing multiple actions “would threaten to create ‘incompatible standards of conduct’ for the Defendants.” SPA56. But if the court is willing (or, we think, required) to permit the Secretary’s suit, on what basis could the court treat the Claimants any different?⁵ Courts are required to *abandon* their hostility to arbitration. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). And yet, by singling out the arbitrations for injunction, the district court laid bare its antipathy to arbitration.

Here again, we submit not only that the class certification is unlawful, but that Claimants’ conduct after its entry was *not* “in frustration” of it.⁶ Indeed, in the Western District, where the Claimants are alleged to have defied the class order, the court declared that since the arbitration were initiated (and many *resolved*) before the class was certified, the order did *not* apply. 2021 WL 4526849, at *10. Meanwhile, the Eighth Circuit declared that “*without a clear statement* by the district

⁵ The order also excludes individuals who served as a fiduciary from March 2010 to August 2016. JA716-17. This includes even those whose tenures as a fiduciary fall well outside the period during which the Plan concentrated assets in the stock of Valeant Pharmaceuticals.

⁶ Additionally, the AAA’s Employment Arbitration Rules, which are incorporated by DST’s Arbitration Program, JA462, expressly state that an arbitration will be suspended *only if*, within 30 days after the arbitration’s commencement, a stay is obtained from the court. *See* EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 1 (Rev. 2017), available at <https://www.adr.org/sites/default/files/Employment-Rules-Web.pdf>. Here, even if the certification order could be construed as a “stay” (it cannot), it is too late for the arbitrations in Missouri since they are all well beyond 30 days after their commencement.

court in the Southern District of New York, [it did] not construe that court’s order as enjoining the parties in this case. . . .” See *Theresa Hursh v. DST Systems, Inc.*, 21-3554, Order (8th Cir. Jan. 3. 2022) (emphasis added).⁷

Finally, to set the record straight, on the date the court entered the injunction, the Claimants *immediately stopped* the arbitrations, including a hearing that was then underway, and have filed *no* new actions since. That is not to say that Claimants agree that the injunction is valid, which it is not, but it is to say that Claimants, unlike the Appellees, have honored *all* court orders pending appeal.

But it is not simply that Appellees have misrepresented the facts; rather, their accusations against the Claimants—that Claimants have attempted to “frustrate the district court’s orders and undermine its jurisdiction”—are a classic case of Freudian projection. The Appellees’ pursuit of a “mandatory” class is the culmination of their concerted effort to undermine the Western District’s *earlier judgments* and to avoid the very arbitrations that *DST compelled*. *Bostick*, 2021 WL 6050907, at *3, *12. The Western District, recognizing the duplicitous scheme, called it a “crass manipulation of the legal process” that “fully warrants invocation of the doctrine of judicial estoppel.” *Hursh*, 2021 WL 4526849, at *9. Indeed, the Appellees’

⁷ These decisions by the courts in Missouri are evidence, too, of the injunctions’ improper and reversible vagueness.

campaign, which is clearly designed to undue the arbitrations that DST has lost, has been roundly rejected by *every* authority except Judge Carter.

Dozens of arbitrators, many former judges among them, have condemned the *Ferguson* class action as an improper attack on the *earlier judgment* reached in *Ducharme*. Justice Robert P. Young, Jr., a former Chief Justice of the Michigan Supreme Court, called the class action an “end run around” the express terms of DST’s Arbitration Program, and charitably stated that DST’s support of a class action was “for strategic rather than meritorious reasons.” SA254. Others called DST’s procedural machinations “disingenuous at best” and still others expressed that DST “should be judicially estopped.” JA1112; JA1114; SA254; SA171-72; SA186-87.

One panel observed that “[f]rom [its] vantage, it appears that the Arbitration provision was asserted by DST to be indestructible until the moment that it became advantageous to DST to grapple with the claims as a class action rather than within individual arbitrations.” JA1106. Indeed, it was only when DST began to *lose* the arbitrations that it reversed course and began to assert that its own class action waiver was *unenforceable*.

