21-3066(L)
22-275(Con)

In the
United States Court of Appeals
For the Second Circuit

Docket No.: 21-3066(L), 22-275(Con)

JAMES DUCHARME,

Intervenor-Plaintiff-Appellant,

- and -

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

Intervenors-Appellants,

(See inside cover for continuation of caption)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

BRIEF AND SPECIAL APPENDIX FOR INTERVENOR-PLAINTIFF-APPELLANT AND INTERVENORS-APPELLANTS

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- v. -

MICHAEL L. FERGUSON, MYRL C. JEFFCOAT and DEBORAH SMITH, ON BEHALF OF THE DST SYSTEMS, INC. 401(K) PROFIT SHARING PLAN,

Plaintiffs-Appellees,

- v. -

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

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

- and -

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, GREGG WM. GIVENS, KENNETH HAGER, CHARLES E. HALDEMAN, JR., LAWRENCE M. HLGBY, JOAN HORAN, STEPHEN HOOLEY, ROBERT T. JACKSON, GERARD M. LAVIN, BRENT L. LAW, SAMEL G. LISS, THOMAS MCDONNELL, JUDE C. METCALFE, TRAVIS E. REED, M. JEANNINE STRANDJORD, BETH SWEETMAN, DOUGLAS TAPP AND RANDALL YOUNG,

Defendants-Cross-Defendants-Cross-Claimants.

RULE 26.1 DISCLOSURE STATEMENT

All of the Intervenors-Appellants are natural persons.

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INTRODUCTION

More than five years ago, when DST first found itself defending a class action in the Western District of Missouri for breach of fiduciary duty under ERISA § 502(a)(2), it invoked the mandatory arbitration and class action waiver provisions contained in both its employee handbook and its employer-sponsored pension plan and asserted that class and collective actions were prohibited. Citing Supreme Court precedent underscoring the liberal federal policy favoring arbitration and declaring it "well settled" that claims for breach of fiduciary duty under ERISA "are properly arbitrable by agreement," DST insisted that since its arbitration and class waiver agreements explicitly apply to "any and all claims arising out of or related to the Plan," all plan participants wishing to recover from DST had to bring their claims in arbitration for the losses sustained in their *individual* plan accounts.

Indeed, in *Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 120, 122 (2d Cir. 1991), this Court held that "ERISA's text and legislative history do not support a conclusion that Congress intended to preclude arbitration of claims brought pursuant to it," and that "statutory claims arising under ERISA may be the subject of compulsory arbitration." And a long and uninterrupted line of decisions from every other circuit to consider the issue also recognizes that claims arising under ERISA are properly arbitrable by agreement. *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); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988).

And these are by no means the sole authority on the issue. 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 reiterated that when parties agree to resolve their disputes by "individualized rather class or collective action procedures," the Federal Arbitration Act ("FAA") protects the parties' agreement "pretty absolutely." *Epic*, 138 S.Ct. 1622. The Supreme Court echoed decades of precedent that have firmly established that the FAA *requires* federal courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at 1619. Nor does it matter that a statute expressly provides for collective legal actions; "even a statute's express provision for collective legal actions does not necessarily mean that it precludes individual attempts a conciliation through arbitration." *Id.* (Internal quotation omitted). Rather, courts may only adopt or apply rules that demand collective or representational adjudication of statutory claims where Congress has "clearly and manifestly" displaced the FAA. *Id.* at 1624-28. And in ERISA, Congress has *not* "clearly and manifestly" displaced the FAA. *Bird*, 926 F.2d at 119.

Accordingly, on June 23, 2017, the Western District of Missouri accepted DST's position, held that DST's arbitration and class waiver agreements are "valid" and that claims for breach of fiduciary duty fall within their scope, and dismissed a proposed class action. *Ducharme v. DST Sys., Inc.*, No. 4:17-CV-00022-BCW, 2017 WL 7795123, at *1 (W.D. Mo. June 23, 2017). Thereafter, on June 18, 2018, DST sent letters to all current and former Plan participants representing that "if [they] desire to do so, [they] may initiate an individual arbitration proceeding under the Arbitration Program by submitting a written request to the DST Systems, Inc. Legal Department" in Kansas City, Missouri. D. Ct. Dkt. 172-12.

In reliance on DST's representations, over a period of several years more than 550 plan participants (or their beneficiaries) initiated individual arbitration proceedings against DST's hometown of Kansas City, Missouri. To date, the claims of at least 342 participants have been fully arbitrated with DST's full and voluntary participation; at least 214 claimants have received monetary awards in their favor; and approximately 60 other claimants have completed their hearings but have not received their awards because of the court below's injunction. *Bostick v. DST Sys., Inc.*, No. 4:21-09133-NKL, 2021 WL 6050907, at *4 (W.D. Mo. Dec. 21, 2021). At least 182 awards have been confirmed as judgments in the Western District of Missouri. In other words, the arbitrations worked *exactly* as designed by Congress, as envisioned by the FAA, and as intended by the parties.

Now, however, facing growing losses (the vast majority of arbitration claimants have won) and rapidly mounting financial liability, DST has reversed course and is engaged in a tactical gambit aimed at destroying the rights of those who filed *and won* in arbitration. In a brazen effort to escape the consequences of the arbitrations it fiercely compelled, DST has joined an effort in the court below undertaken by three nominal plaintiffs to certify a mandatory class requiring that *all* claims against DST, *including those that have already been resolved in arbitration*, be absorbed into and *relitigated* in a single non-opt out class. This about-face represents the height of procedural gamesmanship and forum shopping and should have been swiftly and emphatically rebuffed by the court below.

Indeed, the federal district court with jurisdiction over the arbitrations readily concluded that DST was engaged in a "crass manipulation of the legal process" that "fully warrants invocation of the doctrine of judicial estoppel." *Hursh v. DST Sys., Inc.*, No. 4:21-MC-021-9026, 2021 WL 4526849, at *9 (W.D. Mo. Oct. 4, 2021) (quotation omitted).

The court below, however, saw nothing wrong with pulling the rug out from under the current and retired employees who had devoted significant time and resources arbitrating their claims in reliance on DST's representations. In a series of astonishing rulings, the district court declared ERISA claims categorically "not arbitrable," found that DST would be irreparably harmed by continuing to spend

time and money arbitrating such claims, and granted DST's motion for an injunction halting all of the arbitrations in their tracks and prohibiting enforcement of *final awards that have been confirmed as judgments of the Western District of Missouri*. That injunction is an affront to the FAA, ERISA, the doctrine of judicial estoppel, basic notions of comity, and just about every other rule of law that could possibly apply here. It deserves to be swiftly reversed.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over the *Ferguson* plaintiffs' action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1132(e). On November 18, 2021, the district court entered a preliminary injunction, from which appellants timely filed a notice of appeal on December 16, 2021. On February 3, 2022, the district court entered an order modifying and continuing the preliminary injunction, from which appellants timely filed a notice of appeal on February 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) and 9 U.S.C. § 16(a)(2).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by granting DST's motion to preliminarily enjoin hundreds of pending or completed arbitrations that it had successfully compelled.

2. Whether the district court erred by entering an impermissibly vague injunction and failing to comply with Federal Rule of Civil Procedure 65(d), which

states that an injunction shall "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

3. Whether the district court erred by modifying its injunction during a pending appeal from the injunction.

STATEMENT OF THE CASE

In the proceedings below, DST moved for a temporary restraining order and preliminary injunction enjoining and restraining the Appellants from instituting new actions or litigating in arbitration or other proceedings against the DST Defendants based upon matters arising out of or relating to the facts or transactions alleged in the *Ferguson* amended complaint. The district court (Hon. Andrew L. Carter, Jr.) denied the request for a temporary restraining order but, months later, granted the request for a preliminary injunction.

Specifically, on November 18, 2021, the district court ordered "that all members of the Federal Rule of Civil Procedure 23(b)(1) class certified by [the] Court on August 17, 2021, including the Arbitration Claimants, are ENJOINED 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."

On February 3, 2022, the district court modified the injunction by deleting the phrase "facts or transactions alleged in the *Ferguson* amended complaint" and substituting five new paragraphs after soliciting and receiving edits from DST.

I. The Arbitration Agreement

In 2008, DST implemented an "Arbitration Program and Agreement" requiring that disputes covered by the Agreement be resolved in arbitration. JA462-66. The Agreement broadly covers "all legal claims arising out of or relating to employment, application for employment, or termination of employment[.]" JA465. The Agreement also broadly 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." JA464-65.

In addition, the Agreement states that its provisions are severable. JA466. "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[.]" JA463.

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[.]" JA472. Section 9.11 of the Plan 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" the various arbitration agreements. JA475 (§ 9.11).[1]

III. Relevant Procedural History

A. The *DuCharme* Litigation – DST Successfully Enforces its 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). But after DST advised Cooper of its binding Arbitration Program, Cooper chose to mediate his claims against DST in a private forum. *Id.*

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

Thereafter, on June 17, 2016, Cooper voluntarily dismissed his claims against all but Ruane. *Cooper v. Ruane Cunniff & Goldfarb Inc.*, Case No. 1:16-cv-01900, ECF No. 41 (S.D.N.Y.).

Five months later, after DST had been voluntarily dismissed by Cooper, James DuCharme (an Appellant here) filed a Class Action Complaint against DST in the Western District of Missouri (the "Western District"). D. Ct. Dkt. 172-3. 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." JA477. 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." JA488.

DST also relied on the fact 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." JA686. 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." JA560. Breach of fiduciary duty claims "are explicitly covered by the language of the Plan," DST argued, and "subject to

mandatory arbitration and class action waiver as provided under DST's Arbitration Policy." JA565 (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." JA542. Mr. DuCharme also argued 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." JA543-44.

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." JA560. 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. JA560; JA562-64.

On June 23, 2017, the Western District agreed with DST and held that the Arbitration Program is "valid" and that the "claims for breach of fiduciary duty fall within the Arbitration Agreement's scope." *DuCharme*, 2017 WL 7795123, at *1. That judgment was not appealed and became final.

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." D. Ct. Dkt. 172-12.

B. The Kansas City Arbitration Proceedings

In the months that followed the order in *DuCharme* and DST's notice to the Plan participants, hundreds of Plan participants (or their beneficiaries) initiated individual arbitration proceedings against DST. Each arbitration was initiated by the filing of a "Joint Submission for Arbitration," signed on behalf of DST and the individual Claimant, with the American Arbitration Association ("AAA"). *See e.g.,* JA694-96; D. Ct. Dkt. 305-11. To date, 554 participants or beneficiaries have initiated arbitration proceedings. *Hursh*, 2021 WL 4526849, at *1. "During the past three years, the arbitrations have progressed—including through discovery, depositions, motion practice, merits hearings, or simply settlements." *Id.* As of October 4, 2021, 214 claimants had received awards in their favor. *Id.* All the arbitration hearings, albeit virtual, were conducted in Missouri. *Id.*

In April and June 2021, the Western District confirmed six arbitration awards. *Id.* at *2. "In at least one of those cases, DST expressly stated … that it did not oppose the confirmation of the Arbitration Award." *Id.* (internal quotation and alteration omitted). DST then agreed to pay final arbitration awards voluntarily, rendering further confirmations unnecessary.

However, on August 20, 2021, DST ceased its participation in the arbitrations and refused to pay any additional awards. Accordingly, to access the FAA's streamlined mechanism for *enforcing* an award, certain of the Appellants resumed

filing their applications for confirmation pursuant to 9 U.S.C. § 9. The Western District has now confirmed an additional 177 final arbitration awards. Those 177 awards are the subject of a consolidated appeal by DST pending before the Eighth Circuit Court of Appeals.

C. The *Ferguson* Case (2017-2021): Until November 18, 2021, the SDNY *Denied* All Efforts by DST and the *Ferguson* Plaintiffs to Stay the Kansas City Arbitration Proceedings

On September 1, 2017, more than two months after the order enforcing individual arbitration in *DuCharme*, three individuals (the "*Ferguson* plaintiffs) filed a Complaint in the court below. JA60-99. However, unlike the Complaints in *Cooper* and *DuCharme*, the *Ferguson* plaintiffs did *not* allege a class action. *Id.*

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. JA180-81; JA186-88. DST later filed papers *in support* of these motions. 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." D. Ct. Dkt. 161, at 1. DST then requested that the district court "enter an order staying the Kansas City arbitration proceedings." *Id.* at 8.

That same day, the court denied DST's request for a temporary restraining order (JA207) and later, in a "Minute Entry" entered on July 15, 2020, the court denied DST's request for a preliminary injunction. And so, the Kansas City arbitrations continued unabated, with DST's full participation.

Nearly six months later, while the motions to amend and to certify a mandatory class remained pending, the *Ferguson* plaintiffs filed a motion for the approval of the proposed settlement with DST. JA332-33. 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*." D. Ct. Dkt. 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 this Court issued its split decision in *Cooper v. Ruane Cunniff & Goldfarb Inc.,* 990 F.3d 173 (2d Cir. 2021), the district court denied the *Ferguson* plaintiffs' still-pending motions for leave to amend and to certify a mandatory class, without prejudice renewing the motions and addressing the effect, if any, of the *Cooper* decision. JA414.[2] The *Ferguson* plaintiffs renewed their

[2] In *Cooper*, the Court held that since "Cooper's claims hinge entirely on the investment decisions made by Ruane," his claims against Ruane were not sufficiently "related to" his employment so as to fall within the scope of the Arbitration Agreement. *Cooper*, 990 F.3d at 183-84. The Court held that, in the

motions for leave to amend and for class certification on April 5, 2021, and the Appellants filed their opposition on May 3, 2021. JA415-17; JA450-52; D. Ct. Dkt. 304.

The Appellants argued that *Cooper* was inapposite since, in *Cooper*, this Court was not made aware 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." *Id.* at 3.[3] Additionally, the Appellants 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.*

> Thus, even if they were not *required* to submit to arbitration in the first place, the parties in arbitration have freely and willingly *agreed* to resolve their disputes in private arbitration, much like Mr. Cooper freely and willingly *agreed* to mediate his claims with DST in a private forum. *See Cooper*, 2021 WL 821390, at *3. And it makes no difference that the three *Ferguson* Plaintiffs purportedly opted out of arbitration. The question is not whether *they* must arbitrate; rather, the issue here is whether they can forcibly deprive *others* of the legally protectable *right* to arbitration.

Id. at 11.

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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.

[3] The Court in *Cooper* was also not made aware of the decision in *DuCharme* and of the more than 550 arbitrations that were initiated in reliance thereon.

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

On August 17, 2021, the Southern District granted the *Ferguson* plaintiffs' renewed motions to amend and for class certification. SPA44-59; *see also* JA710-725. The court 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, others could not *voluntarily* arbitrate. SPA49; *see also* JA715.

The court did not address *Epic* or the substantive rights afforded by the FAA as determined in a final, *prior* judgment entered by the Western District.[4] And while the court acknowledged the Kansas City arbitration proceedings, 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.

On August 23, 2021, DST again moved for a TRO and preliminary injunction. JA726. DST argued that by filing their applications for an order confirming their awards, the Appellees had "defied" the Southern District's class certification order. D. Ct. Dkt. 313, at 3.

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

On August 31, 2021, the district court *denied* DST's request for a TRO and ordered briefing on DST's request for a preliminary injunction. JA318. In particular, the court instructed the parties to "address what, if any, application judicial estoppel should have on this application." *Id.*

E. The *Ferguson* Case (November 2021): For the First Time, the Court Enjoins New and Pending Actions Against DST

On November 18, 2021, the district court entered, for the first time, an Order enjoining the Appellants 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." SPA 60; *see also* JA800.

The district court said that "a Federal Court may enjoin an arbitration that the Court determines is not otherwise valid." SPA67; *see also* JA810. Turning to the preconditions necessary for the entry of an injunction, the district court stated that since it had already declared in its class certification order that the claims that Appellants pursued in arbitration were "not arbitrable," DST was likely to succeed on the merits. SPA69-70; *see also* JA812-13.

As for whether DST would suffer irreparable harm in the absence of preliminary relief, the district court held that "DST would be irreparably harmed by being forced to expend resources defending non-arbitrable claims in arbitrations and other actions." SPA69; *see also* JA812.

Finally, the district court held that the balance of equities tips in DST's favor since, without an injunction, it "will be forced to defend against various and conflicting adjudications and to expend unnecessary resources." SPA70; *see also* JA813. The court did not address whether an injunction was in the public interest.

F. The District Court "Clarifies" the Injunction

On January 18, 2022, in response to the Appellants' motion to stay the injunction pending appeal, the district court "acknowledge[d] that the injunction referenced the complaint and accordingly [sought] to clarify the scope of the injunction." SPA77; *see also* JA835. Specifically, the court proposed a "substitution for the language referencing the complaint" and ordered the parties to submit their "proposed modifications" to proposed substitution. SPA77-78; *see also* JA835-36. Then, on February 3, 2022, while insisting that it was *not* adopting a "modification to the injunction," the court substituted, verbatim, DST's proposed modification to the injunction. *Compare* D. Ct. Dkt. 360, at 3-4, *with* SPA82-84.

The court erroneously added that its prior "oral decision on the preliminary injunction discussed that the injunction covers arbitrations concerning class members' individual claims, action to confirm awards won in those arbitrations, and the claims in the *Canfield* and *Mendon* cases." SPA84; *see also* JA842.

Finally, the court stated that it "does not intend to disrespect the Western District of Missouri's authority and jurisdiction, however, the Second Circuit's clear

ruling on this issue compelled the Court to issue the preliminary injunction order and compels the Court to deny this stay [pending appeal].” *Id.*

G. The *Ferguson* Case (February 2021): The *Ferguson* Plaintiffs Belatedly File a Class Action Complaint

Although the court granted the *Ferguson* plaintiffs’ motion to amend to add class action claims to their Complaint on August 17, 2021, by January 18, 2022, the *Ferguson* plaintiffs had yet to file the amended complaint adding class allegations. SPA78-79; *see also* JA836-37. Accordingly, the court ordered the *Ferguson* plaintiffs to file an amended complaint “no later than January 24, 2022.” *Id.* The *Ferguson* plaintiffs did not file an amended complaint adding class allegations until February 4, 2022, some five months after the court certified a mandatory class and more than two months after the court enjoined all class members “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.” JA844-74.

SUMMARY OF THE ARGUMENT

The district court’s injunction should be reversed for multiple reasons.

First, a court may not enjoin an arbitration outside the confines of its district. Rather, the FAA requires a geographic link between the site of the arbitration and the district authorized to exercise judicial control over the arbitration. The district court, however, entered a nationwide injunction barring *all* arbitrations, including

those pending and completed in Missouri. The court's order violates the FAA and improperly interferes with the orderly process of adjudication in the Western District of Missouri.

Second, the court rested its decision on its conclusion that the arbitrations were "invalid." The arbitrations, however, are not invalid. Indeed, even if one ignores the Western District's prior judgment, there is no disputing that (1) DST and the Appellants have entered *multiple* agreements to arbitrate; (2) the Appellants' claims for breach of fiduciary duty fall within the scope of the various agreements; and (3) nothing in ERISA precludes individual attempts at conciliation through arbitration.

Third, the district court erred in its interpretation and application of the All Writs Act. Like all other statutes, the All Writs Act must be construed in harmony with the FAA, and this Court's own precedent makes plain that an anti-arbitration injunction is only permitted under the All Writs Act when it is necessary to *further* the goal of arbitration, not for the purpose of *defeating* it.

Fourth, the court below erred by justifying the injunction orders on the grounds that it certified a mandatory class. The *Ferguson* action was not properly certified as a mandatory class, because it completely failed to satisfy Rule 23(b)(1)(A) or (B). It is axiomatic that those who have already resolved their claims against either DST (either by way of settlement or arbitration) simply cannot be part

of any class action bringing the same claims. And, in any event, Rule 23 does not establish an entitlement to class proceedings. Rather, courts are *required* by the FAA to order piecemeal resolution when necessary to give effect to an arbitration agreement.

Fifth, the district court erred by attempting to enjoin the Appellants confirmation proceedings. 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. Thus, by attempting to enjoin the Appellants' confirmation of their *already final* awards, the district court exceeded its authority and abused its discretion.

Finally, the original injunction fails to comply with this Court's "specificity" requirement since it refers to the "amended complaint" when describing the conduct enjoined, and the court's post-hoc "clarification" violates the rule that courts may not modify an injunction pending on appeal.

STANDARD OF REVIEW

The Court reviews *de novo* the district court's interpretation of the All Writs Act and its "legal conclusions in deciding to grant a motion for a preliminary injunction, but review[s] its ultimate decision to issue the injunction for abuse of discretion." *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020) (footnote and internal quotation marks omitted); *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 130 (2d Cir. 2015). "A district court abuses its discretion when it rests its

decision on a clearly erroneous finding of fact or makes an error of law." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010) (internal quotation marks omitted). A district court also abuses its discretion when its decision—"though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

ARGUMENT

I. The District Court Erred by Enjoining the Kansas City Arbitrations

Since the injunctions implicate "the remedial *powers* of the court," the court below was required to act within the limits of its narrow authority. *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 140 (2d Cir. 2011) ("*American Express*") (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (emphasis in original). A district court errs when it issues an order or adjudicates an issue that exceeds the scope of its authority. *See AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 719 (2d Cir.2010).

In this case, the court below entered a nationwide, anti-arbitration injunction enjoining all Plan participants, including the Appellants, hundreds of whom had already *completed* their arbitrations (and have obtained judicial confirmation of their final awards), from instituting new actions or litigating in arbitration or other

proceedings against DST matters arising out of or relating to the facts or transactions alleged in the *Ferguson* amended complaint. The district court reasoned that its injunction was allowed by the All Writs Act and this Court's decision in *American Express*. The court below did *not* address the limits placed on its authority by the FAA nor did it address or justify its interference with arbitrations conducted in the Western District of Missouri and brought by residents of the Western District of Missouri against a company headquartered in the Western District of Missouri. For the reasons that follow, the district court erred.

A. The District Court Exceeded its Authority Under the FAA

1.

In *American Express*, this Court held that the authority to enjoin an arbitration, though not explicitly permitted, is derivative of the power in § 4 of the FAA to compel it. 672 F.3d at 141. *See also Societe Generale de Surveillance, S.A. v. Raytheon Eur. Mgmt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) (stating that "to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present"). Accordingly, since § 4 supplies the authority and procedural framework applicable to the issuance of an injunction against arbitration, the court below was required to adhere to its strictures, including its prohibition against orders enjoining arbitrations outside of the court's own district. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49

F.3d 323, 328 (7th Cir. 1995) (holding that the prohibition against orders compelling arbitration outside of the court's own district applies to orders *enjoining* them as well).

Section 4 of the FAA states, in pertinent part:

> A party … [subject to] a written agreement for arbitration may petition any United States district court … for an order that … arbitration proceed in the manner provided for in such agreement.... The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

9 U.S.C. § 4.

By mandating that the hearing and proceedings be within the district in which the petition is filed, § 4 "clearly requires a geographic link between the site of the arbitration and the district which, by compelling arbitration or directing its scope, exercises preliminary control." *Merrill Lynch*, 49 F.3d at 327. And where, as in this case, the parties have also *agreed* to arbitrate in the Western District of Missouri, the inescapable conclusion is that the FAA limits the fora that may exercise control of the Kansas City arbitrations to the Western District of Missouri. *Id. See also Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 808 (7th Cir. 2011) (observing that "a district court cannot compel arbitration outside the confines of its district"); *Inland Bulk Transfer Co. v. Cummins Engine Co*., 332 F.3d 1007, 1018 (6th Cir. 2003) (holding that "the Federal Arbitration Act prevents federal courts from compelling arbitration outside of their own district"); *Ansari v. Qwest*

Commc'ns Corp., 414 F.3d 1214, 1219–20 (10th Cir. 2005) (holding that only a district court in the parties' chosen forum has authority to compel or enjoin an arbitration); *Lawn v. Franklin*, 328 F.Supp. 791, 793 (S.D.N.Y.1971) (holding that judicial control of arbitral proceedings should emanate only from the district where those proceedings are occurring); *Spray Holdings, Ltd. v. Pali Fin. Grp., Inc*., 269 F. Supp. 2d 356, 363 (S.D.N.Y. 2003) (noting that "the Court's authority to compel arbitration under FAA § 4 is restricted to arbitration proceedings that occur within this District").

In fact, the court below itself observed that the Western District of Missouri, *not the Southern District of New York*, was "charged with reviewing arbitral agreements and awards," and that the Western District of Missouri, *not the Southern District of New York*, 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). And, in the hearing on the preliminary injunction, the court again "acknowledge[d] the decisions of the Western District of Missouri" and confirmed that District's "authority and jurisdiction" over the arbitrations. SPA71; *see also* JA814.

However, rather than heed the limits of its authority, the court below entered a nationwide injunction barring all arbitrations, including those pending and *completed* in Missouri. And though the district court maintained that it "d[id] not

mean to disrespect [the Western District's] authority and jurisdiction" (SPA71; *see also* JA814), it completely ignored that the Western District had *already found* the Arbitration Program "valid," and that "claims for breach of fiduciary duty fall within the Arbitration Agreement's scope," *see Ducharme*, 2017 WL 7795123, at *1, and had *already found* that, in any event, DST was judicially estopped from asserting that the claims were not arbitrable. *Hursh*, 2021 WL 4526849, at *10 ("Given (1) the Supreme Court's expansive language about the importance of arbitral consent; (2) DST's affirmative representations to the courts, to the arbitrators, and to the Plan Participants that these fiduciary breach claims had to be arbitrated; and (3) DST's consenting, repeatedly, to arbitrate the claims, the Court finds that DST is judicially estopped in this Court from asserting that the fiduciary breach claims at issue are not arbitrable.").

2.

The district court's refusal to respect the limits of its authority over the federal courts in Missouri has produced a shockingly unjust result.

DST agreed to arbitration in Missouri. Then it sought and obtained an order from Western District of Missouri finding the Arbitration Agreement "valid" and holding 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.

Then, more than two-and-a-half years *after* DST successfully enforced its Arbitration Program, the three *Ferguson* plaintiffs, who have made *no effort* to consult with the arbitration claimants or to protect their contractual and statutory right to arbitration even as they purport to represent their interests, filed a motion for the certification of a *mandatory* class (which was a necessary precondition in DST's offer of a grossly inadequate proposed settlement). The result: two ongoing federal court proceedings, both dealing with the *exact same* arbitrations. The Western District of Missouri plainly had the authority under § 4 to hear and decide DST's Motion to Compel. The Western District also had the authority under the FAA to determine whether the claims that the Appellants have pursued in arbitration in the Western District are "arbitrable."

The district court's injunction improperly usurps the Western District's authority and control over the Kansas City arbitrations and that court's own judgments and has created inconsistent orders and irreconcilable rules that raise the disturbing specter of forum-shopping and judicial manipulation.

In fact, the Western District recently labeled DST's pursuit of an order "sweep[ing] aside" the arbitrations as "anathema" and called DST's "wish[] to resort to a class-wide lawsuit" a "crass manipulation of legal process" and a "hypocrisy"

that "will not be blessed." *Hursh*, 2021 WL 4526849, at *9 (quoting *DoorDash*, 438 F. Supp. 3d at 1067–68).

> Given (1) the Supreme Court's expansive language about the importance of arbitral consent; (2) DST's affirmative representations to the courts, to the arbitrators, and to the Plan Participants that these fiduciary breach claims had to be arbitrated; and (3) DST's consenting, repeatedly, to arbitrate the claims, the Court finds that DST is judicially estopped in this Court from asserting that the fiduciary breach claims at issue are not arbitrable.
>
> 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.

Id. at *10.

And, although DST has challenged various aspects of the Western District's judgment on appeal to the Eighth Circuit, DST has chosen *not* to seek review of the Western District's "findings and conclusions concerning the arbitrability of the claims that Appellees pursued in arbitration, including the district court's ruling that DST is judicially estopped from contesting arbitrability." *Hursh, et al. v. DST Systems, Inc.*, Nos. 21-3554, *et al.*, Brief of Appellant DST Systems, Inc., at p. 23 (March 24, 2022).

Accordingly, since DST has forfeited any appeal from the Western District's findings and conclusions concerning the arbitrability of the claims and whether DST

should be judicially estopped, the Western District's orders remain binding on DST. All that remains is for this Court to reverse the injunction and to instruct the court below *not* to interfere with the orderly process of law in the Western District of Missouri. In fact, it is a doctrine of law too long established to require a citation of authorities, that, where the jurisdiction of a court, and the right of a plaintiff to prosecute her suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. And, when a court of competent jurisdiction has entered a final judgment, it puts an end to the cause of action, which cannot again be brought into litigation upon any ground whatever.

Indeed, if this court below could, at will, annul the judgment in *DuCharme* or the later judgments in *Hursh, et al.*, and destroy the rights acquired thereunder, the rules of finality would become a solemn mockery. Those rules, all of which govern here, have their foundation, not merely in comity, but on necessity. For if one Court may enjoin, "the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." *Peck v. Jenness*, 48 U.S. 612, 624–25 (1849). Rather, the governing rule, as stated by the United States Supreme Court, provides that "where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is final until reversed in an appellate court, or modified or set aside in the court of

its rendition. *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938) (internal quotation omitted).[5]

B. The District Court's Rulings on Arbitrability and Class Certification Are Fatally Flawed

The district court granted DST's request for an injunction on the grounds that (1) the arbitrations are invalid; (2) the arbitrations undermine the court's ability to reach and resolve the merits of the *Ferguson* case; and (3) the arbitrations are frustrating the recently certified mandatory class. JA66-67; *see also* JA809-10. In every respect, the district court erred.

1. The Arbitrations are Valid

More than five years ago, DST sought and obtained an order from the Western District declaring the Arbitration Program "valid" and holding that "claims for breach of fiduciary duty fall within the Arbitration Agreement's scope." *Ducharme*, 2017 WL 7795123, at *1. Then, just last year, the Western District ordered that DST is judicially estopped from asserting that claims for breach of fiduciary duty are "not arbitrable." *Hursh*, 2021 WL 4526849, at *10. This being the case, there is no dispute: the arbitrations are *valid* and the claims that Appellants are pursuing in

[5] In further support of this bedrock and unassailable rule, Congress enacted 28 U.S.C. § 1963 which, by its express terms, states that judgments entered by a district court "shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." 28 U.S.C. § 1963.

Missouri are *arbitrable.* But even if the Court were to look at this issue anew, it should reach the same conclusion.

a. The Parties have Entered Into Valid Agreements to Arbitrate

In deciding whether claims are subject to arbitration, courts are to consider "(1) whether the parties have entered into a valid agreement to arbitrate, and, if so, (2) whether the dispute at issue comes within the scope of the arbitration agreement." *American Express*, 672 F.3d at 128. In this case, there is no dispute that DST and the Appellants have entered a valid agreement to arbitrate. The parties' Arbitration Agreement broadly covers "all legal claims arising out of or relating to employment, application for employment, or termination of employment" (JA465) and the Plan's "Mandatory Arbitration and Class Action Waiver" applies to "any and all claims arising out of or related to the Plan." JA475 (§ 9.11).

In addition, each arbitration is initiated by the joint filing of a written "Joint Submission for Arbitration" (*see e.g.,* JA694-96) that, by itself, is enforceable under the FAA. *See Ganguly v. Charles Schwab & Co.*, 2004 WL 213016, at *2 (S.D.N.Y. Feb. 4, 2004), *aff'd*, 142 F. App'x 498 (2d Cir. 2005) ("even if plaintiff could overcome the hurdle of the pre-dispute Schwab Account Application, there is no genuine dispute that he freely and willingly executed the post-dispute NASD Uniform Submission Agreement."); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 809 (2d Cir. 1960) (holding that parties

who voluntarily submit their dispute to arbitration evince a "subsequent agreement for private settlement which would cure any defect in the arbitration clause").

Finally, an agreement may be implied from DST's conduct. *Opals on Ice Lingerie v. Bodylines Inc*., 320 F.3d 362, 368 (2d Cir. 2003) ("Although a party is bound by an arbitral award only where it has agreed to arbitrate, an agreement may be implied from the party's conduct."). In this case, DST *voluntarily sought* arbitration and then proceeded to spend more than three years in an arbitration process that included more than 52 weeks of arbitration hearings and the presentation of more than 200 evidentiary exhibits, sworn testimony by fact and expert witnesses, opening and closing arguments by DST and the arbitration claimants, and both pre- and post-hearing briefing on the merits. Thus, even if the Court ignores the Arbitration Agreement, the Plan's binding arbitration provision, and the parties' "Joint Submission for Arbitration," there is no dispute that DST *agreed* to arbitration by its full participation therein. *See e.g., Hicks v. Cadle*, 436 F. App'x 874, 879 (10th Cir. 2011) (holding that "it would be a perverse understanding of the concept of consent to hold that a party has not consented to arbitration that it voluntarily sought"); *ConnTech Dev. Co. v. Univ. Of Conn. Educ. Props.,* 102 F.3d 677, 685 (2d Cir.1996) (finding waiver where party had participated in 45 days of hearings and did not assert objection until 41 months after being served with notice of arbitration demand).

b. The Appellants' Claims Come Within the Scope of the Agreements

The FAA requires that courts "construe arbitration clauses as broadly as possible." *American Express*, 672 F.3d at 128 (quotation omitted), *see also Mehler v. Terminix Int'l Co. L.P.*, 205 F.3d 44, 49 (2d Cir. 2000) ("the court must compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

In this case, the Plan's "Mandatory Arbitration and Class Action Waiver" provision applies to "any and all claims arising out of or related to the Plan." JA475 (§ 9.11). Additionally, by mutually submitting their dispute to arbitration, the Appellants and DST accepted and agreed that the Appellants' claims fell within the scope of the parties' "Joint Submission for Arbitration." *Jones Dairy Farm v. Loc. No. P-1236, United Food & Com. Workers Int'l Union, AFL-CIO*, 760 F.2d 173, 175 (7th Cir. 1985) ("If a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it."). Finally, by voluntarily and unreservedly participating in the arbitrations for more than three years, DST has agreed that the Appellants' claims fall within the scope of the parties' various agreements.

2. This Court's Decision in *Coan v. Kaufman* Does Not Apply

Without addressing the issue, the court below appears to have concluded that the arbitrations are invalid because ERISA requires that claims for breach of

fiduciary duty proceed as a mandatory, non-opt out class. In the class certification order, for example, the court declared that the Arbitration Policy's class waiver provision violates this Court's holding in *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), which, according to the court below, "requires parties suing on behalf of the plan to demonstrate their suitability to serve as representatives of the interests of other plan stakeholders." SPA50; *see also* JA716. For the reasons set forth below, the district court erred.

a. If a Class Action is Required, it Must be Had in Accordance with the Arbitration Policy

As an initial matter, even if the court below concluded that the class waiver provision violated ERISA, it does not follow that the Arbitration Policy is invalid. The Arbitration Agreement includes a severability clause "[t]hat 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.*" JA466. In fact, the Agreement states that "[i]f a final court decision (including all appeals) holds this prohibition 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." *Id*. Thus, *even if* the Arbitration Policy's class waiver provision violates ERISA or this Court's holding in *Coan*, the district court erred by refusing to stay the *Ferguson* case in accordance with the terms of the agreement so that a class action may be pursued in arbitration. 9 U.S.C.A. § 3 .

That being said, *Coan* does *not* require the certification of a class or any other form of collective or representative action.

b. *Coan v. Kaufman* Does Not Apply to Defined *Contribution* Plan Claims

In *Coan*, this Court construed ERISA § 502(a)(2) to require that plan participants litigating plan-wide claims "employ procedures to protect effectively the interests they purport to represent." 457 F.3d at 259. Relying on the Supreme Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), which was decided in the context of a defined *benefit* plan, the Court in *Coan* "stressed that such procedural safeguards are meant to ensure that any 'recovery inures to the benefit of the plan as a whole.'" *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 184 (2d Cir. 2021) (quoting *Coan*, 457 F.3d at 261). When defined benefit plans dominated the retirement scene, this made perfect sense. As the Supreme Court explained, a defined benefit plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). Indeed, in a defined benefit plan, since the benefits owed to each participant is "fixed" by formula, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool" and, a "plan's actual investment experience does not affect their statutory entitlement." *Id.* at 440. Thus, "[m]isconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances

the risk of default by the *entire plan*." *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255 (2008) (emphasis added).

But after the decision in *Coan*, the Supreme Court revisited the issue in *LaRue*, in the context of a defined *contribution* plan. "*LaRue* held that plaintiff participants in defined contribution pension plans may seek recovery for 'misconduct [that] impaired the value of plan assets in the participant's individual account[s],' and held further that *Russell's* requirement of plan-wide recovery was 'beside the point in the defined contribution context.' " *Fisher v. JPMorgan Chase & Co.*, 303 F. App'x 979, 981 (2d Cir. 2008) (quoting *LaRue*, 552 U.S. at 250, 256); *Fisher v. Penn Traffic Co.*, 319 F. App'x 34, 35 (2d Cir. 2009) ("*LaRue* explained that a participant in a defined contribution plan may maintain a claim for relief under section 502(a)(2) if a fiduciary breach impaired the value of plan assets in the participant's individual account.") (summary orders).

Indeed, the Supreme Court explained that "*Russell's* emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans," which was dominated by defined benefit plans which did *not* consist of individual accounts and paid, instead, a fixed benefit based on a percentage of the employees' salary. *LaRue*, 552 U.S. at 254. "That landscape," however, "has changed." *Id.*

> For defined contribution plans …, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the

> amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409. Consequently, our references to the 'entire plan' in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.

Id. at 255–56.

Thus, "[w]ith *Russell* cabined to defined benefit plans," *Smith*, 13 F.4th at 619, *LaRue* concluded "that although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *LaRue*, 552 U.S. at 256. *See also In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 214 (4th Cir. 2008) (observing that in *LaRue*, the Supreme Court held that plan participants are "authorized to bring [a] claim for loss of plan assets in [their] *individual* account under ERISA § 502(a)(2), notwithstanding its earlier decision in *Russell*" and that "[t]he *LaRue* Court … distinguished *Russell* on the basis that the *Russell* Court addressed a defined benefit plan rather than a defined contribution plan" (emphasis in the original)).

Therefore, "[a]lthough § 502(a)(2) claims seek relief on behalf of a plan, the Supreme Court has recognized that such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue." *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019). "*LaRue* stands for

the proposition that a defined contribution plan participant can bring a § 502(a)(2) claim for the plan losses in her own individual account." *Id.*

Accordingly, returning to this Court's decision in *Coan*, it is now clear that its emphasis on protecting "the plan as a whole" reflects, and is limited to, the former landscape of defined *benefit* plans and does not apply where, as here, the plan is a defined *contribution* plan. *See Spano v. The Boeing Co.*, 633 F.3d 574, 591 (7th Cir. 2011) (vacating the certification of a mandatory class and observing that in the context of a defined contribution plan, *LaRue* permits individual damage claims under § 502(a)(2)); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 376 (5th Cir. 2008) (observing that although many courts have held, in accordance with *Russell,* "that claims for breach of fiduciary duty under § 502(a)(2) must be brought in a representative capacity on behalf of the plan as a whole, with the goal of protecting the financial integrity of the plan," the Supreme Court in *LaRue* "narrowed the holding of *Russell*" to defined *benefit* plans).

Indeed, as this Court observed, when *Coan* was decided, "there was … some question at the time as to whether ERISA permits an individual plan member to bring a breach of fiduciary duty claim against the administrator of a defined contribution plan." *Milgram v. Orthopedic Assocs. Defined Contribution Pension Plan*, 666 F.3d 68, 71 n. 1 (2d Cir. 2011). In *LaRue*, the Supreme Court "made clear that such claims are permissible." *Id.* (citing *LaRue*, 552 U.S. at 256). And while this Court's own

precedent firmly establishes that participants in a defined contribution plan may pursue individual claims for relief, *JPMorgan Chase*, 303 F. App'x at 981; *Penn Traffic Co*., 319 F. App'x at 35, every circuit to consider the issue agrees.[6]

Thus, since the Plan here is a defined *contribution* plan, *Coan*'s requirement that parties employ procedural safeguards meant to ensure that any "recovery insures to the benefit of the plan as a whole" is inapposite.

In any event, the Secretary's active participation here, *see Walsh v. Ruane, Cunniff & Goldfarb, Inc.*, Case No. 1:19-cv-09302 (S.D.N.Y.), and the fact that the Appellants are vigorously represented by counsel of their own choosing (while seeking recovery of only their *own*, individual damages), should eliminate any

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[6] *In re Mut. Funds Inv. Litig.*, 529 F.3d 207 (4th Cir. 2008); *Nichols v. Alcatel USA, Inc*., 532 F.3d 364 (5th Cir. 2008); *Smith v. Bd. of Directors of Triad Mfg., Inc*., 13 F.4th 613 (7th Cir. 2021); *Spano v. The Boeing Co.*, 633 F.3d 574, 591 (7th Cir. 2011); *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019). *See also In re Schering-Plough Corp. ERISA Litig*., 420 F.3d 231, 235 (3d Cir. 2005) (stating that a "fiduciary's liability is not limited to plan losses that will ultimately redound to the benefit of all participants); *Tullis v. UMB Bank, N.A*., 515 F.3d 673, 680 (6th Cir. 2008) (holding that plan participants need *not* seek compensation in a representative capacity for the entire plan under § 409(a)); *Holmes v. Baptist Health S. Fla., Inc.*, No. 21-22986-CIV, 2022 WL 180638, at *3 (S.D. Fla. Jan. 20, 2022) (observing that in accordance with *LaRue*, "individual claimants can each recover the harm to their defined contribution accounts"); *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"); *Smith v. Stockwell Const. Co.*, No. 10-CV-608S, 2011 WL 6208697, at *4 fn, 3 (W.D.N.Y. Dec. 14, 2011) (holding that while plaintiff participants were previously required to bring claims on behalf of the entire plan, that "requirement changed for plaintiffs seeking to recover under a defined contribution plan following the Court's decision in *LaRue*");

concern about protecting absent participants' interests. *Dorman*, 780 F. App'x at 514 ("When an individual participant agrees to arbitrate, he does not give up any substantive rights that belong to other Plan participants."). Additionally, as this Court observed, each "arbitration determination is subject to review by the federal courts through a motion to enforce or to vacate the award." *Bird*, 926 F.2d at 122. Thus, to the extent that *Coan* still requires some procedural safeguards, they are present here.