The Western District put it best:

DST was not dragged into arbitration against its will. It initiated these arbitrations voluntarily, whether its consent was manifested in the terms of the original arbitration agreement found valid in *DuCharme* or by inviting the Arbitration Claimants to arbitrate and then participating

fully in the arbitrations. The only thing that would be unfair would be to let DST escape the consequences of the arbitration proceedings in which it voluntarily participated because they did not turn out as DST hoped they would.

Hursh, 2021 WL 4526849, at *10.

Accordingly, we submit that by frustrating the Western District's earlier judgments, and by undermining the Western District's jurisdiction over the arbitrations, the court below grievously erred.

ARGUMENT

I. The District Court Exceeded its Authority Under the All-Writs Act and Violated the Rules of Comity, Estoppel and Preclusion

At the outset, the Appellees argue that Claimants have waived their right to challenge the injunction under Rule 65. *See e.g.*, Pl. Br. 12 n. 2. However, an injunction entered for the purpose of preventing third parties from “thwarting the court’s ability to reach and resolve the merits of the federal suit before it,” like that which is challenged here, *cannot* be predicated on Rule 65. *Baldwin*, 770 F.2d at 338–39. Such an injunction, if permitted at all, must be predicated on the All-Writs Act. *Id.*

A. Neither the All-Writs Act nor the FAA Authorizes the District Court’s Anti-Arbitration Injunction

In the Appellees’ view, the All-Writs Act transcends all other factors and supplants the rules of preclusion and finality. Indeed, according to the Appellees, the All-Writs Act authorizes the use of appellate-like authority over the prior *judgments*

of a coordinate court of equal authority. In the Appellees' view, so long as the Southern District thought it necessary to protect its *own* ability to reach and resolve the merits of a class action certified more than four years after the judgment in *Ducharme*, it could *reject* the Western District's existing judgments, *ignore* the Western District's prior authority, and *erase* the Western District's earlier decisions. Meaning no disrespect, we disagree.⁸

First, the All-Writs Act provides that courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). However, as the Seventh Circuit recently observed, “[m]any decisions by the Supreme Court over the last 30 years tell us that ‘jurisdiction’ means adjudicatory competence,” *not* the “many procedural or substantive rules that determine how cases are resolved.” *Adkins v. Nestle Purina PetCare Co.*, 779 F.3d 481, 484 (7th Cir. 2015) (collecting cases). A court has “jurisdiction” when it has been designated by statute as an appropriate forum for a dispute of a given sort; all other rules are *non-jurisdictional*. *Id.*

⁸ DST repeatedly criticizes our reliance upon cases interpreting the Anti-Injunction Act, going so far as to claim that such cases have “no application here.” DST Br. 3-4, 27, 29. However, because “the ‘aid of jurisdiction’ language in the All-Writs Act parallels that of the Anti-Injunction Act, cases interpreting the Anti-Injunction Act are “helpful in understanding the meaning of the All-Writs Act.” *Baldwin*, 770 F.2d at 335. *See also In re Jimmy John's Overtime Litig.*, 877 F.3d 756, 763 (7th Cir. 2017) (citing *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 330 (3d Cir. 2007); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1098-99 (9th Cir. 2008)).

In this case, no one doubts that the district court has subject-matter jurisdiction over the *Ferguson* plaintiffs' claims, and no one seriously contends that the judgments in Missouri imperil the Southern District's ability to adjudicate those claims. In fact, there are now more than 180 judgments and the Southern District's adjudicatory competence over the *Ferguson* plaintiffs' claims remains intact.

Nor does the certification of a class action justify the injunction. Rule 23 is a non-jurisdictional rule of *procedure* and "creates no substantive rights or remedies enforceable in federal court." *Baldwin*, 770 F.2d at 335. *See also Adkins*, 779 F.3d at 484 (stating that while earlier judgments by individual class members may reduce the scope of a class, they do *not* justify an injunction).