3. The District Court Exceeded its Authority under the All Writs Act

The court below reasoned that the anti-arbitration injunction was also permitted under the All Writs Act, since it was necessary to prevent the "frustration" of its order certifying a mandatory class and to protect its "ability to reach and resolve the merits of the federal suit before it." SPA67; *see also* JA810. For a myriad of reasons, the district court erred.

First, as shown above, by proceeding with arbitration, the Appellants were not in any way undermining, circumventing, or "frustrating" the court's class certification order. In fact, if one assumes—wrongly—that the Appellants' claims are "not arbitrable," the Appellants were, at most, "merely engaging in a pointless, fruitless exercise" that amounts to "nothing more than a moot court session." *Klay v. United Healthgroup*, Inc., 376 F.3d 1092, 1112–13 (11th Cir. 2004). But as the court in *Klay* put it: "It is precisely because arbitrating nonarbitrable claims is such

a pointless endeavor that it does not threaten or undermine either the district court's existing order or its jurisdiction over the pending cases." *Id.*

But here, of course, the "threat" perceived by the court below was not that the Appellants were engaging in a "pointless, fruitless exercise;" rather, the court felt threatened by the Appellants' continued pursuit of their *arbitrable* claims. But as this Court explained in *American Express*, if the claims are arbitrable, a district court *cannot* enjoin them. 672 F.3d at 140-41.

Second, while this Court has speculated that the All Writs Act "might" give a district court the authority to enjoin a *second* arbitration to prevent the re-litigation by the parties of the issues resolved in the first, *id.* at 141 fn. 20, no court has ever held that the All Writs Act gives district courts the authority to enjoin an *in personam* arbitration simply so that it may be the first to reach and resolve the merits of the federal suit before it. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) ("No case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception; neither have the parties directed us to any other federal court decisions so holding."). On the contrary, the Supreme Court has declared that where an action is *in personam*, "another action for the same cause in another jurisdiction is not precluded." *Kline v. Burke Const. Co.*, 260 U.S. 226, 230 (1922).

And the Supreme Court has repeatedly affirmed that in actions to enforce liability, "[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court" and that, "[w]henever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata." *Vendo*, 433 U.S. at 642 (quoting *Kline*, 260 U.S. at 230). Accordingly, as the Court in *Klay* put it, "the potential *res judicata* effect that the arbitration of arbitrable claims could have on a pending *in personam* federal case does not in itself permit a federal court to enjoin such arbitration." *Klay*, 376 F.3d at 1111. "Given that parallel state court proceedings may peacefully co-exist with *in personam* federal proceedings, it is difficult to understand why a parallel *arbitration* could not." *Id.* (emphasis added).[7]

[7] This Court has approved an *in personam* injunction only once. In *In re Baldwin–United Corp.*, 770 F.2d 328 (2d Cir.1985), this Court held that an injunction was appropriate where "the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control." *Id*. at 337. However, the Court later cautioned that its decision in *Baldwin–United* did not create a blanket rule or presumption that a federal court in any multidistrict action may enjoin parallel state proceedings." *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 427-28 (2d Cir. 2004). *See also 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."). And *Baldwin–United* involved a multidistrict federal securities class action on the verge of settlement. Indeed, by the time the State of New York gave notice of its intent to file a state court action, eighteen defendants had already signed stipulations of settlement, which the district court had preliminarily approved. *Baldwin–United*, 770 F.2d at 332–33. Only on those facts did the Court affirm a grant of an *in personam* injunction. This case *does not* present those facts.

Third, this Court's precedent makes clear that *even if* the All Writs Act "might" give a district court the authority to enjoin an arbitration, an anti-arbitration injunction must nevertheless be agreeable to the usages and principles of the FAA. In *American Express*, for example, the Court approved an injunction barring the appellants from relitigating in arbitration claims that they had previously released. The Court reasoned that the injunction was permitted by the FAA since it furthered the principle that "arbitration under the FAA is matter of consent, not coercion." 672 F.3d at 141. In *Citigroup*, however, the Court reasoned that since the FAA expressly favors arbitration where the parties have *agreed* to arbitrate, district courts may *not* enjoin a second arbitration merely to protect the preclusive effect of a prior judgment. 776 F.3d 126, 131-33.[8]

In other words, the All Writs Act does not permit an end run around the FAA; rather, an anti-arbitration injunction is only permitted under the All Writs Act if it *furthers* the goal of arbitration, not the other way around.

[8] To the extent that the All Writs Act has been explicitly relied upon to enjoin an arbitration, courts have issued anti-arbitration injunctions only where necessary to protect a *prior* judgement addressing the merits of the underlying claim as *res judicata*. *See Abu Dhabi*, 776 F.3d at 132 (citing cases). Here, of course, there is no prior judgment addressing the merits of the *Ferguson* plaintiffs' underlying claim. And even the cases which have relied upon the All Writs Act to protect a prior judgment have been seriously called into question. *See e.g., Constellium Rolled Prod. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 741 (4th Cir. 2021).

Fourth, the All Writs Act may *not* be used "simply to avoid the inconvenience of following statutory procedures that govern the particular circumstances." *Citigroup*, 776 F.3d at 130 (internal quotations omitted). Since, the FAA supplies the statutory procedure governing the issuance of an anti-arbitration injunction, to the extent the district court relied upon the All Writs Act to excuse DST from the requirement that it apply to the Western District for an injunction barring the Kansas City arbitrations, the district court erred.

Finally, the All Writs Act requires that persons enjoined have the "minimum contacts" that are constitutionally required under due process. *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 907 F.2d 277, 281 (2d Cir. 1990). Here, the district court summarily enjoined the Appellants without ever addressing whether the Appellants have "minimum contact" with the State of New York.

C. The Court Erred by Relying Upon the Class Certification Order as the Basis for Granting the Injunction.

Finally, the court below erred by relying on its order granting the certification of a mandatory class.

First, as an initial matter, it is axiomatic that those who have already resolved their claims against either DST or Ruane (either by way of settlement or arbitration) simply cannot be part of any class action bringing the same claims. *See e.g.*, *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 427 (6th Cir. 2012) (holding that class

representative "cannot represent class members who settled their claims" and that "class certification is invalid to the extent that it overlaps with" those who have settled with the defendants); *cf.*, *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"); *see 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.").

The doctrine of collateral estoppel, for example, "prevents previously litigated issues from being relitigated, thereby producing finality in judgments." *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991). And the doctrine of res judicata dictates that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 n. 6 (1982).

And it makes no difference whether the final arbitration awards have been confirmed or not. Both confirmed and unconfirmed awards are final and valid. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) (holding that "award need not actually be confirmed by a court to be valid"); *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 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."). Thus, by including in the class even those who have fully litigated, and

in some cases, even fully recovered, from DST and/or Ruane, the district court certified the kind of "sprawling" class that the Supreme Court declared improper in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 622-28 (1997).

Second, 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.

Third, Rule 23(a) cannot be satisfied where some members of the proposed class are bound by arbitration and class waiver provisions while others are not. *See e.g., Jensen v. Cablevision Sys. Corp*., 372 F. Supp. 3d 95, 123 (E.D.N.Y. 2019), *appeal dismissed, leave to appeal denied*, No. 19-628, 2019 WL 4296129 (2d Cir. Aug. 28, 2019) ("The mere potential that the relevant arbitration provision is valid is sufficient to preclude a named plaintiff who opted out of the provision from representing a class largely made up of individuals that may be subject to the agreement."); *Avilez v. Pinkerton Gov't Servs., Inc*., 596 F. App'x 579 (9th Cir. 2015) (holding that a class may not be certified if it includes employees who signed class action waivers). In this case, since the Appellants and DST are bound by arbitration and class waiver provisions, a class represented solely by the three nominal *Ferguson* plaintiffs cannot be certified.

Fourth, "the Due Process Clause … requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Indeed, "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 or who was otherwise inadequate." *Spano*, 633

F.3d at 587. Since, in this case, hundreds of Appellants have now recovered money damages allocable and in many cases already deposited into their *individual Plan accounts*, and since the *Ferguson* plaintiffs seek to represent a mandatory class that would extinguish those settlements and awards (or otherwise delay, deny, or disturb them), as well as the contractual and statutory rights of others, the *Ferguson* plaintiffs cannot, *under any circumstance*, adequately represent the interests of the Appellants. Indeed, the *Ferguson* plaintiffs (and their counsel) are openly antagonistic to the Appellants and have repeatedly urged the court to enjoin them.[9]

Fifth, "[a]bsent class members have a due process right to notice and an opportunity to opt out of class litigation when the action is 'predominantly' for money damages." *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012). "After the Supreme Court's decision in *Dukes*, the right to notice and an opportunity to opt out under Rule 23 now applies not only when a class action is predominantly for money damages, but also when a claim for money damages is

[9] The former Chairwoman of the DST Advisory Committee, testified that the Plan adopted the Arbitration Agreement and class action waiver because individual arbitration "was in the best interest of the plan participants." D. Ct. Dkt. 203-2, at 115-117. Meanwhile, the Secretary has asserted that efforts to enjoin the arbitrations "fly in the face of the public policy forged in ERISA" and "would do a grave disservice to the public interest that is memorialized in ERISA itself." *Ruane, Cunniff & Goldfarb, Inc. v. Payne*, No. 1:19-cv-11297-ALC, ECF No. 40 at 26 (S.D.N.Y. Jan. 24, 2020). "Attempts to enjoin the arbitrations," the Secretary explained, "is also contrary to the clear public policy enshrined in the [FAA] that favors arbitration." *Id.*

more than 'incidental.'" *Id.* Since the relief sought in this case is predominantly for money damages, the district court was *required* to give the Appellants an opportunity to opt out.

Sixth, basic fairness requires that the Appellants be permitted to opt out. *Cty. of Suffolk v. Long Island Lighting Co*., 907 F.2d 1295, 1303 (2d Cir. 1990). In *Suffolk*, for example, this Court expressly held that, even *after* the certification of a "mandatory class," Rule 23 permits a district court to allow class members to opt out where, for example, " 'basic fairness' *requires* giving" those who have *already litigated* their claims the option to exclude themselves from the class. *Id.* at 1304-05 ("that 'basic fairness' required giving Suffolk the option to exclude itself from the class, is supported amply by the fact that the situation of Suffolk and the procedural posture of its claims [were] distinguishable from the general class. At great expense Suffolk litigated its claims and obtained a jury verdict in its favor.").

In this case, there is no disputing that "basic fairness" requires giving the Appellants the option to exclude themselves from the class. Indeed, the Western District of Missouri expressly held that "it would be ***patently unfair*** to permit DST to revoke its consent to arbitration, vacate the arbitration awards, and require the Arbitration Claimants to start over." *Hursh*, 2021 WL 4526849, at *9 (emphasis added). Not only that, but DST is *estopped* from avoiding the arbitrations.

The doctrine of judicial estoppel provides that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *DeRosa v. Nat'l Envelope Corp*., 595 F.3d 99, 103 (2d Cir. 2010) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)) (internal quotation marks omitted). In evaluating whether to apply the doctrine, "courts generally look for the existence of three factors: (1) that a party's new position is "clearly inconsistent" with its earlier position, (2) that the party seeking to assert this new position previously persuaded a court to accept its earlier position, and (3) that the party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine,* 532 U.S. 742, 750–51 (2001). In this case, all the factors are present. *See Hursh*, 2021 WL 4526849, at *5-10.

Finally, for the reasons more fully discussed in the *Canfield* and *Mendon* plaintiffs' brief on appeal from the dismissal of their actions, the district erred by certifying a mandatory class under Rule 23(b)(1). That subsection applies only when multiple suits would impose incompatible standards of conduct on a defendant, or would prejudice the rights of other class members. Where, as here, plan participants seek only monetary relief to remedy past misconduct, there is no such risk.

Accordingly, for all these reasons, the court below erred by basing its decision upon the certification of a mandatory class.

II. The District Court Erred by Attempting to Enjoin the Confirmation of Arbitral Awards

On February 3, 2022, in response to the Appellants' motion to stay the injunction pending appeal, the district court entered an order purporting to "clarify" the injunction. SPA82; *see also* JA840. The court also erroneously stated that its "oral decision on the preliminary injunction discussed that the injunction covers arbitrations concerning class members' individual claims, actions to confirm awards won in those arbitrations, and the claims in the *Canfield* and *Mendon* cases. SPA84; *see also* JA842. Although the district court's injunction, in its entirety, should be reversed, the court's attempt at enjoining even the confirmation of awards *already won* in arbitration is especially egregious.

"[C]onfirmation of an arbitration award [i]s the *final step* in arbitration proceedings under the FAA." *Teamsters Loc. 177 v. United Parcel Serv.*, 966 F.3d 245, 253 (3d Cir. 2020) (emphasis added). 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." *Mongolia*, 11 F.4th at 160 (emphasis added, quotation omitted).

An "award need not actually be confirmed by a court to be valid." *Florasynth*, 750 F.2d at 176. 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. 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 this Court 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.

In other words, when seeking confirmation of an award, an applicant does *not* relitigate the underlying claims. Rather, a court is called upon merely to enforce an award that, by virtue of the FAA and the parties' agreements, is already *final. Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022) (holding that confirmation of an arbitral presents "different claims," and "turn[s] on different law" than the underlying dispute).

Accordingly, by purporting to enjoin even the confirmation of *already final arbitration awards*, the district court exceeded its authority and abused its discretion.

III. The District Court's Injunction Is Deficiently Vague and Its Modification Improper

Finally, the injunction fails to comply with this Court's "specificity" requirement. In *Diapulse Corp. of America v. Carba, Ltd.,* 626 F.2d 1108 (2d

Cir.1980), this Court held that courts are "required to frame its orders so that those who must obey them will know what the court intends to forbid. Basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* at 1111. Indeed, this Court cautions that "[a]n order which does not satisfy the requirement of specificity and definiteness will not withstand appellate scrutiny." *Id.*

The injunction in this case, as originally issued, is woefully deficient. It does not state its terms specifically and instead refers to the act or acts restrained by reference to an "amended complaint" that had not even been filed and would not be filed for many months. The Eighth Circuit, for example, held that the injunction did not, by its express terms, enjoin the parties from continuing to litigate DST's appeals of the Western District's confirmation orders. *See Hursh, et al. v. DST Systems, Inc.*, Nos. 21-3554, et al., Order, dated Jan. 3. 2022. Yet, the court below later suggested that it might. SPA85; *see also* JA843.

Recognizing that its injunction was impermissibly vague, the district court erroneously attempted to modify it. Specifically, the court proposed a "substitution for the language referencing the complaint" and ordered the parties to submit their "proposed modifications" to its substitution. JA835-36. Then, on February 3, 2022, while insisting that it was *not* adopting a "modification to the injunction," the court

substituted, verbatim, DST's edited version of the court's draft. *Compare* D. Ct. Dkt. 360, at 3-4, *with* SPA83-84.

The district court, however, lacked jurisdiction to modify the injunction pending appeal. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *Chevron Corp. v. Donziger*, 990 F.3d 191, 210 (2d Cir. 2021). And while the district court insisted that it was merely "clarifying" the injunction, the court's characterization strains credulity. The court explicitly called the modification a "substitution" (SPA77; *see also* JA835) and made the substitution for the express purpose of correcting the injunction so that it would be "in accordance with Federal Rule of Civil Procedure 65(d)" *Id.*

Accordingly, both the original injunction and the court's modification are erroneous.

CONCLUSION

The district court's injunction orders should be reversed.

Dated: May 17, 2022

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)(A) because it contains 13,186 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.

Dated: May 17, 2022

/s/ *Andrew Schermerhorn*
Andrew Schermerhorn

SPECIAL APPENDIX

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Part 4. Fiduciary Responsibility (Refs & Annos)

29 U.S.C.A. § 1109

§ 1109. Liability for breach of fiduciary duty

Currentness

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

CREDIT(S)

(Pub.L. 93-406, Title I, § 409, Sept. 2, 1974, 88 Stat. 886.)

Notes of Decisions (544)

29 U.S.C.A. § 1109, 29 USCA § 1109
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United States Code Annotated
Title 29. Labor
Chapter 18. Employee Retirement Income Security Program (Refs & Annos)
Subchapter I. Protection of Employee Benefit Rights (Refs & Annos)
Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement

29 U.S.C.A. § 1132

§ 1132. Civil enforcement [Statutory Text & Notes of Decisions subdivisions I to V]

Effective: December 16, 2014
Currentness

<Notes of Decisions for 29 USCA § 1132 are displayed in mulitple documents.>

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts;

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan; or

(11) in the case of a multiemployer plan, by an employee representative, or any employer that has an obligation to contribute to the plan, (A) to enjoin any act or practice which violates subsection (k) of section 1021 of this title (or, in the case of an employer, subsection (l) of such section), or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) [2] of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under

subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title, section 1021(e)(1) of this title, section 1021(f) of this title, or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E)[2] of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day--

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) Secretarial enforcement authority relating to use of genetic information

(A) General rule

The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements

of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section 1181 or 1182(b)(1) of this title with respect to genetic information, in connection with the plan.

(B) Amount

(i) In general

The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) Noncompliance period

For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period--

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) Minimum penalties where failure discovered

Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) In general

In the case of 1 or more failures with respect to a participant or beneficiary--

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) Higher minimum penalty where violations are more than de minimis

To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) Limitations

(i) Penalty not to apply where failure not discovered exercising reasonable diligence

No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) Penalty not to apply to failures corrected within certain periods

No penalty shall be imposed by subparagraph (A) on any failure if--

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) Overall limitation for unintentional failures

In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of--

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) Waiver by Secretary

In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) Definitions

Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(11) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8)[2] of Title 42.

(12) The Secretary may assess a civil penalty against any sponsor of a CSEC plan of up to $100 a day from the date of the plan sponsor's failure to comply with the requirements of section 1085a(j)(3) of this title to establish or update a funding restoration plan.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

CREDIT(S)

(Pub.L. 93-406, Title I, § 502, Sept. 2, 1974, 88 Stat. 891; Pub.L. 96-364, Title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295; Pub.L. 99-272, Title X, § 10002(b), Apr. 7, 1986, 100 Stat. 231; Pub.L. 100-203, Title IX, §§ 9342(c), 9344, Dec. 22, 1987, 101 Stat. 1330-372, 1330-373; Pub.L. 101-239, Title II, § 2101(a), (b), Title VII, §§ 7881(b)(5)(B), (j)(2), (3), 7891(a)(1), 7894(f)(1), Dec. 19, 1989, 103 Stat. 2123, 2438, 2442, 2445, 2450; Pub.L. 101-508, Title XII, § 12012(d)(2), Nov. 5, 1990, 104 Stat.1388-573; Pub.L. 103-66, Title IV, § 4301(c)(1) to (3), Aug. 10, 1993, 107 Stat. 376; Pub.L. 103-401, §§ 2, 3, Oct. 22, 1994, 108 Stat. 4172; Pub.L. 103-465, Title VII, § 761(a)(9)(B)(ii), Dec. 8, 1994, 108 Stat. 5033; Pub.L. 104-191, Title I, § 101(b), (e)(2), Aug. 21, 1996, 110 Stat. 1951, 1952; Pub.L. 104-204, Title VI, § 603(b)(3)(E), Sept. 26, 1996, 110 Stat. 2938; Pub.L. 105-34, Title XV, § 1503(c)(2)(B), (d)(7), Aug. 5, 1997, 111 Stat. 1062; Pub.L. 107-204, Title III, § 306(b)(3), July 30, 2002, 116 Stat. 783; Pub.L. 108-218, Title I, §§ 102(d), 103(b), 104(a)(2), Apr. 10, 2004, 118 Stat. 602, 603, 606; Pub.L. 109-280, Title I, § 103(b)(2), Title II, § 202(b), (c), Title V, §§ 502(a)(2), (b)(2), 507(b), 508(a)(2)(C), Title IX, § 902(f)(2), Aug. 17, 2006, 120 Stat. 816, 884, 885, 940, 941, 949, 951, 1039; Pub.L. 110-233, Title I, § 101(e), May 21, 2008, 122 Stat. 886; Pub.L. 110-458, Title I, §§ 101(c)(1)(H), 102(b)(1)(H), (I), Dec. 23, 2008, 122 Stat. 5097, 5101; Pub.L. 111-3, Title III, § 311(b)(1)(E), Feb. 4, 2009, 123 Stat. 70; Pub.L. 113-97, Title I, § 102(b)(6), Apr. 7, 2014, 128 Stat. 1117; Pub.L. 113-235, Div. O, Title I, § 111(d), Dec. 16, 2014, 128 Stat. 2793.)

Notes of Decisions (7045)

Footnotes

1 So in original. Probably should be "subtitle".

2 See References in Text note set out under this section.

29 U.S.C.A. § 1132, 29 USCA § 1132
Current through P.L. 117-120. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions [Rule Text & Notes of Decisions subdivisions I to VII]

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 23 are displayed in multiple documents. >

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) ***In General.*** In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class--or a class proposed to be certified for purposes of settlement--may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to be Excluded.*** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14

days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E)may make further orders in connection with the appointment.