And while this Court approved an "in aid of" injunction in the narrow context of a complex, multi-district class action that was "so far advanced that it was the virtual equivalent of a res over which the district judge required full control," *Baldwin*, 770 F.2d at 335, the injunction there applied only to the filing of *new* claims; it did not purport to enjoin the completion of cases *already pending*. *Baldwin*, 770 F.2d. at 334. *See also Hursh*, 2021 WL 4526849, at *10 (observing that an order that "interferes with pending proceedings may be improper"). Even still, the Court later observed that in *Baldwin*, "[it] relied on the exceptional circumstances of that case—the case's extraordinary complexity and multidistrict nature, the fact that 18 of the 26 defendants had already settled, and the fact that

there was a ‘substantially significant prospect that [the remaining] 8 defendants [would] settle in the reasonably near future.’ ” *United States v. Schurkman*, 728 F.3d 129, 137–38 (2d Cir. 2013) (quoting *Baldwin*, 770 F.2d at 338).

Here, the *Ferguson* case is still in its infancy. Even after four years, there is no trial date, “[n]o depositions have occurred, and all remaining fact discovery is ongoing.” D. Ct. Dkt. No. 408. Meanwhile, the arbitrations are beyond advanced; hundreds have been *completed* and hundreds of awards have been *confirmed*. And to add to that, the Claimants have also entered a completed settlement with Ruane. Thus, to the extent there is a virtual equivalent of a *res*, it resides within the jurisdiction of the Western District.

In any event, outside of *Baldwin*, this Court has repeatedly held that complex litigation—and even class actions—do *not* justify the issuance of an “in aid of” injunction. *Wyly v. Weiss*, 697 F.3d 131, 139 (2d Cir. 2012) (“We have never held that a district court’s involvement in complex litigation justifies, without more, issuance of an injunction ‘in aid of’ the court’s jurisdiction, and we decline to create such a rule here.”); *cf. Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 428 n. 7 (2d Cir. 2004) (“We reject as unfounded defendants’ contention that *Baldwin–United* created a presumption that multidistrict class actions should be regarded as in rem actions.”).

In fact, *Baldwin* and the other cases relied upon by the Appellees confirm that they are simply barking up the wrong tree when they try defending the injunction on the basis of the All-Writs Act. In *Baldwin*, for example, the Court explained that the primary purpose of an All-Writs injunction is “to prevent relitigation of an existing federal judgment.” 770 F.2d at 335. *See also Nat’l Equip. Rental, Ltd. v. Fowler*, 287 F.2d 43, 45 (2d Cir. 1961) (observing that by enjoining prosecution of a *later-filed* action, the district court “was protecting the jurisdiction his court had obtained some five months prior to commencement of that second action”). But here, DST has turned that rationale on its head. The judgments in need of protection are those that were *previously entered* by the Western District. Indeed, the principles of comity and preclusion dictate that the Western District’s *earlier judgments* be respected and left alone.

In *Covell v. Heyman*, 111 U.S. 176, 182 (1884), for example, the Supreme Court stated that “[t]he forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord[.]” It is for this reason that federal-federal injunctions “appear to be rare aves.” *Negrete*, 523 F.3d at 1099; *see also Jimmy John’s*, 877 F.3d at 762 (stating that “[i]t is particularly rare for a federal court to enjoin litigation in another federal

court.”). And this, we think, should be especially true of an injunction that so openly and defiantly undermines the principle of comity. *See Schurkman*, 728 F.3d at 138 n. 4 (holding that the district court erred by issuing an All-Writs injunction that, “if permitted to stand, would seriously undercut principles of comity.”).