(2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 24, 1998, effective December 1, 1998; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009; April 26, 2018, effective December 1, 2018.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This is a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 Georgetown L.J. 551, 570 et seq. (1937); Moore and Cohn, *Federal Class Actions,* 32 Ill.L.Rev. 307 (1937); Moore and Cohn, *Federal Class Actions--Jurisdiction and Effect of Judgment,* 32 Ill.L.Rev. 555-567 (1938); Lesar, *Class Suits and the Federal Rules,* 22 Minn.L.Rev. 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits,* 15 Minn.L.Rev. 501 (1931).

The general test of [former] Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in [former] Equity Rule 38, see Del.Ch. Rule 113; Fla.Comp.Gen.Laws Ann. (Supp., 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala.Code Ann. (Michie, 1928) § 5701; 2 Ind.Stat.Ann. (Burns, 1933) § 2-220; N.Y.C.P.A. (1937) 195; Wis.Stat. (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v. Stiglitz,* 260 Ky. 430, 86 S.W.2d 155 (1935). The rule adopts the test of [former] Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits,* 30 Mich.L.Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants,* 19 Corn.L.Q. 399 (1934); Note, 36 Harv.L.Rev. 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v. Brotherhood of Locomotive Firemen and Enginemen,* 271 Pa. 419, 114 Atl. 377 (1921); *Pickett v. Walsh,* 192 Mass. 572, 78 N.E. 753, 6 L.R.A., N.S., 1067 (1906); *Colt v. Hicks,* 97 Ind.App. 177, 179 N.E. 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v. Coronado Coal Co.,* 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 Georgetown L.J. 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v. Swormstedt,* 16 How. 288, 14 L.Ed. 942 (U.S. 1853). Compare *Christopher, et al. v. Brusselback,* 1938, 58 S.Ct. 350, 302 U.S. 500, 82 L.Ed. 388.

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). See also *Terry v. Little*, 101 U.S. 216, 25 L.Ed. 864 (1880); *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596 (D.C.N.Y., 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936); Glenn, *The Stockholder's Suit--Corporate and Individual Grievances,* 33 Yale L.J. 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit,* 46 Yale L.J. 421 (1937). See also Subdivision (b) of this rule which deals with Shareholder's Action; Note, 15 Minn.L.Rev. 453 (1931).

Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (3). See *Everglades Drainage League v. Napoleon Broward Drainage Dist.*, 253 Fed. 246 (D.C.Fla., 1918); *Gramling v. Maxwell*, 52 F.2d 256 (D.C.N.C., 1931), approved in 30 Mich.L.Rev. 624 (1932); *Skinner v. Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford v. Ellis* (1901) A.C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits,* 30 Mich.L.Rev. 878 (1932).

Note to Subdivision (b). This is [former] Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v. Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX.

Note to Subdivision (c). See McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421 (1937).

Supplementary Note

Note. Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law * * *."

As a result of the decision in *Erie R. Co. v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v. Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder

to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes v. Oakland,* 1882, 104 U.S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v. Tyson,* 1842, 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v. Tompkins* in 1938, concerned with the question whether *Hawes v. Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes v. Oakland,* and at the same term, the Court, to implement its decision, adopted [former] Equity Rule 94, which contained the same provision above quoted from Rule 23 F.R.C.P. The provision in [former] Equity Rule 94 was later embodied in [former] Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy v. Steel,* 1887, 120 U.S. 241, 245, 7 S.Ct. 520, the Court referring to *Hawes v. Oakland* said: "In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States."

Some other cases dealing with [former] Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v. Tompkins* are *Dimpfel v. Ohio & Miss. R.R.*, 1884, 3 S.Ct. 573, 110 U.S. 209, 28 L.Ed. 121; *Illinois Central R. Co. v. Adams*, 1901, 21 S.Ct. 251, 180 U.S. 28, 34, 45 L.Ed. 410; *Venner v. Great Northern Ry.,* 1908, 28 S.Ct. 328, 209 U.S. 24, 30, 52 L.Ed. 666; *Jacobson v. General Motors Corp.*, S.D.N.Y.1938, 22 F.Supp. 255, 257. These cases generally treat *Hawes v. Oakland* as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no "title" and results in a dismissal "for want of equity."

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v. Gould,* 1911, 202 N.Y. 11, 94 N.E. 1088.

The first case arising after the decision in *Erie R. Co. v. Tompkins,* in which this problem was involved, was *Summers v. Hearst,* S.D.N.Y.1938, 23 F.Supp. 986. It concerned [former] Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: "The federal cases that discuss this section of [former] Rule 27 support the view that it states a principle of substantive law." He quoted *Pollitz v. Gould,* 1911, 202 N.Y. 11, 94 N.E. 1088, as saying that the United States Supreme Court "seems to have been more concerned with establishing this rule as one of practice than of substantive law" but that "whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts."

He then concluded that, although the federal decisions treat the equity rule as "stating a principle of substantive law", if "[former] Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v. Tompkins,* it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule."

In *Piccard v. Sperry Corporation,* S.D.N.Y.1941, 36 F.Supp. 1006, 1009-10, affirmed without opinion, C.C.A.2d 1941, 120 F.2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v. Tompkins.* In *New York v. Guaranty Trust Co. of New York,* C.C.A.2, 1944, 143 F.2d 503, rev'd on other grounds, 1945, 65 S.Ct. 1464, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by F.R.C.P. 23(b) or other state statutes are procedural," citing the *Piccard* and other cases.

Some other federal decisions since 1938 touch the question.

In *Gallup v. Caldwell,* C.C.A.3, 1941, 120 F.2d 90, 95 arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins v. DeSoto Securities Co.,* W.D.La.1942, 45 F.Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman v. Missouri-Kansas Pipe Line Co.,* D.Del.1941, 41 F.Supp. 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v. Tompkins,* or its effect on the rule.

In *Perrott v. United States Banking Corp.,* D.Del.1944, 53 F.Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp. v. Barr,* S.D.N.Y.1945, 9 Fed.Rules Serv. 23b.11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz v. Gould,* supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that "in any action brought by a shareholder in the right of a * * * corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b.) These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt v. Moffett,* Ct.App.1945, 294 N.Y. 180, 61 N.E.2d 435, rev'g 51 N.Y.S.2d 188, aff'g 49 N.Y.S.2d 64; *Noel Associates, Inc. v. Merrill,* Sup.Ct.1944, 184 Misc. 646, 63 N.Y.S.2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum v. Clinton Trust Co.,* Sup.Ct.1944, 183 Misc. 340, 48 N.Y.S.2d 267; *Noel Associates, Inc. v. Merrill,* supra. In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) * * *." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v. Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc. v. Merrill,* supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc. v. Merrill,* supra, it has been held that even though the statute is procedural in nature--a matter not definitely decided--the Legislature evinced no intent that the provisions should apply to actions pending when it became effective. *Shielcrawt v. Moffett,* supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v. Atkinson,* Sup.Ct.1944, 182 Misc. 675, 49 N.Y.S.2d 703 (constitutional); *Citron v. Mangel Stores Corp.,* Sup.Ct.1944, 50 N.Y.S.2d 416 (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of § 61-b of the New York General Corporation Law,* 1945, 54 Yale L.J. 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P.L.1945, Ch. 131, R.S.Cum.Supp. 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively.

It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v. Moffett,* Sup.Ct.N.Y.1945, 184 Misc. 1074, 56 N.Y.S.2d 134.

See, also generally, 2 Moore's *Federal Practice,* 1938, 2250-2253, and Cum.Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

1966 Amendment

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur,* 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts,* 71 Harv. L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v. Veterans' Coop. H. Assn.,* 13 F.R.D. 11 (D.D.C.1952); *Shipley v. Pittsburgh & L.E.R. Co.,* 70 F.Supp. 870 (W.D.Pa.1947); *Deckert v. Independence Shares Corp.,* 27 F.Supp. 763 (E.D.Pa.1939), rev'd 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa.1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives v. Deckert,* 123 F.2d 979 (3d Cir.1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v. Reed,* 180 F.2d 991 (6th Cir.1950); *Wilson v. City of Paducah,* 100 F.Supp. 116 (W.D.Ky.1951); *Citizens Banking Co. v. Monticello State Bank,* 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.,* 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); *United States v. American Optical Co.,* 97 F.Supp. 66 (N.D.Ill.1951); *National Hairdressers' & C. Assn. v. Philad Co.,* 34 F.Supp. 264 (D.Del.1940); 41 F.Supp. 701 (D.Del.1940), aff'd mem., 129 F.2d 1020 (3d Cir.1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v. Bankers Sec. Corp.,* 17 F.R.D. 245 (E.D.Pa.1954), aff'd 230 F.2d 717 (3d Cir.1956); *Giesecke v. Denver Tramway Corp.,* 81 F.Supp. 957 (D.Del.1949); *York v. Guaranty Trust Co.,* 143 F.2d 503 (2d Cir.1944), rev'd on grounds

not here relevant, 326 U.S. 99 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v. Kalodner,* 145 F.2d 316, 320 (3d Cir.1944), cert. denied, 325 U.S. 867 (1945). But cf. the early decisions, *Duke of Bedford v. Ellis,* [1901] A.C. 1; *Sheffield Waterworks v. Yeomans,* L.R. 2 Ch.App. 8 (1866); *Brown v. Vermuden,* 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's *Federal Practice,* pars. 23.10[1], 23.12 (2d ed.1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir.1961), pet. cert. dism., 371 U.S. 801 (1963); but cf. *P. W. Husserl, Inc. v. Newman,* 25 F.R.D. 264 (S.D.N.Y.1960); *Athas v. Day,* 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen v. Black,* 234 F.2d 12 (10th Cir.1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but cf. *Wagner v. Kemper,* 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230-31; Keeffe, Levy & Donovan, supra; *Developments in the law,* supra, 71 Harv.L.Rev. at 937-38; Note, *Binding Effect of Class Actions,* 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23,* 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v. Radio Corp. of Am.,* 183 F.2d 558, 560 (3d Cir.1950); *Zachman v. Erwin,* 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc. v. Warren-Connelly Co., Inc.,* 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such

that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v. Looney,* 219 F.2d 529 (9th Cir.1955); *Rank v. Krug,* 142 F.Supp. 1, 154-59 (S.D.Calif.1956), on app., *State of California v. Rank,* 293 F.2d 340, 348 (9th Cir.1961); *Gart v. Cole,* 263 F.2d 244 (2d Cir.1959), cert. denied 359 U.S. 978 (1959); cf. *Martinez v. Maverick Cty. Water Con. & Imp. Dist.,* 219 F.2d 666 (5th Cir.1955); 3 Moore, supra, par. 23.11[2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921); *Waybright v. Columbian Mut. Life Ins. Co.,* 30 F.Supp. 885 (W.D.Tenn.1939); cf. *Smith v. Swormstedt,* 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v. Bankers Securities Corp.,* 17 F.R.D. 245 (E.D.Pa.1954), aff'd, 230 F.2d 717 (3d Cir.1956); *Giesecke v. Denver Tramway Corp.,* 81 F.Supp. 957 (D.Del.1949); *Zahn v. Transamerica Corp.,* 162 F.2d 36 (3d Cir.1947); *Speed v. Transamerica Corp.,* 100 F.Supp. 461 (D.Del.1951); *Sobel v. Whittier Corp.,* 95 F.Supp. 643 (E.D.Mich.1951), app. dism., 195 F.2d 361 (6th Cir.1952); *Goldberg v. Whittier Corp.,* 111 F.Supp. 382 (E.D.Mich.1953); *Dann v. Studebaker-Packard Corp.,* 288 F.2d 201 (6th Cir.1961); *Edgerton v. Armour & Co.,* 94 F.Supp. 549 (S.D.Calif.1950); *Ames v. Mengel Co.,* 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v. Chicago T. & T. Co.,* 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank,* 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.,* 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); cf. *York v. Guaranty Trust Co.,* 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v. Burnham,* 197 F.2d 973 (2d Cir.1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v. Bennett & Armour,* 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. *City & County of San Francisco v. Market Street Ry.,* 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v. Paramount Pictures, Inc.,* 66 F.Supp. 323, 341-46

(S.D.N.Y.1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v. Flax,* 313 F.2d 284 (5th Cir. 1963); *Bailey v. Patterson,* 323 F.2d 201 (5th Cir. 1963), cert. denied, 376 U.S. 910, (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S.C.,* 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green v. School Bd. of Roanoke, Va.,* 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush,* 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.,* 277 F.2d 370 (5th Cir. 1960); *Northcross v. Board of Ed. of City of Memphis,* 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.,* 134 F.Supp. 589 (M.D.N.C.1955, 3-judge court), aff'd 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v. F. J. Young & Co., Inc.,* 144 F.2d 387 (2d Cir. 1944); *Miller v. National City Bank of N.Y.,* 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes v. Encyclopaedia Britannica,* 199 F.2d 295 (7th Cir. 1952); *Sturgeon v. Great Lakes Steel Corp.,* 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v. United States,* 111 F.Supp. 80 (D.N.J.1953); cf. Weinstein, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); cf. *Weeks*

v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); *Kainz v. Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland v. Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chafee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice[,] setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); *York v. Guaranty Trust Co.,* 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); *Pentland v. Dravo Corp.,* 152 F.2d 851, 856 (3d Cir. 1945); *Speed v. Transamerica Corp.,* 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.,* 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp.,* 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver v. Cudahy Packing Co.,* 39 F.Supp. 337, 339 (E.D.Tenn.1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law,* supra, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v. Hercules Powder Co.,* 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram v. San Joaquin Cotton Oil Co.,* 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 in 4; see also *All American Airways, Inc. v. Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart v. Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; *Brendle v. Smith*, 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v. Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass.1962); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y.1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

1987 Amendment

The amendments are technical. No substantive change is intended.

1998 Amendment

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1291(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probably benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

2003 Amendment

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice--including an opportunity to request exclusion--must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority--already established in part by Rule 23(d)(2)--to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be--and at times was--read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action--such as filing claims--to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions,* 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on

the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation--that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties--for example, nonsettling defendants--may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

2007 Amendment

The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

2009 Amendment

The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

2018 Amendments

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice--that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors--perhaps many--may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class

counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements--inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors--or their counsel--have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission

to appeal by any party. The extension recognizes--as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)--that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Notes of Decisions (4541)

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., FRCP Rule 23
Including Amendments Received Through 5-1-22

End of Document

SPA-44

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL L. FERGUSON ET AL,
Plaintiffs,

-against-

RUANE CUNIFF & GOLDFARB INC.,
Defendants.

17-CV-6685 (ALC)

MEMORANDUM AND ORDER

Michael L. Ferguson, Myrl C. Jeffcoat and Deborah Smith collectively, ("Plaintiffs"), individually and on behalf of the DST Systems, Inc. 401(k) Profit Sharing Plan (the "Plan"), bring this action under 29 U.S.C. § 1132 against Ruane Cuniff & Goldfarb Inc. ("RCG"); DST Systems, Inc. ("DST"); The Plan's Advisory Committee; and the Compensation Committee of the Board of Directors of DST Systems, Inc.; (collectively, "Defendants"), for breach of fiduciary duties and other violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. Pending before the Court are Plaintiffs' motions for leave to file a third amended complaint, class certification, and preliminary approval of the class action settlement agreements. For the reasons that follow, Plaintiffs' motions to file a third amended complaint and for class certification are granted. Plaintiffs' motions for preliminary approval of the class action settlements are denied.

BACKGROUND

DST is a global provider of technology-based information processing and servicing solutions who offered its employees the opportunity to participate in the DST Systems, Inc. 401(k) Profit Sharing Plan (the "Plan") — a vehicle for retirement savings designated to produce retirement income for its participants. SAC ¶ 12. Plaintiffs are Plan Participants. *Id.* at ¶¶ 9–11.

The Plan is a defined-contribution retirement plan, funded through employee-directed contributions, DST matching contributions, and DST's voluntary profit-sharing contributions. SAC ¶¶ 4,12. The Plan was originally composed of two components: 1) a Profit Sharing Account ("PSA"), in which DST made contributions on behalf of employees and delegated investment management responsibilities to RCG; and 2) a 401(k) participant-directed portion of the Plan, where participants allocate the employee and employer matching contributions into any investment option available under the Plan as determined by the Advisory Committee ("401(k) portion of the plan"). *Id.* at ¶¶ 4 n.1, 22–23, 27.

DST is the Plan's sponsor, administrator, and a designated fiduciary. SAC ¶ 14. The Advisory Committee and Compensation Committee are named fiduciaries under the Plan, and DST administered the Plan through the Compensation and Advisory Committees. *Id.* at ¶¶ 14-16, 18.

With respect to the PSA portion of the Plan, Plaintiffs allege, *inter alia*, that RCG breached its fiduciary duties under ERISA by concentrating an enormous and imprudent amount of the Plan assets in the Valeant Pharmaceuticals International Inc. stock ("VRX"), which caused the Plan to suffer over $100 million in losses when VRX's share price declined in 2015. SAC ¶¶ 5, 24–50. As Plan fiduciaries, the DST Defendants had a duty to monitor RCG, and thus breached that duty by both failing to protect the Plan from RCG's imprudent investment strategy and even supporting RCG when its strategy imploded. *Id.* at ¶¶ 51-53, 55. According to Plaintiff, the DST Defendants engaged in such nonfeasance and malfeasance to preserve its longstanding financial relationship with RCG. *Id.* at ¶¶ 35-40.

Proposed Class

Plaintiffs seek to certify and be appointed as representatives of the Class that includes:

> All participants and beneficiaries of the DST Systems, Inc. 401(k) Profit Sharing Plan from March 14, 2010 through July 31, 2016 (the "Class Period"), excluding the Defendants and all other individuals who are or have ever been a member of the Advisory Committee of the DST Plan, the Compensation Committee of the Board of Directors of DST or otherwise served as fiduciaries of the DST Plan during the Class Period.

See Pls.' Class Certification Mem. of Law at 7.

Plaintiffs allege that the Class includes more than 9,000 members and joinder is impracticable; there are questions of law and fact common to the Class regarding Defendants' fiduciary duties to the Plan and the participants and beneficiaries; Plaintiffs' claims are typical of the class because they were all participants in the plan during the period and all Participants in the Plan were harmed by Defendants' misconduct; and Plaintiffs are adequate representatives of the Class because they were Participants in the Plan during the Class Period and have no conflicts with the Class. *See* Pls.' Class Certification Mem. of Law; Proposed Third Am. Compl. at ¶¶ 61–64.

Moreover, Plaintiffs allege that prosecution of separate actions by individual participants and beneficiaries would create the risk of inconsistent and varying adjudications, and adjudications by individual participants and beneficiaries would be dispositive of the interests of the participants and beneficiaries not parties to the adjudications, or would impede those participants' and beneficiaries' ability to protect their interests. Therefore, Plaintiffs allege the action should be certified as a class action pursuant to Rules 23(a) and 23(b)(1). *Id.*

PROCEDURAL HISTORY

Plaintiffs filed their Original Complaint on September 1, 2017, an Amended Complaint on November 20, 2017, the Second Amended Complaint on November 5, 2018, and leave to file the Third Amended Complaint on April 10, 2020. (ECF Nos. 1, 9, 82, 124). Plaintiffs moved to certify the class on April 10, 2020 (ECF No. 126), and on January 12, 2021, Plaintiffs moved for

preliminary approval of the class action settlement agreements with the RCG and DST defendants. (ECF Nos. 265, 266.)

The RCG Defendants opposed both the motion to file a third amended complaint and the motion for class certification. (ECF Nos. 138, 140.) Similarly, the arbitration claimants opposed the motion for class certification and the motions for preliminary approval of the class action settlement agreements. (ECF Nos. 183, 271), and the Secretary of Labor opposed the injunctive provisions in Plaintiffs' class action settlement agreement. (ECF No. 269.)

On March 4, 2021, the Second Circuit Court of Appeals found that a similar plaintiff's breach of fiduciary duty claim brought on behalf of the plan did not relate to his employment and thus did not require arbitration under the terms of the arbitration agreement. *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 175 (2d Cir. 2021). The Court then denied Plaintiffs' motions for class certification and to file a third amended complaint without prejudice. The Court gave Plaintiffs an opportunity to refile their motions, and directed the parties to address what, if any, effect the Copper opinion has on the motion for class certification and motion for leave to file a third amended complaint. Plaintiffs then refiled their motions on April 5, 2021. (ECF Nos. 298, 300.) The arbitration Claimants opposed the motions, and the DST Defendants filed a motion in support of class certification on May 3, 2021. (ECF Nos. 304, 306.) Plaintiffs replied on May 10, 2021. (ECF No. 309.) The Court considers these motions fully briefed.

DISCUSSION

I. Standard of Review

Under Rule 23, members of a class may sue as representational parties "only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the

claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). "Said differently, in order to qualify for class certification, plaintiffs in the proposed class must demonstrate that they satisfy four requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." C*ent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244 (2d Cir. 2007).

The third factor, typicality, "requires that the claims of the class representatives be typical of those of the class and is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* at 245 (internal quotation marks omitted). Part of the typicality requirement (or a separate requirement implicit in Rule 23(a), as it is sometimes viewed, *see* 1 Newberg on Class Actions § 3:1 (5th ed., June 2019 update)) is that the proposed class representatives be members of the class they seek to represent. *See id.*; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011). In addition, there is an "implied requirement of ascertainability . . ., which demands that a class be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017) (internal quotation marks omitted). In the Second Circuit, that "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *Id.* at 264.