Meanwhile, in *Rich v. Spartis*, 516 F.3d 75 (2d Cir. 2008), not only did the injunction target an arbitration that was filed *after* the class action, but it was targeted only at those class members who had failed to *opt out* of a securities class action. But here, again, the Claimants commenced their arbitrations *years before* the plaintiffs filed a class action complaint. And, despite the pendency of their already-existing arbitrations, the court below refused Claimants’ request to opt out.

The Appellees’ reliance upon *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210 (2d Cir. 2014), is similarly flawed. In *Goldman*, the Court observed that since the FAA “does not restrict the venue for an action to enjoin an arbitration,” the Southern District had authority to enjoin an arbitration pending elsewhere. *Id.* at 213-14. However, absent from *Goldman* are the peculiar circumstances present here. Specifically, *Goldman’s* commentary on venue did not account for the principle of comity that must be applied where venue *has already been established*. In this case, to avoid interfering with the orderly process of law *already underway in Missouri*, comity dictates that the *only* possible venue for an action to enjoin the Missouri arbitrations is the Western District. Indeed, were it

otherwise, Mr. Ducharme and the Claimants would be faced with conflicting and irreconcilable rulings from coordinate courts of equal authority.

Moreover, if *Goldman's* reasoning was extended even to cases in which a coordinate court of equal dignity had *already* obtained and exercised jurisdiction under 9 U.S.C. § 4, litigants across the county unhappy with the results of their arbitration would be emboldened to shop around the federal judiciary until they found a court willing (unwittingly or not) to circumvent an earlier order compelling arbitration. As we stated before, under those circumstances, the rules of finality, comity, waiver, and preclusion—and the fundamental concept of fairness—would all become a solemn mockery. Opening Br. 28.

B. The All-Writs Act Does Not Authorize an Anti-Suit Injunction that Violates or Interferes with an Existing Federal Judgment

As alluded to above, the doctrine of collateral estoppel, which the Supreme Court describes as “an extremely important principle in our adversary system of justice,” precludes relitigation of an issue that was litigated and determined by a valid and final judgment. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980). The rule of preclusion is straightforward: “Once a court has decided an issue, it is forever settled as between the parties.” *Id.* (internal quotation omitted).

In this case, the rule of preclusion dictates that, as for those who were employed in Missouri, the arbitrability of their claims against DST is forever settled.

Indeed, the judgment in *Ducharme*, which not appealed, has been repeatedly ratified by the Western District.⁹

And earlier precedent from the Eighth Circuit reinforces that *Ducharme* was correctly decided. In *Pilger v. Sweeney*, 725 F.3d 922 (8th Cir. 2013), for example, the Eighth Circuit recognized that “when a defined-contribution plan is at issue, a § 1132(a)(2) plaintiff may recover individualized relief.” *Id.* at 926 fn. 4. And in *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), the Eighth Circuit “f[ou]nd nothing ... demonstrating Congress intended to prohibit arbitration of ERISA claims.” *Id.* at 478.

And, of course, considering the unusual circumstances this case presents, the doctrine of judicial estoppel also fits the controversy. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). In fact, the procedural machinations employed by the Appellees are so brazen and perverse that there are but few comparisons and a dearth of decisions that address the kind of crass manipulation committed here.¹⁰ Needless

⁹ *See Hursh*, 2021 WL 4526849; *Eisenberger v. DST Sys., Inc.*, No. 4:21-CV-09022, 2021 WL 4710820 (W.D. Mo. Oct. 8, 2021); *Sutton v. DST Sys., Inc.*, No. 4:21-00705-NKL, 2021 WL 4896545 (W.D. Mo. Oct. 20, 2021); *Campfield v. DST Sys., Inc.*, No. 4:21-09160, 2021 WL 5435245 (W.D. Mo. Nov. 19, 2021); *Carroll v. DST Sys., Inc.*, No. 4:21-09090-NKL, 2021 WL 5435249 (W.D. Mo. Nov. 19, 2021); *Newtal v. DST Sys., Inc.*, No. 4:21-9185-NKL, 2021 WL 6050933 (W.D. Mo. Dec. 21, 2021); *Bostick v. DST Sys., Inc.*, No. 4:21-09133-NKL, 2021 WL 6050907 (W.D. Mo. Dec. 21, 2021).

¹⁰ In the only case we have found that resembles the scheme employed by the parties here, *DoorDash, Inc.*, sought an order from the U.S. District Court for Northern District of California staying thousands of arbitrations that, in an earlier case, it had

to say, it “constitutes an insult to the integrity of the judicial system and fully warrants invocation of the doctrine of judicial estoppel.” *Hursh*, 2021 WL 4526849, at *9 (quoting *Data Mountain Sols., Inc. v. Giordano*, 680 F. Supp. 2d 110, 128 (D.D.C. 2010)).

The court below, however, refused to apply these fundamental principles. What is more, rather than offer *any* justification for why the Western District’s *earlier judgments* should not continue to apply to the Missouri arbitrations, the court below simply ignored them. Instead, it declared that its unprecedented interference with the orderly process of law in Missouri was compelled by this Court’s decision in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021). JA-715-16; JA-814. In so holding, the court badly misread *Cooper*.

II. The *Cooper* Decision Does Not Necessitate or Render Appropriate the District Court’s Injunction

A. The *Cooper* Decision is Inapposite Here and Inapplicable to the Missouri Arbitrations

In *Cooper*, this Court was *not* called upon to decide the consequences of an earlier judgment, nor was it called upon to consider the consequences of then-existing arbitrations in which the parties plainly *agreed* to arbitrate. Nor, for that

induced by invoking the class action waiver in its employment arbitration agreement. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020). In that case, the district court excoriated DoorDash for its hypocrisy and flatly rebuffed its request. *Id.* at 1068.

matter, was it called upon to consider the doctrines of waiver and estoppel or the significance of the Plan, which *specifically mandates* arbitration of “any and all claims arising out of or related to the Plan.” Rather, the Court in *Cooper* was simply called upon to decide whether, in the context of an ordinary employment arbitration agreement, and in the absence of any terms specifically mandating arbitration of an ERISA claim (since the Court was not provided evidence of the Plan’s supplementary language), a non-signatory (i.e., Ruane Cunniff & Goldfarb) could *compel* arbitration of Mr. Cooper’s claim for breach of fiduciary duty.

None of these circumstances are present here. Here, the Arbitration Program is no ordinary employment agreement; the Plan *explicitly states* that “any and all claims arising out of or related to the Plan...are subject to mandatory arbitration and class action waiver as provided under” DST’s various arbitration agreements. JA475 (§ 9.11). Further, both DST and Claimants *actually submitted* their claims, *voluntarily*, to the AAA; an unequivocal post-dispute agreement that, by itself, is enforceable under the FAA. Opening Br. 30-31. And, of course, unlike Ruane, DST is both a signatory of *all three agreements* and the Claimants’ *employer*.

Cooper is, to put it simply, not relevant to the issues that were before the court below. In fact, even beyond the obvious and material distinctions above, *Cooper* is irrelevant because it says *nothing* about the unusual circumstances this case presents. Once again, the court below was *not* called upon to decide whether to *compel*

arbitration. Nor was the court even asked to decide whether claims against DST for breach of fiduciary duty under ERISA § 502(a)(2) fall within the scope of DST's Arbitration Program. Thanks to DST's dogged pursuit of arbitration in Missouri, those questions were *already answered* by the Western District.