If the requirements of Rule 23(a) are met, "the district court must also find that the action can be maintained under Rule 23(b)(1), (2), or (3)." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011). Plaintiffs need establish only one basis for certification under Rule 23(b). *See Waggoner v. Barclays PLC*, 875 F.3d 79, 93 (2d Cir. 2017).

Here, Plaintiffs seek to certify the class under Rule 23(b)(1), "where individual adjudications 'as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.'" *Wal-Mart*, 564 U.S. at 361 n.11 (quoting Rule 23(b)(1)(B)). The Court shall address each element in turn.

II. The Second Circuit's Decision in Cooper

As an initial matter, the Court finds that the Second Circuit's decision in *Cooper* made clear that the claims at issue in this matter are not covered by the arbitration agreement. In *Cooper*, the Second Circuit found that Plaintiff's claim for breach of fiduciary duty on behalf of the plan did not relate to his employment and thus did not require arbitration under the terms of the arbitration agreement. *Cooper*, 990 F.3d at 173.

Here, the arbitration claimants put forth several arguments. The arbitration claimants argue that the Second Circuit did not have the opportunity to consider the plan's adoption of the arbitration agreement which states that "the arbitration policy applies to all claims arising out of or relating to the Plan", and since the agreement was adopted, *Cooper* is inapposite. Arbitration Claimants' Mem. of Law at 3–5. The Arbitration claimants further argue that they are not seeking to bring claims on behalf of the plan. Rather, the arbitration claimants argue that they are asserting individual claims in arbitration for the fiduciary breaches that damaged the value of their individual plan assets in their defined contribution plans. *Id.*

The Court finds both of these arguments unavailing. The arbitration provision that RCG and DST used to compel arbitration is the arbitration provision that was before the Second Circuit as well as the arbitration provision that is at issue in this matter. Thus, the Court is not in the position to question what was before the Second Circuit, and the Court does not find that the

Second Circuit applied a countertextual reading to the arbitration agreement as the Arbitration Claimants suggest.

Additionally, even if the Court were to consider the Plan's adoption of the amended Arbitration Agreement, the Court would still find that claims for fiduciary breach are not covered by the Arbitration Agreement. The Arbitration Claimants' assertion that the adopted language bars class certification runs afoul of *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), which requires parties suing on behalf of the plan to demonstrate their suitability to serve as representatives of the interests of other plan stakeholders. Thus, as the Second Circuit stressed in *Cooper*, if the Court were to take the Arbitration Claimants' version of the Arbitration Agreement, it is unclear how "an employee can bring an ERISA fiduciary claim that satisfies *Coan*'s adequacy requirement, while concurrently applying with the agreement[.]"

Moreover, while *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008) authorizes recovery for fiduciary breaches that "impair the value of plan assets in a participant's individual account," these claims are still on behalf of the plan. *LaRue* did not expand § 502(a)(2) to allow individual claims that are not based on losses to plan assets. In fact, the Court explicitly warned that "§502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries . . . ." *See id.* at 256. Thus, as previously stated, the Court finds that the Second Circuit's decision in *Cooper* made clear that the claims at issue in this matter are not covered by the Arbitration Agreement.

III. Rule 23(A)

The Court shall next address Plaintiffs' class certification motion. Plaintiffs seek to certify and be appointed as representatives of the Class that includes:

> All participants and beneficiaries of the DST Systems, Inc. 401(k) Profit Sharing Plan from March 14, 2010 through July 31, 2016 (the "Class Period"), excluding

the Defendants and all other individuals who are or have ever been a member of the Advisory Committee of the DST Plan, the Compensation Committee of the Board of Directors of DST or otherwise served as fiduciaries of the DST Plan during the Class Period.

i. Numerosity

The numerosity requirement is met if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although the practicality of joinder "depends on all the circumstances surrounding a case, not on mere numbers," the Second Circuit has stated that "courts are likely to conclude that the numerosity requirement is satisfied when the class comprises 40 or more members." *Novella v. Westchester Cty.*, 661 F.3d 128, 143-44 (2d Cir. 2011) (internal quotation marks omitted); *see*, *e.g.*, *Shahriar v. Smith & Wollensky Rest. Grp.*, Inc., 659 F.3d 234, 252 (2d Cir. 2011) (numerosity requirement is met for class of 275 people); *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15 Civ. 9936, 2017 WL 3868803, at *4 (S.D.N.Y. Sept. 5, 2017) (numerosity requirement met in derivative ERISA suit where the plan had 22,000 participants and 10,000 former participants).

Here, Plaintiffs allege that the class consists of over 9,000 members. Therefore, Because the class here consists of potentially thousands of members, the numerosity requirement is plainly met.

ii. Commonality

Next, the "commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Central States II*, 504 F.3d at 245 (internal quotation marks omitted). "In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries." *In re Glob.*

Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 452 (S.D.N.Y. 2004) (internal quotation marks omitted); *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 142–43 (S.D.N.Y. 2010) ("By their very nature, ERISA actions often present common questions of law and fact, and are therefore frequently certified as class actions.").

Here, the questions of law and fact — including "(1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties; (3) whether the Plan and its participants and beneficiaries were injured by Defendants' breaches; and (4) whether the Class is entitled to damages and, if so, the proper measure of damages" — are "common questions [that] satisfy Plaintiffs' burden under Rule 23(a)(2)." *In re Marsh*, 265 F.R.D. at 143; *see* SAC ¶ 72; *see also Moreno*, 2017 WL 3868803, at *4 ("Typically, the question of defendants' liability for ERISA violations is common to all class members."). Accordingly, the commonality requirement is met here.

iii. Typicality

The third Rule 23(a) requirement — typicality — is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Central States II*, 504 F.3d at 245 (internal quotation marks omitted). In many contexts, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Wal-Mart*, 564 U.S. at 349 n.5. In ERISA breach of fiduciary duty cases, however, courts sometimes break the typicality requirement into three elements. *See*, *e.g.*, *Moreno*, 2017 WL 3868803, at *7; *see also Cunningham v. Cornell Univ.*, No. 16 Civ. 6525, 2019 WL 275827, *7 (S.D.N.Y. Jan. 22, 2019) (breaking down into first two components). The first element is that the claims largely "arise from the same course of events — the[parties'] participation in the Plan." *Moreno*, 2017 WL 3868803, at *7. Second, plaintiffs must make "similar legal arguments to prove

liability — that Defendants mismanaged the Plan in violation of ERISA." Id. The third element is, effectively, that each plaintiff invested in at least one of the subject funds. *See id.*

The Arbitration Claimants and Canfield and Mendon Claimants argue that the named Plaintiffs' claims are atypical of class as they are not bound by the arbitration agreement and thus cannot represent the absent class members, the majority of which are bound by arbitration agreements and/or currently in arbitration proceedings.

Here, Plaintiffs' claims are typical of the class. Notably, *Cooper* made clear that the claims at issue in the matter are not covered by the arbitration agreement. Thus, while a significant portion of the proposed class—approximately 95% according to the Arbitration Claimants—were subject to the arbitration agreement and/or are currently engaged in arbitration proceedings, this, alone, does not defeat Plaintiffs' typicality arguments.[1]

As the arbitration agreement is not a barrier to typicality, the Arbitration Claimants are not in a different position than the named Plaintiffs because the arbitration provision that they rely on was found not to relate to their employment and thus did not require arbitration under the terms of the agreement. Additionally, the Arbitration Claimants do not have defenses that the named Plaintiffs cannot argue on their behalf, and there is no circumstance where the arbitration provisions would be applicable to the Arbitration Claimants and not applicable to the named Plaintiffs.

The typicality requirement 'is often met in putative class actions brought for breaches of fiduciary duty under ERISA." *In re Marsh*, 265 F.R.D. at 143 (citing *Koch v. Dwyer*, 2001 WL 289972, at *3 (S.D.N.Y. Mar. 23, 2001)); *see also LARRY W. JANDER, RICHARD J. WAKSMAN,*

[1] The Arbitration Claimants have submitted several status letters noting the progression of the arbitration proceedings. On February 11, 2021, the Arbitration Claimants' counsel provided a status letter, indicating that to date the arbitration claimants have prevailed in 73 cases and lost 9 cases. *See* ECF No. 291.

& all other individuals similarly situated, Plaintiffs, v. RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL, MARTIN SCHROETER, & ROBERT WEBER, Defendants., No. 15 CV 3781, 2021 WL 3115709, at *5 (S.D.N.Y. July 22, 2021). Typicality requires a "common thread linking the proposed class members," *see In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12 CV 2548, 2017 WL 1273963, at *9 (S.D.N.Y. Mar. 31, 2017), and the common thread here is that RCG breached its fiduciary duties under ERISA by concentrating an enormous and imprudent amount of the Plan assets in the VRX, and as Plan fiduciaries, the DST Defendants had a duty to monitor RCG, and thus breached that duty by failing to protect the Plan from RCG's investment strategy. *Id.* at ¶¶ 51–53, 55. *See Robidoux v. Celani*, 987 F.2d 931, 936–937 (2d Cir. 1993)). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims;" *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 (1982). "The commonality and typicality requirements of Rule 23(a) tend to merge." Thus, for the reasons discussed in reviewing plaintiffs' commonality arguments, plaintiffs have satisfied the typicality requirement.

iv. Adequacy of Representation

"Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). There is "no simple test for determining if a class will be adequately represented by a named plaintiff." *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 672 (E.D.N.Y. 1986). "Each case must be approached on an individual basis." *Id.* The Court should consider "the representative's understanding and involvement in the lawsuit," "the willingness to

pursue the litigation," and "any conflict between the representative and the class." *Id.* (citing *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968). The analysis required for Rule 23(a)(4)'s adequacy requirement is analogous to that required for typicality: the class representative must "fairly and adequately protect the interest of the class." FED. R. CIV. P. 23(a)(4); *Gen. Tel. Co. of Sw.*, 457 U.S. at 157, n. 13.

Plaintiffs allege that there are no conflicts with other class members and that their interests with the class are aligned by the very nature of the claims that Plaintiffs bring, seeking to recover damages on behalf of the plan. The Arbitration Claimants argue that Plaintiffs do not represent the interest of the class as they have a right to arbitrate, choose their own counsel, and opt out of any class and have their own day in Court. Arbitration Claimants Mem. of Law at 16–19.

As the Court discussed *Supra*, all members of the proposed Class allege claims arising from the same conduct, that is that RCG breached its fiduciary duties under ERISA by concentrating an enormous and imprudent amount of the Plan assets in the VRX, and as Plan fiduciaries, the DST Defendants had a duty to monitor RCG, and thus breached that duty by both failing to protect the Plan from RCG's investment strategy. *Id.* at ¶¶ 51–53, 55. These claims would potentially vindicate the interests of the entire Class. While the Arbitration Claimants argue that they have a right to arbitrate, the Second Circuit as well as this Court has found that the claims at issue here are not covered by the arbitration agreement. Additionally, as the Court will discuss below, this class is properly certified under Rule 23(b)(1). Therefore, Because Rule 23(b)(1) does not provide opt-out protections, class actions brought under this rule "are often referred to as 'mandatory' class actions." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n. 13 (1999). Thus, the Court cannot credit the Arbitration Claimants' arguments regarding the right to opt out of the class action. The Adequacy of Representation requirement is plainly met.

IV. Rule 23(b)(1)

As Plaintiffs have satisfied the requirements of Rule 23(a), the Court is required to assess the class under Rule 23(b)(1) for "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications." Fed. R. Civ. P. 23(b)(1)(B); *see* Pls.' Class Certification Mem. of Law at 16. The "derivative nature of ERISA § 502(a)(2) claims makes them paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class . . . because any decision regarding whether the defendants breached their fiduciary duties would necessarily affect the interests of other participants." 2 Newberg on Class Actions § 4:21 (5th ed., June 2019 update) (internal quotation marks omitted); *see also Coan*, 457 F.3d at 261("[A] breach of trust by . . . [a] fiduciary . . . similarly affecting the members of a large class of beneficiaries . . . [is] among the classic examples of Rule 23(b)(1)(B) class actions." (internal quotation marks omitted)); I*n re Glob. Crossing*, 225 F.R.D. at 453 ("Because of ERISA's distinctive representative capacity and remedial provisions, ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." (internal quotation marks omitted)).

As the requirements of Rule 23(a) are met, the class is properly certified under Rule 23(b)(1)(B). Plaintiffs purport to bring this action as a breach of fiduciary duty brought under § 1132(a)(2) on behalf of the Plan. The allegations in the Complaint intend to remedy fiduciary breaches and other misconduct on behalf of the Plan. Allowing multiple actions, each of which would seek similar or the same relief from the Defendants on behalf of the Plan, would potentially prejudice individual class members and would threaten to create "incompatible standards of conduct" for the Defendants. These are issues that Rule 23(b)(1) seeks to avoid. Because plaintiffs' allegations are brought with respect to breaches of fiduciary duties to the Plans as a whole,

defendants' duties rise and fall with all plaintiffs. In sum, because the management of the Plans has an effect on all Plan-participants, the class is properly certified under Rule 23(a) and Rule 23(b)(1)(A) or 23(b)(1)(B). *See Clark v. Duke Univ.*, No. 16 CV 1044, 2018 WL 1801946, at *9 (M.D.N.C. Apr. 13, 2018); *Sacerdote v. New York Univ.*, No. 16 CV 6284, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018).

V. Plaintiffs' Motion to Amend

Plaintiffs seek leave to file a third amended complaint to add class allegations. As the Court granted Plaintiffs' motion for class certification, the Court grants Plaintiffs leave to file a third amended complaint only to the extent of adding class allegations. Under Rule 15(a)(2), the Court should "freely give" leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2).

VI. Plaintiffs' Motion for Preliminary Approval of their Class Action Settlement with the RCG and DST Defendants

Plaintiffs move for preliminary approval of their Class Action Settlement with the RCG and DST Defendants. The Court will not approve the agreements. Plaintiffs' settlement agreements include an injunctive provision that states:

> In further aid of and to protect the Court's jurisdiction to review, consider, implement, and enforce the Settlement, the Court preliminarily enjoins and bars (i) Plaintiff releasors, the Secretary, and any Person purporting to represent them or pursue Claims on their behalf, and (ii) any participant who has been excluded from the Settlement Class, from bringing or prosecuting in any forum any Claim that arises from, relates to, or is connected with: (i) the conduct alleged in the Complaint.

While Plaintiffs argue that the purported bar order/injunction is a commonplace provision in class action settlements, the above provision is far more than a common bar order and cannot be approved by this Court. As the caselaw Plaintiffs cited in support of the provision explained, bar orders typically involve contribution and indemnification between settling defendants. The

Court stated the following in *In re WorldCom, Inc. ERISA Litig.*, 339 F. Supp. 2d 561 (S.D.N.Y. 2004):

> Because of the importance of settlement to our litigation system, and because an unlimited right to seek contribution would "surely diminish the incentive to settle," … courts may approve provisions in settlement agreements that bar contribution and indemnification claims between the settling defendants and non-settling defendants so long as there is a provision that gives the non-settling defendants an appropriate right of set-off from any judgment imposed against them. *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368–69 (2d Cir.1991). Without the ability to limit the liability of settling defendants through bar orders "it is likely that no settlements could be reached." *Id.* at 1369. Nonetheless, "[a] settlement bar should not be approved unless it is narrowly tailored and preceded by a judicial determination that the settlement has been entered into in good faith and that no one has been set apart for unfair treatment." *Masters Mates*, 957 F.2d at 1031.

Plaintiffs' injunctive provision seeks to enjoin non-parties, including the Secretary of Labor, from bringing or prosecuting their claims. While Plaintiffs attempt to characterize this as a traditional bar order, it is plainly not. Section 502(a)(2) authorizes "the Secretary [of Labor] . . . a participant, beneficiary, or fiduciary" to bring a "civil action" for breach of fiduciary duty, and Plaintiffs have failed to cite any case law in this circuit or otherwise that have approved such an overbroad provision in an ERISA Section 502(a)(2) case. Thus, approving the settlement's injunction provision would circumvent the Secretary's independent and unqualified right to sue and seek redress for ERISA violations on the basis that ERISA plans significantly affect the "national public interest." *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1423–25 (11th Cir.1998) (holding that a private litigant's settlement does not bar a Secretary's independent action to address ERISA violations; observing that it is well-established that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests); *Agway, Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson*, 409 F. Supp. 2d 136, 146 (N.D.N.Y. 2005) (stating that "endorsement of a private

settlement attempting to bar the Secretary's action in a particular case would effectively undermine the ERISA enforcement scheme carefully constructed by Congress.") Accordingly, the Court denies Plaintiffs' motions for premilitary approval of the class action settlements. (ECF Nos. 265, 266.)

CONCLUSION

For the reasons set forth above, Plaintiff's motion for leave to file a third amended complaint is granted. (ECF No. 298.) Plaintiffs' motion for class certification pursuant to Rule 23 is granted. (ECF No. 300.) Additionally, Plaintiffs' motions for preliminary approval of the class action settlements are denied. (ECF Nos. 265, 266.) Likewise, the identical motion for preliminary approval of the class settlement in 20 CV 7092 (ECF No. 8) is denied for the reasons above.

SO ORDERED.

Dated: August 17, 2021
New York, New York

ANDREW L. CARTER, JR.
United States District Judge

SPA-60

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL L. FERGUSON ET AL.,
Plaintiffs,

-against-

RUANE CUNIFF & GOLDFARB INC.,
Defendants.

17-CV-6685 (ALC)

ORDER

ANDREW L. CARTER, JR., United States District Judge:

In accordance with the Court's ruling at the hearing on November 18, 2021, the DST Defendants' Motion for a Preliminary Injunction is GRANTED. ECF No. 312. The DST Defendants' Motion to Seal is also GRANTED. ECF No. 323.

It is hereby ORDERED that all members of the Federal Rule of Civil Procedure 23(b)(1) class certified by this Court on August 17, 2021, including the Arbitration Claimants, are ENJOINED 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.

The DST Defendants and the Arbitration Claimants shall submit briefing, not to exceed three pages, regarding the amount of security to be posted. The DST Defendants' brief is due **Friday, November 18, 2021**. The Arbitration Claimants' response is due **Monday, November 22, 2021**.

The Court orders the DST Defendants and the Arbitration Claimants to submit briefing on the issue of arbitration awards that have been entered against the DST Defendants. The Parties shall jointly submit a proposed briefing schedule by **Wednesday, November 24, 2021**.

The Clerk of Court is respectfully directed to terminate the letter motion at ECF No. 323.

SO ORDERED.

Dated: November 18, 2021
New York, New York

ANDREW L. CARTER, JR.
United States District Judge

LBIFERD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
MICHAEL L. FERGUSON ET AL.,,

Plaintiffs,

v. 17 CV 6685 (ALC)
Telephone Conference

RUANE CUNIFF & GOLDFARB INC.,

Defendants.
----------x

New York, N.Y.
November 18, 2021
12:07 p.m.

Before:

HON. ANDREW L. CARTER, JR.,

District Judge

APPEARANCES VIA TELECONFERENCE

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JEFFREY J. RECHER

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Attorneys for Intervenor Plaintiffs, Arbitration Claimants
BY: ANDREW SCHERMERHORN
KENNETH McCLEAN

KENT, BEATTY & GORDON, LLP
Attorneys for Intervenor Plaintiffs, Canfield and Mendon
BY: JOSHUA B. KATZ

(The Court and all parties appearing telephonically)

(Case called)

THE DEPUTY CLERK: Counsel please state your appearances for the record. For the plaintiff?

MR. MILLER: Good afternoon, your Honor. This is James Miller for the plaintiffs, and with me is my colleague, Alec Berin, and our co-counsel, Monique Olivier.

THE DEPUTY CLERK: And for defendant Ruane?

MR. WARD: On behalf of defendant Ruane, this is Robert Ward from Schulte, Roth and Zabel, with my colleague, Frank Olander.

THE DEPUTY CLERK: And for the DST defendants?

MR. CLAYTON: This is Lew Clayton from Paul, Weiss for DST. With me is my partner, Jeff Recher.

THE DEPUTY CLERK: And for the intervenor plaintiff?

MR. SCHERMERHORN: Thank you. This is Andy Schermerhorn for the arbitration claimants, and with me is my colleague, Kenneth McClean.

THE DEPUTY CLERK: Thank you.

MR. KATZ: And also, it's Josh Katz, K-a-t-z, for the intervenor plaintiffs, Canfield and Mendon.

THE DEPUTY CLERK: Thank you, Mr. Katz.

THE COURT: Okay. Good afternoon. I hope everyone is safe and healthy.

Before the Court is a motion for a preliminary

injunction brought by DST Systems, Incorporated; the Advisory Committee of the DST Systems, Inc. 401(k) Profit Sharing Plan; and the Compensation Committee of the Board of Directors of DST.