And while the Appellees dwell upon irrelevant caselaw from outside the Eighth Circuit, the Arbitration Program expressly requires 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[.]” JA463. Thus, since the Claimants were each employed by DST in Missouri, it is the federal substantive law of the *Western District* that applies to the Missouri arbitrations.¹¹

B. Even if *Cooper* Were Relevant, it Does Not Support the District Court’s Class Certification or Injunction Orders

Since the *Cooper* decision, the Supreme Court has cast serious doubt on its continued viability. In *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1914 (2022), the Supreme Court reiterated that rules requiring that “plaintiffs [] unite a massive number of claims in a single-package suit” are “incompatible with the FAA.” *Id.* at 1924. Specifically, the Court declared that when a “representative”

¹¹ That said, we do not believe that the actual law in the Second Circuit (as distinct from the district court’s misapprehension of that law) is any different. Opening Br. 29-39.

claim is predicated on injuries sustained by other employees, the FAA “licenses contracting parties to depart from standard rules [of civil procedure] in favor of individualized arbitration procedures of their own design,” and that this “is true even if bifurcated proceedings are an inevitable result.” *Id.* at 1923 (quotation omitted). Separately, the Supreme Court also explained that the phrase “arising out of,” in the context of the FAA, refers to a “but for” causal relationship. *Id.* at 1919, fn. 4. Both holdings contradict the Panel majority’s reasoning in *Cooper*.

In *Cooper*, the panel majority relied upon an earlier court-made rule, established in *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), requiring that plaintiffs serve as representatives of *all* other plan participants. *Cooper*, 990 F.3d at 184. But *Viking* makes plain that the *Coan* rule—to the extent it has been construed as requiring a mandatory class—is preempted.

The Court in *Cooper* also reasoned that a “but for” causal relationship was insufficient to establish that Cooper’s claims arise out of or relate to his employment. *Id.* But *Viking* makes plain that the Arbitration Program, when considered in its entirety, clearly embraces claims for breach of fiduciary duty since the Plan specifically states that “[u]nless 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” DST’s various arbitration agreements. JA475 (§ 9.11)

In other words, the Court in *Cooper* relied upon two rationales, both of which were overruled in *Viking*.

Moreover, even in *Cooper*, the Court explained that the “procedural safeguards” conceived in *Coan* “would not necessarily justify, on its own, a countertextual reading of an arbitration agreement that,” as in this case, JA475 (§ 9.11), “explicitly applied to a given circumstance.” 990 F.3d at 185. And as Judge Sullivan observed, “[i]t is also not at all clear that *Coan* would require [that plaintiffs] join other parties or bring [their] claims on a class-wide basis....” *Cooper*, 990 F.3d at 188 (Sullivan, J., *dissenting*). While the Court in *Coan* explained that plaintiffs who comply with Rule 23 “‘will likely be proceeding in a ‘representative capacity’ properly for purposes of section 502(a)(2),’ [the Court] also explicitly declined to ‘delineate minimum procedural safeguards that section 502(a)(2) requires in all cases.’” *Id.* (quoting *Coan*, 457 F.3d at 261). Indeed, *Coan* noted that when Congress enacted ERISA, it deliberately chose *not* to require class actions.

Thus, even if *Cooper* applied to the Missouri arbitrations (as opposed to the law as interpreted by the Eighth Circuit Court Appeals), it does *not* establish a basis for enjoining the arbitrations.

Finally, as we stated in our Opening Brief, even if the court below concluded that the class waiver provision violated ERISA, it does not follow that the Arbitration Program is invalid. The Program explicitly states that “[i]f a final court decision

(including all appeals) holds this prohibition [on class actions] invalid, ... the court then shall refer the claim to arbitration under the procedures of this Arbitration Program and Agreement for a decision on the merits of the claim.” JA465. Thus, contrary to the plaintiffs’ assertion, class-wide arbitration is not “implied,” it is *explicitly* required.

III. The Arbitrations Do Not Harm the Plaintiffs or the Class

The Appellees baselessly assert that the Claimants are working “irreparable harm on the Plaintiffs and the Class” and that arbitration counsel “hav[e] little concern for [their clients’] individual interests.” These allegations are demonstrably false.