Since the parties have fully briefed this motion, I am prepared to rule orally on the record today. First, the DST defendants have requested permission to file under seal the declaration of Jeffrey Recher and certain attached exhibits to the DST defendants' response to the arbitration claimants' opposition in order to protect the confidentiality interests of the arbitration claimants, as these exhibits include information connected to the arbitrations, which, per the arbitration agreement, requires the arbitration to be kept confidential.

Under Second Circuit law, judicial documents are afforded a presumption of public access. The weight of this presumption is governed by the role of the material at issue and the material's value to the public. That's *Lugosch v. Pyramid Company of Onondaga*, 435 F.3d 110 at 119 (2d Cir. 2006). The presumption must be balanced against competing factors, which include the privacy interests of those resisting disclosure. That's *Lugosch* 435 F.3d at 120.

The confidentiality interests of the arbitration claimants outweigh the value of the information to the public. Accordingly, I grant the DST defendants' motion to seal.

I assume the parties are familiar with the facts and procedural history. In relevant part, on August 17th, 2021, I certified, under Federal Rule of Civil Procedure 23(b)(1), a mandatory non-opt-out class of participants and beneficiaries of the DST Systems, Inc. 401(k) Profit Sharing Plan from March 14th, 2010, through July 31st, 2016, excluding plan fiduciary.

I also held that the claims at issue in this matter are not covered by the arbitration agreement. Since I issued this order, members of the class, who have brought claims in arbitration, and their counsel have continued to litigate individual claims through arbitration and to file new actions to confirm arbitration awards in the Western District of Missouri.

The DST defendants requested that I issue 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 amended complaint.

I denied the TRO request, and ordered the arbitration claimants to show cause why a preliminary injunction should not be issued. I also ordered the parties to address the issue of judicial estoppel.

The DST defendants have asked that I exercise my

authority under the All Writs Act or, alternatively, under Federal Rule of Civil Procedure 65, to enforce my August class certification order. Under the All Writs Act, federal district courts can issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of the law, 28 U.S.C. Section 1651(a).

The All Writs Act empowers courts to issue extraordinary writs as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued. *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American AFL-CIO,* 907 F.2d 277 at 280 (2d Cir. 1990); quoting *United States v. New York Tel.*, 434 U.S. 159 at 172 from 1977.

Certification of a mandatory class under rule 23(b)(1) is intended to address the challenges that would come from individual cases resulting in varying adjudications over defendants' alleged breach and how to measure the damages and incompatible standards and conflict between various court orders. *Sacerdote v. New York University*, No. 16-CV-6284, 2018 Westlaw 840364, at page 6, (S.D.N.Y. Feb. 13, 2018).

Conditional certification of a national mandatory class action, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, supersedes all litigation against the defendants pending in federal and state forums, such that the effect of conditional class certification is for all pending

state and federal cases to become part of the mandatory class and cease to exist as independent cases. *In re: Joint E. & S. Dist. Asbestos Litigation*, 134 F.R.D. 32, 36 (E. & S.D.N.Y. 1990).

And my class certification order explained as much. There, I stated allowing multiple actions, each of which would seek similar or the same relief from the defendants on behalf of the plan, would potentially prejudice individual class members and would threaten to create incompatible standards of conduct for the defendants. That's ECF 311 at 13.

The Second Circuit has stated that a Federal Court may enjoin an arbitration that the Court determines is not otherwise valid. *In re: Am. Exp. Financial Advisors Securities Litigation*, 672 F.3d 113, 140 (2d Cir. 2011).

Additionally, a Federal Court may enjoin actions in other jurisdictions that would undermine its ability to reach and resolve the merits of the federal suit before it. *State Farm Mutual Auto Insurance Company v. Parisien*, 352 F. Supp. 3d 215, 224 (E.D.N.Y. 2018).

The arbitration and litigation over the arbitration claimants have engaged in since my class certification order quite clearly are in frustration of that order, and therefore, I find that the instant injunction is necessary to protect this Court's jurisdiction. If an injunction is entered pursuant to the All Writs Act, the Court need not analyze the factors to be

considered when ruling on a preliminary injunction motion under Federal Rule of Civil Procedure 65. *In re: Baldwin-United Corporation*, 77 F.2d 328 at 338 (2d Cir. 1985). However, I find that the DST defendants have also satisfied the requirements under rule 65.

To succeed on a preliminary injunction motion, a litigant must establish: One, irreparable harm absent the injunctive relief; and two, either, A, a likelihood of success on the merits, or, B, sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief. *Jackson Dairy, Incorporated v. HP Hood and Sons, Incorporated*, 596 F.2d 70 at 72 (2d Cir. 1979).

First, turning to irreparable harm. To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *Kamerling v. Massanari*, 295 F. 3d 206 at 214 (2d Cir. 2002).

The DST defendants claim that they will be irreparably harmed by wasting resources when litigating non-arbitrable claims in parallel proceedings in arbitrations. Indeed, courts in this circuit have found irreparable harm where, absent an injunction, litigants would be forced to spend resources in

numerous litigations, rather than resolving them in one matter. See, for example, *Parisien*, 352 F. Supp. 3d at 233.

This is especially true where parallel proceedings in arbitrations result in awards that might eventually be, at best, inconsistent with this Court's ruling and, at worst, essentially ineffective. *Allstate Insurance Company v. Elzanaty*, 929 F. Supp. 2d 199 at 222 (E.D.N.Y. 2013).

As I stated in the class certification order, rule 23(b)(1) seeks to avoid multiple actions that would create conflicting standards of conduct. Thus, DST would be irreparably harmed by being forced to expend resources defending non-arbitrable claims in arbitrations and other actions.

In evaluating whether the DST defendants are likely to succeed on the merits, or whether there is a sufficiently serious question going to the merits to make them a fair ground for litigation, the parties have suggested that, for this matter, success on the merits refers to the issue of whether the class is likely to be maintained such that the arbitration claimants' claims cannot be brought in arbitration.

I already held in my August order that, in line with the Second Circuit's ruling in *Cooper v. Ruane*, 990 F.3d 173 (2d Cir. 2021), the claims were not arbitrable and, therefore, I certified the mandatory class under rule 23(b). In the same vein, I find that the DST defendants are likely to succeed on

the merits.

The balance of the hardships also favors the DST defendants. As discussed with regard to irreparable harm, the DST defendants will be forced to defend against various and conflicting adjudications and to expend unnecessary resources. *Parisien*, 352 F. Supp. 234, stating that the Court need not pause on this question for long, as the irreparable harm factors discussed above also tip the equities squarely in the movant's favor.

Turning to judicial estoppel. Judicial estoppel applies if: One, a party's later position is clearly inconsistent with its earlier position; two, the party's former position has been adopted in some way by the courts in the earlier proceeding; and, three, the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. *DeRosa v. National Envelope Corporation*, 595 F.3d 99, 103 (2d Cir. 2010) (citing *New Hampshire v. Maine*, 532 U.S. 742 at 749 (2001).

Judicial estoppel is ultimately not relevant here. In the Western District of Missouri *DuCharme* action, the DST defendants did previously support the position that the Plan's claim should be adjudicated in arbitrations. However, the relevant inquiry for which the DST defendants have established its current position, is necessarily different than the inquiry there.

The DST defendants are not here advocating for whether or not the claims are arbitrable. That question was decided in my August class certification order. Rather, they are asserting that in light of the class certification order, parallel litigations of the claims encompassed by the order cannot continue. Thus, the DST defendants are not judicially estopped here. See *American Manufacturers Mutual Insurance Company v. Payton Lane Nursing Home, Incorporated,* 704 F. Supp. 2d 177 at 197 to 98 (E.D.N.Y. 2010). Where litigant did not make any earlier representation on relevant issue, there is no previous position which is inconsistent for the purposes of judicial estoppel.

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. Accordingly, I grant the DST defendants' motion for a preliminary injunction.

It is hereby ordered that all members of the Federal Rule of Civil Procedure 23(b)(1) class, certified by this Court on August 17th, 2021, including the arbitration claimants, are enjoined 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. This injunction covers any pending and future arbitrations and actions.

With regard to the arbitration awards that have been entered against DST, I would like the parties to submit briefing on the issue of how those awards should be handled, in light of the class certification order and this injunction. The parties should submit a proposed joint briefing schedule by Wednesday, November 24th, 2021.

Additionally, the class certification order, and now this order, mooted the claims in the related Canfield and Mendon cases. Accordingly, those cases are dismissed.

With respect to the amount of security to be posted by the DST defendants, I would like to hear from the parties on the amount they feel is appropriate. First, I'll hear from the arbitration claimants.

MR. McCLEAN: Judge, we -- as you know, we have obtained verdicts and judgments in excess of $50 million. No less than $100 million should be posted, we believe, under these circumstances. Kenneth McClean.

THE COURT: Yes. Counsel, please just state your name before you speak.

Okay. Let me hear from the DST defendants.

MR. CLAYTON: Lew Clayton, your Honor, from Paul, Weiss for the DST defendants. I would like to, if the Court would think it's helpful, to have short briefing on that

question because this is a situation where DST is a subsidiary of SS&C, a large New York Stock Exchange traded company, and there's no question that the company is good for these -- any of these obligations, No. 1.

And No. 2, all Mr. McClean, representing the arbitration claimants, has said is he has some awards, which are in various stages of the arbitration. He has no right, at this point, to security for those awards. The only security that he could seek is any damage that would occur because of the activity of the Court's injunction.

To just say that he is harmed and his clients are harmed by the full amount of the awards that are, as I say, in various stages, up through the chain of appeal, awards also that we think are not valid under Cooper, to say that the injunction causes harm equal to every dollar of those awards, I respectfully submit makes no sense.

The only damage is the delay that they will face if, for some reason, this Court's injunction is overturned. And there's no proof. Mr. McClean's pure statement that he has judgments in an approximate -- or awards in that approximate amount is, I respectfully submit, not anything close to proof of damage from delay. And as I say, your Honor, if it will be helpful to the Court, I think each party could very quickly submit a piece of paper to your Honor on that issue.

THE COURT: Okay. Any response from the arbitration

claimants?

MR. McCLEAN: I mean, I certainly don't object to him writing something in response, Judge, but I didn't really understand what he said.

MR. CLAYTON: I could repeat it, your Honor, if that would be useful for the Court.

THE COURT: I don't think that that would be useful. I understood what counsel said.

MR. CLAYTON: Thank you.

THE COURT: Why don't we go ahead and have counsel just turn something around very quickly on this issue regarding the security. Let's have the DST defendants submit something by, let's say, something by end of day tomorrow, and the arbitration claimant can respond by the end of the day on Monday.

MR. CLAYTON: Okay. Thank you, your Honor.

THE COURT: Okay. Is there anything else from the parties? Okay. Hearing nothing -- okay, go ahead. Is there something?

MR. MILLER: Your Honor, this is James Miller. I was just going to say nothing for the plaintiff. Thank you very much.

THE COURT: All right. So I'll get these quick letter briefs in quickly and rule on the amount of security.

Is there anything else from anyone?

MR. SCHERMERHORN: Judge, just for clarification.

THE COURT: Make sure you just identify yourself before you speak.

MR. SCHERMERHORN: Mr. Schermerhorn for the arbitration claimants. There are cases presently pending in the Eighth Circuit Court of Appeals, as well as in the Western District of Missouri in which arbitration awards have been confirmed and appealed.

The Eighth Circuit and the Western District have both held, contrary to the Second Circuit, that these claims are arbitrable as far back as in the *DuCharme* case. As for those cases presently pending in the Eighth Circuit, there will be briefs due to the Eighth Circuit. I don't suspect that your injunction applies to those pending matters because certainly the Court doesn't think that it can enjoin either the Eighth Circuit or the Eighth Circuit's request that we brief various issues.

MR. CLAYTON: Your Honor, this is Lew Clayton for DST. I would suspect that I think the parties now have an obligation, at the very least, to inform the Eighth Circuit of your Honor's ruling. And I think what we would do is inform those courts of your ruling, and I think it is likely those courts will afford comity to this Court's ruling and stay the actions of before them. But I don't think that that fact is a reason to make any change in your Honor's order.

THE COURT: Okay. I agree with counsel for DST. You can certainly notify the Eighth Circuit of this ruling, yes.

Was there something else you were going to say, counsel?

MR. SCHERMERHORN: I guess, Judge, no. We'll make that notification, but to the extent we're ordered by the Eighth Circuit to do something, then I think we're -- you know, I'm sitting here in the Eighth Circuit.

THE COURT: I understand that. Obviously, again, we don't need to get into all of these other things. 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.

Anything else from the parties?

(Pause)

Okay. We are adjourned. Thank you.

(Adjourned)

SPA-77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL L. FERGUSON ET AL.,

Plaintiffs,

-against-

RUANE CUNIFF & GOLDFARB INC. ET AL.,

Defendants.

17-CV-6685 (ALC)

ORDER

ANDREW L. CARTER, JR., United States District Judge:

The Arbitration Claimants' memorandum of law in support of their motion to stay contends that the preliminary injunction issued on November 18, 2021 is "deficient" because "[i]t does not state its terms specifically and it refers to the act or acts restrained by reference to the amended complaint." ECF No. 347 at 14. The Court acknowledges that the injunction referenced the complaint and accordingly seeks to clarify the scope of the injunction.[1]

The injunction as issued at the November 18, 2021 preliminary injunction hearing states:

> "[A]ll members of the Federal Rule of Civil Procedure 23(b)(1) class certified by this Court on August 17, 2021, including the Arbitration Claimants, are ENJOINED 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. This injunction covers any pending and future arbitrations and actions."

ECF No. 335 at 10:25-11:2.

In substitution for the language referencing the complaint, the Court proposes the following:

[1] Although a court may not modify an injunction pending on appeal, a court is permitted to explain or interpret the injunction. *See, e.g.*, *Chevron Corp. v. Donziger*, 990 F.3d 191, 210 (2d Cir. 2021) ("Surely the district court had the authority to explain its Injunction while it was on appeal . . . ."). The Court does not modify the injunction here.

[A]ll members of the Federal Rule of Civil Procedure 23(b)(1) class certified by this Court on August 17, 2021, including the Arbitration Claimants, are ENJOINED from instituting new actions or litigating in arbitration or other proceedings against the DST Defendants matters arising out of or relating to the following allegations:

(i) That the assets of the PSA ("Profit Sharing Account") were invested in a reckless and imprudent manner by Ruane Cuniff & Goldfarb Inc. ("Ruane"), to the severe detriment of the DST Systems, Inc. 401(k) Profit Sharing Plan ("Plan") (and thereby, its participants).

(ii) That, with respect to the retirement savings of Plan participants, Ruane (under the oversight and with the consent of DST and the Advisory Committee Defendants) gambled with these Plan assets by failing to appropriately diversify the investment of the Plan's assets and pursuing risky, inappropriate investment strategies, while the Compensation Committee Defendants failed to fulfill their duties to supervise the Advisory Committee Defendants. In addition, the Plan participants were not provided with meaningful and timely guidance regarding the nature of the investments held in the PSA, or any specific or meaningful and timely information regarding the investment objectives or investment components of the PSA.

(iii) That Defendants have engaged in and continue to engage in severe breaches of fiduciary duty with respect to the investments in the PSA and non-PSA portions of the Plan, in violation of the Employee Retirement Income Security Act ("ERISA") § 404, 29 U.S.C. § 1104, by failing to (a) discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, (b) diversify the investments of the Plan so as to minimize the risk of large losses, and (c) monitor the performance of other fiduciaries to the Plan in a prudent and reasonable manner.

(iv) That Defendants are liable for breaches of their fiduciary duties, violations of ERISA's prohibited transaction rules, and co-fiduciary breaches and liability for a knowing breach of trust.

No later than **Friday, January 21, 2022**, the parties shall submit to the Court by joint filing any proposed modifications to the above language. The Court is *not* inviting comments regarding the "instituting new actions or litigating in arbitration or other proceedings" language in the injunction, and the submission shall not address this language.

Further, the Court's August 17, 2021 Memorandum and Order granted Plaintiffs leave to file a third amended complaint, only to the extent of adding class allegations. ECF No. 311 at 14.

To date, Plaintiffs have yet to file the amended complaint. Therefore, the operative complaint is Plaintiffs' Second Amended Complaint, ECF No. 82. Plaintiffs shall file their amended complaint no later than **January 24, 2022**.

The hearing on the motion to stay is adjourned until **Wednesday, January 26, 2022 at 2:30 p.m.**

SO ORDERED.

Dated: January 18, 2022
New York, New York

ANDREW L. CARTER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL L. FERGUSON ET AL.,

Plaintiffs,

-against-

RUANE CUNIFF & GOLDFARB INC.,

Defendants.

17-CV-6685 (ALC)

ORDER DENYING MOTION TO STAY

On December 16, 2021, the Arbitration Claimants appealed this Court's November 18, 2021 injunction to the Second Circuit. ECF No. 339. On December 31, 2021, the Arbitration Claimants filed a motion to stay the preliminary injunction pending appeal. ECF No. 347. On January 3, 2022, the Court ordered the DST Defendants to show cause why the Court should not issue a stay and the Court preliminarily denied the request to stay. ECF No. 349. The Court has reviewed the parties' submissions concerning the motion to stay. The Court has also reviewed the briefing on the issue of those arbitration awards already entered against DST, as well as the joint letter regarding clarification of the injunction. For the reasons that follow, the motion to stay the preliminary injunction is DENIED.

When deciding a motion to stay an injunction pending appeal, a court considers the following four factors: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected." *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009).

First, the Arbitration Claimants have not shown they will be subject to irreparable harm absent a stay. Delay in recovery of losses is the potential harm the Arbitration Claimants would suffer. This is not a harm that "cannot be remedied without a stay." *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, No. 14 CIV 585 (AJN), 2015 WL 5051769, at *2 (S.D.N.Y. Aug. 26, 2015), *aff'd*, 836 F.3d 153 (2d Cir. 2016), and *aff'd*, 843 F.3d 48 (2d Cir. 2016) (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)). Nor is it a harm that is "not readily remediable monetarily." *Purdue Pharma L.P. v. Endo Pharms. Inc.*, No. 00 CIV 8029 (SHS), 2004 WL 306591, at *2 (S.D.N.Y. Feb. 17, 2004) (quoting *Monsanto Co. v. Homan McFarling*, 302 F.3d 1291, 1296–97 (Fed. Cir. 2002)). Rather, here, money damages *can* "provide adequate compensation" because—as the Court held in declining to impose a bond—harm from the delay in recovery may be remedied by pre-judgment or post-judgment interest on the arbitration awards. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002).

Second, the DST Defendants and the plaintiff class will suffer substantial injury if a stay is issued. The Court stated in the August 2021 class certification order and reiterated in the November 2021 preliminary injunction order that "[a]llowing multiple actions . . . would potentially prejudice individual class members and would threaten to create incompatible standards of conduct for the Defendants." ECF No. 311 at 13. At the November 2021 preliminary injunction hearing, the Court held that DST would be irreparably harmed by being forced to expend resources defending non-arbitrable claims in arbitrations and other actions.

If the Court stayed the injunction, the risk of these harms would still be present. As the Second Circuit has held, "the grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm that is imminent as required to sustain the same preliminary injunction" and a finding of no serious harm or substantial

injury would be "a fatal flaw." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999).

Third, the Arbitration Claimants have not demonstrated a substantial possibility of success on appeal. The standard of review for a grant of a preliminary injunction is abuse of discretion, and the Arbitration Claimants have not shown that the Court has "rest[ed] its decision on a clearly erroneous finding of fact or ma[d]e[] an error of law." *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010) (quoting *Almontaser v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008)).

In the aftermath of the class certification order, the Arbitration Claimants continued to arbitrate individual claims and file new actions to confirm arbitration awards. In the preliminary injunction order, the Court held that the Arbitration Claimants' conduct in pursuing claims in arbitration and other litigation was in frustration of the class certification order. The Court also held that the injunction is necessary to protect this Court's jurisdiction. This all remains true.

The Arbitration Claimants have argued that the injunction is deficiently unspecific. The Court finds that the injunction is sufficiently specific, however, in accordance with Federal Rule of Civil Procedure 65(d), which states that an injunction shall "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required," the Court provides further clarification to the injunction's reference to the Complaint. The Court notes that this is *not* a modification to the injunction, rather this is an explanation of the injunction. *See, e.g.*, *Chevron Corp. v. Donziger*, 990 F.3d 191, 210 (2d Cir. 2021) ("Surely the district court had the authority to explain its Injunction while it was on appeal . . . ."). Thus, the Court clarifies the injunction as follows:

> All members of the Federal Rule of Civil Procedure 23(b)(1) class certified by this Court on August 17, 2021, including the Arbitration Claimants, are ENJOINED

from instituting new actions or litigating in arbitration or other proceedings against the DST Defendants matters arising out of or relating to the following allegations:

(i) That the assets of the PSA ("Profit Sharing Account") were invested in a reckless and imprudent manner by Ruane Cuniff & Goldfarb Inc. ("Ruane"), to the severe detriment of the DST Systems, Inc. 401(k) Profit Sharing Plan ("Plan") (and thereby, its participants).