First, as this Court observed in *Beck v. Levering*, 947 F.2d 639 (2d Cir. 1991), concurrent actions by private plaintiffs “ensures some recovery for the Plan[]” in the event that subsequent, representative plaintiffs are “incapable or unwilling” to secure a competent recovery. *Id.* at 642. This is a case in point. While the *Ferguson* action has languished *for years*, the Claimants have recorded *millions* of dollars in awards and judgments behalf the Plan.

And while it is true that no participant may collect more than a total recovery of their individual losses, it does *not* follow that the arbitrations reduce the damages available to *other* class members. *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 in *Ruane, Cunniff & Goldfarb, Inc. v. Payne*, No. 19-cv-11297 (S.D.N.Y. Jan. 24, 2020). 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.” *Payne*, ECF No. 40 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*.”).¹² Instead, should the class survive in some form or another, the court below would simply offset any amounts payable to the Appellants’ *individual accounts* by the amount they have already recovered. *Beck*, 947 F.2d at 642; *see also Hursh*, 2021 WL 4526849, at *11.

¹² DST states that in a recent filing, the Secretary “has recognized...that ERISA fiduciary duty claims involving defined-contribution plans are to be brought in a representative capacity on behalf of the plan as a whole[.]” DST Br. 50 (internal quotation marks omitted). However, *in this case*, the Secretary has repeatedly expressed that he “believes that all participants have the right to pursue private actions under ERISA Section 502(a)(2), including through arbitration.” JA1115.

Indeed, the plaintiffs *admit* that the class action damages will be calculated at the participant level. *See* D. Ct. Dkt. No. 345, p. 4 fn. 1. This is because, even in a class action, ERISA damages must be determined on an individual participant basis. *LaFlamme v. Carpenters Loc. No. 370 Pension Plan*, 212 F.R.D. 448, 454 (N.D.N.Y. 2003). Thus, under no circumstance would the amounts owing to others in the class be disturbed or lessened by the damages awarded in arbitration.

But, just as DST is guilty of having projected its own duplicitous scheme onto the Claimants, so too have class counsel. By colluding with DST to certify a “mandatory” class and procure an injunction, the plaintiffs have intentionally caused irreparable harm to both the Claimants *and the Class*. Whereas the arbitrations were successful in recovering millions of dollars on behalf of the Plan, the plaintiffs have joined DST in frustrating the arbitrations. What is worse, the next step for class counsel and DST will be to contend that the *already final* awards should be nullified based on the same (erroneous) reasoning they relied upon in seeking a mandatory class. This, of course, would not only harm the Claimants by causing the further delay of their recovery (assuming the plaintiffs even prevail), but it would also violate their independent and unqualified right, as established in *Ducharme*, to sue and seek redress for ERISA violations that caused damage in their *individual* accounts.

Finally, as a point of emphasis, the effect of the injunction is to cause the Claimants, including those still awaiting a hearing on the merits, the denial of their right to a *timely* recovery of the losses in their retirement savings accounts. For those participants who are now at or near retirement, this harm is particularly great. In fact, while the *Ferguson* case has languished for years, Plan participants, including several Claimants, *have died* while awaiting the recovery of their lost retirement savings.

Second, the plaintiffs' depiction of the arbitrations' "varying results" is completely fictitious. Pl. Br. 17 n. 5. As of September 21, 2021, hearings had been completed in 347 arbitrations. JA772.5. Post-hearing awards had been issued in 294 arbitrations, and the Claimants have prevailed in 225 of those. However, as for those awards that were entered in favor of DST, the first ten to be reviewed through the parties' appellate arbitration process *were reversed* (the remaining 59 are still pending due to the injunction). In other words, in terms of final awards, the Claimants have won them *all*.

Moreover, the amounts won in arbitration, though sometimes less than the greater of the four alternative amounts sought by the Claimants, *far exceed* the damage amounts proffered by the plaintiffs. JA382-83. If extrapolated to the entire Plan, the Claimants are winning at a rate equivalent to approximately \$261,000,000 (*plus* separate attorneys' fees). JA383. Meanwhile, according to the calculations

conducted by the plaintiffs' expert, the total Plan damages amount to between \$86 million and \$97 million. D. Ct. Dkt. 265-1, at 16.¹³ And, of course, the plaintiffs' ambition is to settle on behalf of the *entire plan* for only \$79 million, from which their attorneys will request that \$19,750,000 be diverted to them. *Id.* at 13, 17.

In short, the plaintiffs have it backwards; *they* are the ones acting against the interests of the class.

IV. The District Court Erred by Purporting to Enjoin the Confirmations

In *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), the Supreme Court held that confirmation of an arbitration award presents “different claims” and “turn[s] on different law” than the underlying dispute. *Id.* at 1318. Indeed, “[t]he 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). And yet, the court below enjoined the confirmations on the assumption that they asserted the same claims as the proposed class. SPA68-69. That is clearly wrong after *Badgerow*.

Finally, as we stated in our Opening Brief, “a valid and final award by arbitration has the same effects under the rules of *res judicata* ... as a judgment of a

¹³ The Secretary's loss estimate is more than \$400 million. *Walsh v. Ruane, Cunniff & Goldbarb, Inc., et al.*, No. 1:19-cv-9302-ALC-BCM, ECF No. 161, p. 9 (S.D.N.Y.).

court.” *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 16 (2001) (Ginsburg, J., concurring). Indeed, “[i]f any party dissatisfied with the award were left free to pursue independent judicial proceedings on the same claim or defenses, arbitration would be substantially worthless.” *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 832 (10th Cir. 2005) (quotation omitted).

Here, by purporting to enjoin even the confirmation of final awards, the court below not only erred as a matter of law, but it also erroneously widened its disregard for the deeply rooted common law concepts of comity and preclusion and obliterated the virtues—and the bargained-for advantages—of arbitration.

V. This Court Has Jurisdiction Over the Class Certification Order and the *Canfield and Mendon* Plaintiffs’ Appeal

DST’s crabbed view of this Court’s jurisdiction to review the injunction ignores hornbook law. “Review of a preliminary injunction is not confined to the act of granting the injunction, but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of the bill, and, if so, to directing a final decree dismissing it.” *Munaf v. Geren*, 553 U.S. 674, 691 (2008) (cleaned up). Thus, as this Court has repeatedly held, “where our jurisdiction is properly founded upon the district court’s ruling on a preliminary injunction under 28 U.S.C. § 1292(a)(1), our review extends to all matters inextricably bound up with the preliminary injunction.” *Lamar Advert. of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365, 371 (2d Cir. 2004) (cleaned up).

This principle fully applies where, as here, the injunction is intertwined with the issue of class certification. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 482 (2d Cir. 1995). The district court’s injunction was predicated entirely on the certification order; accordingly, review of the class certification is necessary to ensure meaningful review of the injunction.

Finally, DST baselessly contends that the *Canfield* and *Mendon* plaintiffs are not proper parties to this appeal because they did not oppose the preliminary injunction motion. DST’s proposed order to show cause would have directed “all members of [the class], including the Arbitration Claimants” to show cause why they not should be enjoined (JA726-27), but the district court declined to sign it. Instead, the court drafted its own order, limited to just “the Arbitration Claimants.” (JA772.) Nevertheless, the court proceeded to issue an injunction against every absent class member, without notice or an opportunity to heard. DST’s attempt to turn this flagrant due process violation into a jurisdictional hurdle falls flat. It is settled that a non-party has appellate standing to challenge an injunction that purports to bind it regardless of whether the non-party “intervened below.” *NML Cap., Ltd. v. Republic of Argentina*, 727 F.3d 230, 239 (2d Cir. 2013). The *Canfield* and *Mendon* plaintiffs therefore have standing to appeal.

CONCLUSION

The district court’s injunction and certification orders should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(B) because it contains 6,978 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief 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 brief has been prepared in a proportionally spaced typeface, Times New Roman 14-point font.

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