(ii) That, with respect to the retirement savings of Plan participants, Ruane (under the oversight and with the consent of DST Systems, Inc. ("DST") and the Advisory Committee of the DST Systems, Inc. 401(k) Profit Sharing Plan (the "Advisory Committee Defendants")) gambled with these Plan assets by failing to appropriately diversify the investment of the Plan's assets and pursuing risky, inappropriate investment strategies, while the Compensation Committee of the Board of Directors of DST Systems, Inc. (the "Compensation Committee Defendants" and, together with DST and the Advisory Committee Defendants, the "DST Defendants") failed to fulfill their duties to supervise the Advisory Committee Defendants. In addition, the Plan participants were not provided with meaningful and timely guidance regarding the nature of the investments held in the PSA, or any specific or meaningful and timely information regarding the investment objectives or investment components of the PSA.

(iii) That Ruane and the DST Defendants ("Defendants") have engaged in and continue to engage in severe breaches of fiduciary duty with respect to the investments in the PSA and non-PSA portions of the Plan, in violation of the Employee Retirement Income Security Act ("ERISA") § 404, 29 U.S.C. § 1104, by failing to (a) discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the Plan; (b) discharge their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (c) diversify the investments of the Plan so as to minimize the risk of large losses; and/or (d) monitor the performance of other fiduciaries to the Plan in a prudent and reasonable manner.

(iv) That Defendants are liable for breaches of their fiduciary duties, violations of ERISA's prohibited transaction rules, and co-fiduciary breaches and liability for a knowing breach of trust.

(v) That Defendants are liable to restore the losses that have been suffered as a direct result of Defendants' breaches of fiduciary duty, violations of ERISA's prohibited transaction rules, and/or co-fiduciary breaches, and are

> liable for all recoverable damages and any other available equitable or remedial relief, including prospective injunctive and declaratory relief, and attorneys' fees, costs and other recoverable expenses of litigation."

To reiterate what the Court made clear in November, the injunction covers any pending and future arbitrations and actions. Additionally, the Court's oral decision on the preliminary injunction discussed that the injunction covers arbitrations concerning class members' individual claims, actions to confirm awards won in those arbitrations, and the claims in the *Canfield* and *Mendon* cases.

As they argued when opposing the preliminary injunction motion, the Arbitration Claimants again suggest that the preliminary injunction order exceeds this Court's authority by enjoining parallel proceedings, including federal proceedings. The Court considered their arguments and addressed the Court's authority to do so in the ruling on the preliminary injunction. As the Court noted there, the Court does not intend to disrespect the Western District of Missouri's authority and jurisdiction, however, the Second Circuit's clear ruling on this issue compelled the Court to issue the preliminary injunction order and compels the Court to deny this stay. As the Court has certified a mandatory class, the claims of class members should be handled and resolved in this class action.

Fourth, the public interest weighs against a stay. The Arbitration Claimants argue that federal policy generally favors arbitration, however that policy is not applicable here as the Second Circuit's ruling in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021) instructs that the Arbitration Claimants' claims are not arbitrable. The class certification order and injunction order held accordingly. Instead, principles of judicial economy favor denial of the stay. "Considerations of judicial economy counsel, as a general matter, against investment of court resources in proceedings that may prove to have been unnecessary." *Sutherland v. Ernst & Young*

LLP, 856 F. Supp. 2d 638, 644 (S.D.N.Y. 2012). Further "[t]here is a significant public interest in conserving judicial and arbitration resources by preventing duplicative proceedings." *Morgan Stanley & Co. v. Seghers*, No. 10 CIV. 5378 (DLC), 2010 WL 3952851, at *7 (S.D.N.Y. Oct. 8, 2010). The class certification order and preliminary injunction expressly intended to eliminate duplicative litigation; granting the requested stay would amount to a grant of permission for the Arbitration Claimants and other class members to engage in parallel proceedings, leading to a waste of judicial resources and inconsistent judgments.

Accordingly, the Court **DENIES** the Arbitration Claimants' motion to stay.

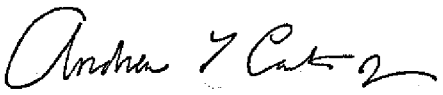
With respect to the issue of those arbitration awards already entered against DST, the status of those awards will be determined at final judgment, either after trial or after settlement. Additionally, the Court grants DST's motion to file under seal an exhibit to their brief regarding the awards that have been entered against DST.

In light of this order, the hearing scheduled for February 4, 2022 is cancelled.

The Clerk of Court is respectfully directed to terminate the letter motion at ECF No. 341.

SO ORDERED.

Dated: February 3, 2022
New York, New York



ANDREW L. CARTER, JR.
United States District Judge

SPA-86

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANFIELD et al.,	:	
	:	
Plaintiffs,	:	
-against-	:	**1:18-cv-08913(ALC)**
	:	
SS&C TECHNOLOGIES HOLDINGS, INC., et al.,	:	
	:	
Defendants.	:	
	:	
	:	

MENDON, et al.,	:	
	:	
Plaintiffs,	:	
-against-	:	**1:18-cv-10252 (ALC)**
	:	
SS&C TECHNOLOGIES HOLDINGS, INC., et al.,	:	
	:	**OPINION AND ORDER**
Defendants.	:	
	:	
	:	

ANDREW L. CARTER, JR., United States District Judge:

Before the Court is Defendants' motion to disqualify Plaintiffs' counsel in these two related actions—*Canfield et al v. SS&C Technologies Holdings, Inc. et al*, and *Mendon et al v. SS&C Technologies Holdings, Inc. et al*—as well as in pending arbitration proceedings in Missouri. For the reasons that follow, Defendants' motion with respect to the *Canfield* and *Mendon* actions is GRANTED. Additional briefing is required to rule on the motion with respect to Counsel's representation in the arbitration proceedings.

BACKGROUND

I. All Related Cases

Before delving into the facts specific to the instant motion, it is necessary to provide an overview of the procedural history of these and related actions, as it is complex.

There are four related cases pending before this Court and arbitration proceedings pending in the Western District of Missouri concerning the facts at issue here. In three of the actions before this Court—*Ferguson*, *Canfield,* and *Mendon*—the named Plaintiffs are current or former employees of DST Systems, Inc., now SS&C Technologies Holdings, Inc. They are also participants in the DST Systems, Inc., 401(k) Profit Sharing Plan, "an individual account or defined contribution pension plan…subject to the provisions of ERISA." (Canfield Compl. ("CC") at ¶ 3; Mendon Compl. ("MC") at ¶¶ 1, 8–9). The Advisory Committee of DST Retirement Plan is the plan's named fiduciary. (CC at ¶ 15). Ruane, Cunniff & Goldfarb & Co., Inc. is the investment manager of DST's Master Trust, in which Plaintiffs allege "a portion of the Plan's assets are invested…" (CC Compl. at ¶ 3).

In *Ferguson*, Plaintiffs brought suit against Ruane, DST or SS&C, The Advisory Committee of the Plan, and The Compensation Committee of the DST Board of Directors as well as over a dozen of its named members. (Ferguson Compl.). In *Canfield* and *Mendon*, Plaintiffs raise claims against SS&C or DST, Ruane, The Advisory Committee of the Plan, including its "individual members," and The Compensation Committee and its individual members, and John Does 1–20. (CC at ¶ 1; MC. at ¶ 1). Plaintiffs in these three actions claim that Defendants violated ("ERISA") through several breaches of the fiduciary duty they owed to Plan participants, and as a result of this breach, Plaintiffs' Plan accounts sustained losses.

Claimants asserted virtually identical claims against Defendants in arbitration proceedings in the Western District of Missouri. (Payne Compl. ("PC") at ¶ 45). Ruane alleges that in their arbitration demands, claimants improperly purported to assert both individual claims and prohibited claims on behalf the plan. (*Id.* at ¶ 47). Ruane filed an action in the Western District of Missouri to enjoin claimants from prosecuting collective or representative claims and from prosecuting the arbitrations until the Southern District of New York determined whether the plaintiffs in *Ferguson* represent the entire plan. (*Id.* at ¶ 49). Claimants moved to dismiss the action, representing that the inclusion of the collective claims was a mistake that they now disavow. (*Id.* at ¶ 52). Based on these representations, Ruane ultimately voluntarily dismissed its claims without prejudice, and the claimants' revised demands are pending in arbitration. (*Id.* at ¶¶ 52, 54, 56).

In *Scalia v. Ruane, Cunniff & Goldfarb, Inc. et al*, the Secretary of Labor sued Ruane, the DST parties, sixteen members of the former DST Plan Advisory Committee and Compensation Committee's Board of Directors, alleging that Defendants "caused the Plan and its participants to suffer harm" and seeking an order requiring Defendants to "restore to the Plan and its participants all losses caused." (Scalia Compl. ("SC") at ¶¶ 59, 63).

Finally, in *Ruane v. Payne*, Ruane seeks a declaratory judgement providing that "multiple representatives of the participants and Plan cannot at the *same* time seek recovery in multiple forums for the *same* harm to the *same* Plan assets caused by the *same* alleged breaches of fiduciary duty." (PC at ¶ 61). Additionally, Ruane seeks injunctive relief "enjoining the arbitrations until this Court can determine whether *Ferguson* or *Scalia* represents all 10,000 Plan participants or only the approximately 500 who opted out of the Arbitration Agreement." (*Id.*)

II. The Instant Motion to Disqualify

Defendants in the *Mendon* and *Canfield* actions now move to disqualify Plaintiffs' counsel. Plaintiffs in these cases are represented by The Klamann Law Firm and Kent, Beatty & Gordon, LLP. The Klamann group also represents Percy Payne, the Defendant in the *Payne* action. Conversely, the law firms Shepard, Finkelman, Miller & Shah, LLP, Kirby McInerney LLP, and the Law Office of Heidi A. Wendel, PLLC represent Plaintiffs in the *Ferguson* action.

On December 5, 2019, DST Defense counsel in the *Mendon* and *Canfield* actions notified the court that The Klamann group also represented three, former members of the Plan's Advisory Committee—Kenneth Hager, Thomas McDonnell, and Joan Horan—in arbitration proceedings against DST and Ruane in the Western District of Missouri. (*Canfield* ECF No. 27; *Mendon* ECF No. 28). Defendants assert that Plaintiffs in *Mendon* and *Canfield* sue the Advisory Committee of the Plan and its *individual members*, which include Hager, McDonnell, and Horan. In other words, Defendants argue that The Klamann Group is bringing suit against its own clients in *Canfield* and *Mendon*, which amounts to a concurrent conflict of interest warranting disqualification. With the court's permission, Defendants filed a motion to disqualify on the above basis on February 18, 2020. (*Canfiled* ECF Nos. 34–35; *Mendon* ECF Nos. 33–34).

LEGAL STANDARD

"'District courts have broad discretion to disqualify attorneys, but it is a drastic measure that is viewed with disfavor in this Circuit' due to the delay it involves and its potential for misuse as a litigation tactic." *Mura v. Thomas*, No. 19 CV 8699, 2020 WL 2086039, at *3 (S.D.N.Y. Apr. 30, 2020) (quoting *Ritchie v. Gano*, No. 07 Civ. 7269, 2008 WL 4178152, at *2 (S.D.N.Y. Sept. 8, 2008) (internal quotation marks omitted)). The decision "requires balancing 'the client's right to select counsel of his choice against the need to maintain the integrity and

high standards of the legal profession.'" *Giambrone v. Meritplan Ins. Co.*, 117 F. Supp. 3d 259, 267 (E.D.N.Y. 2015) (quoting *Nordwind v. Rowland*, 584 F.3d 420, 435 (2d Cir. 2009)). "However, 'any doubt [with respect to whether disqualification should be ordered] is to be resolved in favor of disqualification.'" *Bell v. Ramirez*, No. 13 Civ. 7916, 2017 WL 4296781, at *1 (S.D.N.Y. Sept. 26, 2017) (quoting *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975)) (internal citation omitted) (alteration in original).

In deciding disqualification motions, courts may look to "the American Bar Association (ABA) and state disciplinary rules," however "such rules merely provide general guidance and not every violation of a disciplinary rule will necessarily lead to disqualification." *Hempstead Video, Inc.*, 409 F.3d 127, 132 (2d Cir. 2005). Disqualification is only appropriate where "an attorney's conduct tends to taint the underlying trial[.]" B*oard of Ed. of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (internal quotation marks omitted).

"The standard for disqualification depends on whether the representation is concurrent—meaning the lawyer represents two or more current clients at the same time—or successive—meaning the attorney represents a current client against, or whose interests are adverse to those of, a former client." *Tour Technology Software, Inc. v. RTV, Inc. et al.,* No. 17 CV 5817, 2018 WL 3682483, at *3 (E.D.N.Y. Aug. 2, 2018). The Second Circuit considers concurrent representation *per se* improper. *Hempstead Video*, 409 F.3d at 133. An attorney engaging in concurrent representation will be disqualified unless he or she can "show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation." *Id.* (emphasis in original). "[T]his is 'a burden so heavy that it will be rarely met.'" *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010) (*quoting Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 749 (2d Cir. 1981)).

DISCUSSION

I. Concurrent Representation

The Klamann Group argues that Hager, McDonnell and Horan are not among the individual Advisory Committee members Plaintiffs are suing in *Canfield* and *Mendon*, thus, the arbitration claimants' and Plaintiffs' interests do not conflict. (ECF No. 39 at 7, 20). Horan served on the Committee until December 6, 2010, McDonnell until April 3, 2012, and Hager until October 21, 2013. (ECF No. 39 at 13 n.1). The *Canfield* and *Mendon* Plaintiffs, the Klamann Group argues, are only suing for breaches in fiduciary duty that occurred after 2013, thus, Horan, McDonnell, and Hager are not being sued. (*Id.* at 12–13). Accordingly, the Klamann Group argues that any potentially adverse interests are hypothetical, and not severe enough to warrant disqualification. I disagree. From the plain language of Plaintiffs' complaints, at least Hager and McDonnell, and possibly Horan are defendants in the *Mendon* and *Canfield* actions. This type of conflict poses a severe risk of "trial taint."

By the plain text of the *Canfield* and *Mendon* complaints, Plaintiffs allege that Defendants DST and the Advisory Committee breached their fiduciary duties prior to 2014. For instance, the complaints allege that "[b]y retaining Defendant Ruane, Defendants failed to discharge their duty to select and retain an investment manager solely in the interest of the participants and beneficiaries of the plan and for the exclusive purpose of providing benefits to Plan participants and beneficiaries." (MC at ¶ 42; CC at ¶ 45). Additionally, the complaints allege that "while acting as Plan fiduciaries[,]" Defendants allowed Ruane to charge the Plan a "grossly and objectively excessive" fee. (MC at ¶ 43; CC at ¶ 46). "A prudent fiduciary under like circumstances would have negotiated an annual feel of far less than one percent (1%)." (*Id.*)

Defense counsel submitted evidence obtained during discovery that Ruane has served as the Plan's Investment Manager since 1973. (Recher Decl. Exs. A, B).

Additionally, Plaintiffs take issue with the Plan's investment in Valeant Pharmaceuticals. The Complaint alleges that Valeant was unsuitable for an investment in a retirement account" as Valeant pursued a "a particularly risky" "aggressive growth by acquisition strategy since at least 2008." (CC at ¶¶ 33–34, 37; MC at ¶¶ 31, 34). Specifically, the complaints state that "Defendants knew or should have known by at least 2011 that Valeant was a particularly risky and imprudent investment." (CC at ¶ 39; MC at ¶ 36).

Based on these examples, it is evident that Plaintiffs intended to sue DST and the Advisory Committee for fiduciary breaches they committed at least in 2011, potentially as early as 1973. At least Hager and McDonnell were on the Committee in 2011. The Klamann group is suing its own clients, thereby jeopardizing the undivided loyalty it owes to Plaintiffs. The risks posed by this scenario are endless and exemplified by Counsel's arguments in its opposition brief. The Klamann Group argues that its allegation related to Ruane's fee was provided for motivational context as to later actionable breaches and that "[n]either the Plaintiffs nor the Arbitration Claimants…seek damages against DST for having originally retained Ruane." (ECF No. 39 at 13). Additionally, Counsel insists that Plaintiffs and Arbitration Claimants allege that DST and the Committee breached their fiduciary obligations only by retaining Ruane as Investment Manager after *2014*. It was in 2014, Counsel asserts, when the DST and the Committee should have been aware that the Plan's investments were overly concentrated in Valeant, amounting to a breach of Ruane's duties. (*Id.* at 14–15). As for the contradictory allegation appearing in both the *Canfield* and *Mendon* complaints—that "Defendants knew or should have known by at least 2011 that Valeant was a particularly risky and imprudent

investment"—The Klamann Group contends that this was a mere typo. (*Id.* at 15). The rest of the complaint, Counsel highlights, clearly focuses on post-2013 conduct. (*Id.*)

Given the severe conflict posed by the initial complaints in these actions, the Court cannot assess whether Counsel acts in good faith, or improperly seeks to limit the scope of Plaintiffs' actions simply to preclude liability against his arbitration clients. "When determining whether a…conflict due to concurrent representation merits disqualification, courts look to the point in time at which the conflict arose, not when the litigation is filed." *Troika Media Group, Inc. v. Stephenson*, No. 19 Civ. 145, 2019 WL 5587009, at *5 (S.D.N.Y, Oct. 30, 2019). The reason is to prevent attorneys from "convert[ing] a present client into a 'former client' by choosing when to cease to represent the disfavored client." (*Id.*) (internal quotation marks omitted). However, the same principle applies here to prevent an attorney from amending a complaint to erase the appearance of concurrent representation. By the plain terms of the originally filed complaints, Plaintiffs sued their Counsel's arbitration clients.

II. The Klamann Group's Burden

Plaintiffs' Counsel has not satisfied his high burden of establishing "that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation" despite this concurrent conflict. *Hempstead*, 409 F.3d at 133 (emphasis in original). Counsel raises three arguments as to why I should deny Defendants' disqualification motion even upon a finding that there is a concurrent conflict. The first is that Defendant DST's unreasonable delay in making this motion raises a reasonable inference either that DST did not honestly believe that a conflict exists, or that the motion is nothing but a strategic tool to deprive Plaintiffs of their chosen counsel. (ECF No. 39 at 25). Defendants' motivations for bringing the motion do not support the conclusion that Plaintiffs' counsel will not still face a conflict in loyalties. Defendants' motives

and tactics possibly may be improper, but that finding does not remedy the concurrent representation problem at issue. Plaintiffs cite one case from this District in which the court noted that a waiver may be presumed if a motion to disqualify is not brought within a reasonable time. (*Id.*) (quoting *Siverio v. Lavergne*, No. 86 Civ. 6584, 1989 WL 31531, at *2 (S.D.N.Y. Mar. 29, 1989). However, the court in that case found that there had not been an unreasonable delay and noted that the cases in which an unreasonable delay had been found typically involved delays of "at least several years between the time the moving party learned of the conflict and the time the disqualification motion was asserted." *Siverio*, 1989 WL 31531, at *2.

Counsel's second argument is that his clients—both Plaintiffs and the arbitration claimants—would be severely prejudiced by their disqualification. (ECF No. 39 at 26–27). However, this argument again, does not satisfy Counsel's required burden.

Third, Counsel contends his clients have provided informed consent to joint representation, thereby waiving any conflict. However, this consent needed to be "obtained prior to [Counsel's] undertaking representation of adverse interests, not in response to a motion to disqualify." *Anderson v. Nassau Cty. Dept. of Corrections*, 376 F. Supp. 2d 294, 299–300 (E.D.N.Y. 2005) (citing *Discotrade Ltd. v. Wyeth-Ayerst Intern., Inc.*, 200 F.Supp.2d 355, 360 (S.D.N.Y. 2002)).

Based on the above, Counsel has not met its burden and disqualification in the face of this concurrent representation is warranted.

CONCLUSION

Defendants' motion to disqualify as to the *Canfield* and *Mendon* actions is GRANTED. The parties should submit additional briefing by July 24, 2020 as to whether this Court has jurisdiction over Defendants' disqualification motion as it relates to the Missouri arbitration

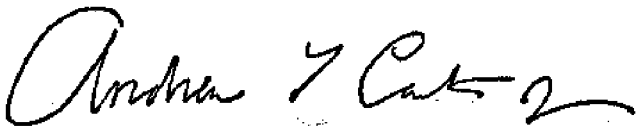
proceedings. Related to this issue is The Klamann Group's representation of Percy Payne in *Ruane Cunniff & Goldfarb, Inc. v. Payne et al*. DST is not a party to this action, but the Klamann Group and Ruane should both submit briefing by July 24, 2020, as to whether The Klamann Group's representation in this matter remains proper.

Further, the Court is aware that Plaintiffs in *Mendon* and *Canfield* have filed notices voluntarily dismissing their claims against Ruane pursuant to Fed. R. Civ. P. 41(a)(1). The Court is also in receipt of Ruane's letter informing the Court that it intends to dismiss *Payne* in its entirety pursuant to Fed. R. Civ. P. 41(a)(2). Because Plaintiffs' Counsel has been disqualified in the *Mendon* and *Canfield* actions, I cannot sign off Plaintiffs' Rule 41(a)(1) dismissal.

SO ORDERED.

Dated: July 10, 2020

New York, New York



ANDREW L. CARTER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANFIELD ET AL,

Plaintiffs,

-against-

SS&C TECHNOLOGIES HOLDINGS, INC. ET AL,

Defendants.

18-CV-8913 (ALC)

MEMORANDUM AND ORDER

MENDON ET AL,

Plaintiffs,

-against-

SS&C TECHNOLOGIES HOLDINGS, INC. ET AL,

Defendants.

18-CV-10252 (ALC)

MEMORANDUM AND ORDER

ANDREW L. CARTER, JR., District Judge:

This opinion concerns a series of ERISA actions currently before this Court and related arbitrations proceeding in Missouri. After consideration of the parties' briefings filed on July 24, 2020, the Court DENIES Defendants' Motion to Disqualify Plaintiffs' counsel from the arbitrations.

I. Context of Relevant Actions

The *Canfield* and *Mendon* cases are two of many related legal actions pending in this district and in the Western District of Missouri. Before addressing the parties' arguments regarding disqualification, a brief procedural of history of these related matters is helpful.

Plaintiffs in all but one case before this court, *Scalia*, are current or former employees of DST Systems, Inc. who participated in the Kansas-based Company's 401(k) Profit Sharing Plan

together with Plan fiduciaries whom Plaintiffs allege committed ERISA violations that caused losses to the Plan and individual accounts. Hundreds of Plan participants signed an arbitration agreement with their employer, agreeing to resolve through AAA arbitration all employment disputes not explicitly excluded from the agreement. One exclusion is for claims regarding "ERISA-related benefits provided under a Company sponsored benefit plan." (*Ferguson*, ECF No. 169-2). The agreement bars class or representative actions and expressly prohibits an employee who agreed to arbitrate from "hav[ing] a claim asserted om [their] behalf by another person as a class representative or otherwise." (*Ferguson*, ECF No. 172-9 at 2).

Not all Plan Participants signed the agreement, some chose to opt out of the arbitration program.

The first federal suit filed was *Cooper v. Ruane Cunniff & Goldfarb, Inc.*, No. 16-cv-1900 (S.D.N.Y. 2016). The Plaintiff in *Cooper* initially sued DST and Ruane, but subsequently dismissed his claims against DST because he was subject to the arbitration agreement. Although Ruane was not a signatory to the agreement, the court determined that Ruane was entitled to enforce the agreement and compel arbitration. *Cooper v. Ruane Cunniff. & Goldfarb Inc.*, 2017 WL 3524682 (S.D.N.Y. Aug. 15, 2017). The Second Circuit reversed and remanded, ruling that the arbitration agreement did not encompass Cooper's claims. *Cooper v. Ruana Cunniff & Goldfarb Inc.*, 2021 WL 821390 (2d Cir. Mar. 4, 2021).

Plaintiff Ducharme filed the second federal action in the Western District of Missouri as a class action complaint. Ducharme participated in the arbitration program, but argued that the agreement did not apply to claims arising under 29 U.S.C. § 1132(a)(2)). The court upheld the legitimacy of the agreement's class action waiver and held that Ducharme's individual claims were

arbitrable. The court entered the dismissal on June 23, 2017. *Ducharme v. DST Systems, Inc. et al.*, No. 4:17-cv-00022 (W.D. Mo. June 23, 2017).

On June 30, 2017, Ducharme moved for relief from the dismissal order and Plaintiff Ostrander moved to intervene in Ducharme's case. On September 7, 2017, Ostrander filed her own suit alleging breach of fiduciary duty in the Western District of Missouri. Ostrander had opted out of arbitration. *Ostrander v. DST Systems, Inc. et al*, No. 4:17-cv-00747, 2018 WL 10799300, at *1 (W.D. Mo. Feb. 2, 2018) (summarizing procedural history).

On October 16, 2017, the court denied Ducharme's motion for relief and denied as moot Ostrander's motion to intervene in light of her filing a separate action. *DuCharme v. DST Systems, Inc., et al.*, No. 4:17-cv-00022, 2017 WL 11511727 (W.D. Mo. Oct. 16, 2017).

On September 1, 2017, six days before Ostrander filed her own suit, the *Ferguson* Plaintiffs, who opted out of arbitration, filed their representative action in the Southern District of New York.

On February 2, 2018, the Western District of Missouri court dismissed *Ostrander* pursuant to the first-filed rule after determining that its claims substantially overlapped with those in *Ferguson*. *Ostrander*, 2018 WL 10799300, at *2–3.

Seven additional opt-out DST plan participants filed their own actions in the Southern District of New York.

Close to 500 Participants initiated individual arbitrations under the DST arbitration agreement. According to the parties, many of these claims are for breach of fiduciary duty and are similar if not identical to the claims of the federal judicial plaintiffs in *Ferguson*, *Canfield*, and *Mendon*. According to the firms representing arbitration plaintiffs, the proceedings are at varying stages, but some have concluded, resulting in substantial victories for participants.

In *Scalia,* the Secretary of Labor is the plaintiff and is suing Ruane, the DST parties, and sixteen members of the former DST Plan Advisory Committee and Compensation Committee's Board of Directors, alleging that Defendants "caused the Plan and its participants to suffer harm" and seeking an order requiring Defendants to "restore to the Plan and its participants all losses caused." (Scalia Compl. at ¶¶ 59, 63).

II. Disqualification in *Canfield* and *Mendon*

Plaintiffs in the *Canfield* and *Mendon* actions were represented initially by The Klamann Law Firm and Kent, Beatty & Gordon, LLP. The Klamann group also represents three, former members of the Plan's Advisory Committee. Because Plaintiffs in *Canfield* and *Mendon* sued, among other defendants, the Advisory Committee and its individual members, the Court found a concurrent conflict of interest and disqualified the Klamann group from the Canfield and *Mendon* actions. (Opinion and Order, *Canfield* ECF No. 49). In its opinion, the court ordered the parties to submit additional briefing as to whether the court should disqualify the Klamann group from representing the Advisory Committee members in arbitrations. (*Id.*)

On July 24, 2020, the Klamann group moved for reconsideration of the court's disqualification opinion (*Canfield,* ECF No. 60).

III. Disqualification in Arbitrations

The court now considers the parties' briefings regarding disqualification in the arbitration proceedings. For the reasons that follow, Defendants' motion to disqualify the Klamann group in the Missouri arbitrations is DENIED.

Attorney disqualification is better decided by courts rather than arbitrators. See *Northwestern National Insurance Co. v. Insco, Ltd.,* 2011 WL 4552997, at *5 (S.D.N.Y. Oct. 3, 2011); *Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins. Co.*, 500 F. Supp. 2d 272, 275

(S.D.N.Y. 2007); *Troika Media Grp., Inc. v. Stephenson*, No. 19 CIV. 145, 2019 WL 5587009, at *3 (S.D.N.Y. Oct. 30, 2019). Additionally, there are circumstances in which courts may disqualify counsel from representing clients in arbitration proceedings set in other districts. For instance, in *Simply Fit of North America, Inc. v. Poyner*, Plaintiff sued Defendant for contract and RICO claims in the Eastern District of New York. 579 F. Supp 371 (E.D.N.Y. 2008). Defendant argued that the case must be dismissed in favor of Florida arbitration pursuant to an agreement between the parties. *Id.* at 374. Defendant did not otherwise argue that the court lacked personal or subject matter jurisdiction over the case or parties. The court agreed with Defendant's interpretation of the contract and compelled arbitration in Florida. *Id.* at 382. Pursuant to Section 3 of the Federal Arbitration Act, the court stayed the action pending resolution of the arbitration, "retain[ing] jurisdiction over any subsequent petition for judicial review of any aware." *Id.*

In the same opinion compelling arbitration, the court considered Plaintiff's argument that Defense Counsel should be disqualified as councel in the arbitrations because of a conflict of interest. *Id.* Although the court denied Plaintiff's Motion to Disqualify, the court clearly operated with the understanding that it could disqualify counsel from the Florida proceedings. The relevant distinction is that the Eastern District of New York Court here was the court that compelled arbitration and pursuant to the FAA, retained to jurisdiction to review some elements of the resulting arbitration proceedings.

I did not compel the arbitrations into which Defendants now ask me to interfere and the Klamann Group's position is that I lack jurisdiction to disqualify counsel in the arbitration proceedings. DST argues that my jurisdiction over Plaintiffs' counsel in these proceedings derives from this court's jurisdiction over the Plan generally and the fact that the Klamann Group has appeared before me in the Canfield and Mendon actions.

Regardless of whether there is a jurisdictional basis for me to disqualify arbitration counsel, I find that the disqualification of arbitration counsel is a question more appropriately left to Missouri federal courts.

Only Plan Participants who opted out of the DST arbitration agreement have brought claims in front of this court. From their pleadings, I have no basis upon which to determine with any certainty the similarities or dissimilarities between the claims raised by non-opting-out Plan participants in arbitrations, or the timeline in which the Klamann Group brought the relevant arbitration proceedings. Both categories of information are relevant to the disqualification question presented here. This information is accessible, however, to the court charged with reviewing arbitral agreements and awards. Accordingly, this court, the Western District of Missouri, is better positioned to rule on disqualification in the arbitration proceedings.

Pointing to the Western District of Missouri Court's refusal to hear the *Ostrander* action, DST asserts that the court similarly would refuse to hear argument as to disqualification in the arbitration context. The situations are inapposite. The *Ostrander* plaintiff did not sign an arbitration agreement. Like the *Ferguson, Mendon, and Canfield* plaintiffs, she was free to bring her claims in federal court or arbitrations. She chose federal court. The Western District of Missouri Court dismissed her case not because it did not have jurisdiction over the matter, but rather because the court felt it more appropriate that her claims be considered by the court already considering the identical claims of similarly situated plaintiffs. From the *Ostrander* dismissal, it is impossible to draw the conclusion that the Western District of Missouri Court does not believe it has jurisdiction over the arbitration proceedings that must be brought in its district and which concern dissimilar plaintiffs.

Ducharme similarly does not exclude the Western District of Missouri court's jurisdiction. Although the court held that the arbitration agreement encompassed Ducharme's claims, rather than compel arbitration, the court dismissed the case, concluding that the representative nature of Ducharme's claims barred them from being asserted validly even in an alternative, non-judicial setting under the express terms of the arbitration agreement. 2017 WL 7795123 at *1. Presumably, if the court had permitted Ducharme's claims to proceed to arbitration as stated, it would have retained, pursuant to the parties' or a party's request, limited Section 3 jurisdiction over the proceedings.

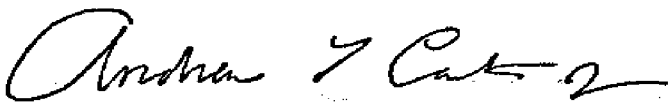
If DST feels disqualification warranted in individual arbitrations, it must raise the issue independently in a court authorized to preside in some capacity over these extra-judicial proceedings.

CONCLUSION

Defendants' Motion to Disqualify Counsel in the arbitration proceedings is DENIED.

SO ORDERED.

Dated: **March 17, 2021**
New York, New York



ANDREW L. CARTER, JR.
United States District Judge

SPA-103

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANFIELD et al,	:	
Plaintiffs,	:	
-against-	:	**1:18-cv-8913 (ALC)**
SS&C TECHNOLOGIES HOLDINGS, INC. et al,	:	
Defendants.	:	
MENDON ET AL	:	
Plaintiffs,	:	
-against-	:	**1:18-cv-10252 (ALC)**
	:	**OPINION AND ORDER**
SS&C TECHNOLOGIES HOLDINGS, INC. et al,	:	
Defendants.	:	

ANDREW L. CARTER, JR., United States District Judge:

Familiarity with the facts of these matters is presumed, and here, the court recites only those facts necessary to resolve the instant motion.

On July 10, 2020, the court granted Defendants' motion to disqualify Plaintiffs' counsel, the Klaymann Group, in these two related actions. (ECF No. 49). These cases are ERISA actions in which Plaintiffs are current or former employees of Defendant DST Systems, Inc., now SS&C

Technologies Holdings, Inc., and participants in the DST Systems, Inc., 401(k) Profit Sharing Plan. (*Id.* at 2). Plaintiffs in these actions raised claims against DST; Ruane, Cunniff & Goldfarb & Co., Inc., the investing manager of the DST's Master Trust, in which Plaintiffs allege a portion of the Plan's assets are invested; The Advisory Committee of the Plan, including its individual members; and the Compensation Committee of the Plan. (*Id.*) Plaintiffs allege Defendants violated ERISA through several breaches of the fiduciary duty they owed to the Plan's participants, and as a result, Plaintiffs' Plan accounts sustained losses.

In addition to representing Plaintiffs in these two actions, the Klaymann Group also represented several individuals pursuing actions against DST and Ruane in arbitration proceedings. Three of those arbitration claimants are former members of the Plan's Advisory Committee. All three claimants left their position on the Committee by mid-October of 2013. (*Id.* 5–6). However, DST argued that there was a concurrent conflict of interest. The Klaymann Group argued that there was no conflict as Plaintiffs were suing for breaches in fiduciary duties that occurred post-2014. However, DST identified several places in Plaintiffs' complaints containing allegations of misconduct by Defendants prior to October 2013. The Klaymann Group asserted that many of these allegations were typos.

The court concluded that, "[f]rom the plain language of Plaintiffs' complaints" at least two of the former Advisory Board members represented by the Klaymann Group were sued in the *Canfield* and *Mendon* Plaintiffs' initial complaints. Finding that this concurrent representation posed a severe risk of trial taint, the court disqualified the Klaymann Group. (*Id.* 9–10).

The Klaymann Group filed the instant motion for reconsideration, which the court now DENIES.

LEGAL STANDARD

"A motion for reconsideration should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation omitted). Where a movant seeks only to present "the case under new theories" or take "a second bit at the apple," a motion for reconsideration should be denied. *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "This standard is strict because 'reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Seoul Viosys Co., Ltd. V. P3 Int'l Corp.*, No. 16-cv-6276, 2019 WL 3858621, at *1 (S.D.N.Y. Aug. 16, 2019) (internal quotation marks omitted).

DISCUSSION

The Klamann Group's Motion rests on three arguments: (1) The court did not apply the correct legal standard; (2) overlooked important facts; and (3) new evidence warrants a reversal.

The Klamann Group cites law from this District holding that "disqualification is appropriate only if there is a significant risk that an attorney's conduct will taint the trial," *Sumitomo Corp. v. J.P. Morgan & Co.*, No. 99 Civ. 4004, 2000 WL 145747, at *3 (S.D.N.Y. Feb. 8, 2000), a determination which requires a "painstaking analysis of the facts of a case." *Akagi v. Turin Hous. Dev. Fund Co.*, No. 13 Civ. 5298, 2017 WL 1076345, at *2 (S.D.N.Y. Mar. 22, 2017); (ECF No. 62 at 2). The Klaymann Group argues the court failed to adhere to this standard by limiting its analysis to the complaint and neglecting to perform the required analysis of the case as clarified by two years of discovery and other litigation. (*Id.* at 4). Additionally, the Klamann Group

argues that the court drew inferences and resolved ambiguities in DST's favor. *Id.* The Klaymann Group then proceeds to argue that the facts of the case indicate that there was no risk of taint.

The Klaymann Group is correct in its recitation of the disqualification standard—no matter what the type of conflict alleged, "a court should disqualify an attorney 'only if '[his] conduct tends to taint the underlying trial.'" *Akagi v. Turin Housing Development Fund Co., Inc.*, 2017 WL 1076345, *10 (Mar. 22, 2017) (alterations in original) (quoting *GSI Commerce Solutions, Inc. v. Babycenter L.L.C.*, 618 F.3d 204, 209 (2d Cir. 2010) (quoting *Board of Ed. V. Nyquist,* 590 F.2d 1241, 1246 (2d Cir. 1979)). In other words, "[t]he appearance of impropriety alone does not warrant disqualification." *Id.* (alteration in original) (quoting *Rotherberg v. Phil's Main Roofing, LLC*, No. 14 Civ. 10195, 2016 WL 2344882, at *2 (S.D.N.Y. May 2, 2016) (quoting *Bangkok Crafts Corp. v. Capitolo di San Pietro in Vaticano*, 376 F. Supp. 2d 426, 428 (S.D.N.Y. 2005)).

That being said, the Klamann Group ignores the fact that where the type of conflict at play is prima facie improper concurrent representation, the burden shifts, and it becomes "incumbent upon the attorney to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. [The Second Circuit has] noted that this a burden so heavy it will rarely be met." *Cohen v. Strouch*, 2011 WL 1143067, *2 (S.D.N.Y. Mar. 24, 2011) (alteration in original) (quoting *GSI Commerce Solutions, Inc.*, 618 F.3d at 209).

In the original complaint filed in this case, the Klaymann Group sued clients it was then and is still representing in arbitration proceedings. The Klaymann Group argued that it sued these clients accidentally due to several typographical errors and therefore, that no concurrent representation problem will exist after an amendment to the original complaint. As the court noted its disqualification opinion, however, permitting such an amendment raises concerns that counsel

seeks to limit the scope of Plaintiffs' actions to protect the interests of its arbitration clients, and thus, is not acting within Plaintiffs' best interests. (ECF 49 at 8).

In its motion for reconsideration, the Klaymann Group explains why this amendment would not hurt, but in fact, would benefit Plaintiffs in this case. The Klamann Group points out that encompassing pre-2014 Plan conduct into its theory of liability would hurt all clients and help DST, which argues that the Plan performed excellently pre-2014. According to documents submitted by the Klaymann Group from the arbitration proceedings, DST's expert reported finding no reliable basis to conclude that plan participant plaintiffs suffered economic losses because of the Plan's investment strategies or "conduct beginning on or after April 2010" and through 2016 when Ruane directed the [Plan] to make its first purchase of Valeant shares." (ECF No. 58-3 ¶¶ 21, 26). However, it is clear from these documents, that the arbitration claimants disputed this expert's assessment, alleging that they were damaged by Defendants' pre-2014 decisions, and that, for instance, Defendants "knew or should have known by at least 2011 that Valeant was a particularly risky and imprudent investment." (*Id.* ¶ 27). This allegation is identical to an allegation made in Plaintiffs' original complaint. (ECF No. 1 ¶¶ 27, 28).

What the documents the Klaymann Group submitted show is that in DST's opinion, the Plan's and its fiduciaries' pre-2014 conduct led to no economic losses. However, this does not assure the court that DST's arbitration position is correct and it is frivolous for Plaintiffs' to pursue claims based on this earlier conduct. The fact remains that, if the Klaymann Group remained counsel in these cases, the *Canfield* and *Mendon* Plaintiffs would give up claims that they initially felt were worth pursuing. If these claims have merit, there would be significant taint to further proceedings in allowing the Klaymann Group to remain on the cases. The Klaymann Group has not carried its heavy burden of convincing the court that no such taint would exist.

The Klaymann Group also submitted new evidence it argues establishes that DST Defendants' misconduct began after 2014—an arbitrator in one of the related arbitrations determined that DST was jointly and severally liable under ERISA for all of Claimant's losses calculated on how the Plan actually performed versus how it would have performed had it been prudently invested using the S&P 500 as the benchmark from May 29, 2015 onward." (ECF No. 61 at 7). Again, while this finding by the Arbitrator may be supportive of DST's and now the Klaymann Group's position on the relevant time period, based on the largely undeveloped factual record before me, I cannot reach the conclusion that Plaintiffs received non-tainted advice regarding whether it is in their best interest to abandon the pre-2014 claims they originally sought to pursue.

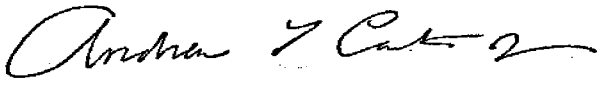
The other new evidence the Klaymann Group submits is that it obtained a settlement agreement with Ruane on behalf of several of its arbitration clients. This settlement agreement, submitted for in-camera review in a related case, was purportedly joined by Plaintiffs in these two cases. (ECF No. 61 No. 12). The Klaymann Group does not explain, and the court does not see how this new evidence supports the reconsideration motion.

CONCLUSION

For the reasons provided above, the Klaymann Group's motion for reconsideration is DENIED. (ECF Nos. 59, 60.) Additionally, the Court grants the following motions to seal. *Canfield*, 18cv8913 (ECF Nos. 39, 51, 56, 67); *Mendon*, 18cv10252 (ECF Nos. 36, 38, 50, 55, 66.)

SO ORDERED.

Dated: **March 17, 2021**
New York, New York



ANDREW L. CARTER, JR.
United States District Judge

SPA-109

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT CANFIELD ET AL.,

Plaintiffs,

-against-

SS&C TECHNOLOGIES HOLDINGS, INC. ET AL.,

Defendants.

18-CV-8913 (ALC)

ORDER

MARK MENDON ET AL.,

Plaintiffs,

-against-

SS&C TECHNOLOGIES HOLDINGS, INC. ET AL.,

Defendants.

18-CV-10252 (ALC)

ORDER

ANDREW L. CARTER, JR., District Judge:

The Court's August 17, 2021 Memorandum and Order in *Ferguson v. Ruane Cunniff & Goldfarb Inc.*, No. 17-cv-6685, ECF No. 311, granted certification of a mandatory class pursuant to Federal Rule of Civil Procedure 23. Accordingly, the above-referenced cases are hereby DISMISSED. The Clerk of Court is respectfully directed to close these cases.

SO ORDERED.

Dated: **November 19, 2021**
New York, New York

Andrew L Carter Jr

ANDREW L. CARTER, JR.
United States District Judge