

Volume 2 of 2

Filed May 9, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2185

IN RE: CENDANT CORPORATION LITIGATION

JANICE G. DAVIDSON; ROBERT M. DAVIDSON, in his
capacity as trustee of Robert M. Davidson Charitable
Remainder Unitrust, and as co-trustee of Elizabeth A.
Davidson Irrevocable Trust, Emilie A. Davidson Irrevocable
Trust, John R. Davidson Irrevocable Trust, Emilie A.
Davidson Charitable Remainder Unitrust and John R.
Davidson Charitable Remainder Unitrust,
Appellants

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 98-cv-01664)
District Judge: Honorable William H. Walls

Argued: November 16, 2000

Before: SLOVITER, AMBRO, and GARTH, Circuit Judges

(Filed: May 9, 2001)

GARTH, Circuit Judge, dissenting.

I respectfully dissent from the majority's decision. In particular, and apart from any other doctrine of law, I cannot understand how the majority can permit a New Jersey District Court to enjoin arbitration and thereby overrule an order by a companion district court in California compelling arbitration,¹ when that arbitration order was entered months before notice of class certification was even distributed and when that order embraced each and every one of the Davidsons' claims.

This issue of arbitration vis-a-vis class certification is of overriding importance, and its proper resolution cannot be overemphasized. Indeed, just recently this Court has announced the formation of a Task Force on selection of class counsel and has enumerated a number of issues for the Task Force to consider.² I suggest that this question of arbitration-class certification is one which in my opinion should assume prominence in the Task Force's labors.

I.

I suggest that the sequence in which the majority discusses issues in its opinion is inappropriate and in effect "puts the cart before the horse." I should not be surprised that the discussion of the arbitration injunction issue-- unquestionably the most significant and important in this case and an issue of first impression--was relegated to the very last discussion in an otherwise mundane appeal. Obviously, if one "goes into" the arbitration injunction discussion with a holding that the appellants--the Davidsons--were and are class members, all else falls into the majority's theory. As one goes in, that's how one comes out. That is the tactic employed by the majority here.

1. The California Central District Court's order, Cendant Corp. v. Davidson, No. 99-0587 (C.D. Cal. April 8, 1999) appears in the appendix at App. 704-09.

2. See, e.g., Cendant Corp. PRIDES Litig., 243 F.3d 721 (3d Cir. 2001), discussing our overall supervisory role and our responsibilities in the selection of class counsel and in attorneys' fee awards as well as in safeguarding fair settlements of class actions.

However, if, with an understanding of the record and a correct understanding of the case authority and res judicata, we recognize, as I do, that the opinion and order of the California Central District Court which required Cendant to arbitrate with the Davidsons preceded any class certification and also preceded by approximately seven months any distribution of a class notice which prescribed an opt-out period, then a completely different and a correct result obtains.

Accordingly, the proper course of action for the majority would have been to deal with the arbitration injunction first. If the majority then concluded, as I feel it should have, that the arbitration order both preceded and preempted the class action as to the Davidsons, then the issue of whether the Davidsons fit within the class definition is completely irrelevant because they could not have been class members. As I will discuss later, that is the only and the correct result of this appeal. In light of my conviction that the arbitration issue necessarily had to be decided before the issue of the Davidsons' inclusion in the class, I will discuss the issues in that order.

II.

The majority characterizes its holding with respect to the New Jersey District Court's injunction of the Davidsons' arbitration as follows: "we hold that the District Court did err in enjoining, in its entirety, Appellants' arbitration. While Appellants are subject to the class settlement, and therefore are enjoined from pursuing any claims that fall within that settlement, they are not enjoined from pursuing, in arbitration, any claims that fall outside the settlement's scope." (Maj. Op. at 1 (emphasis added).)

In discussing the arbitration injunction, the majority correctly cites language from the Supreme Court emphasizing the preferred status of arbitration under the Federal Arbitration Act ("FAA"). (Maj. Op. at 32.) However, because "Appellants . . . cite no case law holding that the FAA trumps, and thereby forgives, [the Davidsons'] failure to opt out," the majority holds that "the District Court did not violate the policies of the FAA when it enjoined

Appellants from proceeding with their arbitration after they did not opt out of the class." (Maj. Op. at 36.) Accordingly, the majority concludes that "the District Court could enjoin . . . claims in arbitration that were resolved by the Class Action Settlement." (Maj. Op. at 36.) The majority could not be more wrong.

Indeed, I strongly disagree with the majority's decision for several reasons. I would hold that the New Jersey District Court did abuse its discretion, indeed it grossly abused its discretion, in enjoining the arbitration and not giving effect to the California Central District Court's order compelling arbitration, and I would hold that the entire arbitration must be allowed to go forward.

A.

First, the majority wholly ignored the timing of the initiation of the arbitration and of the class action. Because of the importance of the various events, I note in the margin the timeline of these events and the dates on which they occurred.³ Further, I recite the chronology of the most significant events that occurred:

3. Timeline:

December 14, 1998 Lead Plaintiffs file an Amended Consolidated Class Action Complaint ("ACCAC") and move for class certification.

December 17, 1998 The Davidsons initiate arbitration against Cendant pursuant to their Settlement Agreement.

January 21, 1999 Cendant files suit in the District Court for the Central District of California to enjoin the arbitration (claiming that the Davidsons' claims are barred by the Settlement Agreement).

January 27, 1999 The New Jersey District Court grants the motion for class certification.

February 17, 1999 Cendant moves for a preliminary injunction of the arbitration; the Davidsons move for summary judgment on the injunction action.

April 8, 1999 The California Central District Court dismisses Cendant's injunction action and finds that the Davidsons' claims must be arbitrated.

April 1999 Cendant appeals the California Central District Court's decision, and Cendant and the Davidsons

- 1) the Amended Consolidated Class Action Complaint and motion for class certification were filed on December 14, 1998;
- 2) the Davidsons filed a Notice of Claims for arbitration against Cendant on December 17, 1998;
- 3) the class was certified on January 27, 1999;
- 4) on April 8, 1999, the California Central District Court issued an opinion and order declining to enjoin the Davidsons' arbitration and finding that the Davidsons' claims must be arbitrated;
- 5) in October 1999, class notice was first disseminated and the opt-out period began (almost a year after the Notice of Claims for arbitration was filed);
- 6) the opt-out period for the class action expired on December 27, 1999.

The majority ignores the most salient fact--that the Davidsons initiated arbitration before the class was certified --indeed, before any notice of certification was ever formulated or distributed. Despite this and despite the fact

agree to stay arbitration pending the Ninth Circuit's resolution of the appeal.

August 6, 1999 The New Jersey District Court orders dissemination of class notice.

October 1999 Class notice is disseminated.

December 17, 1999 A proposed settlement of the class action is reached.

December 27, 1999 The opt-out period for the class action expires.

March 29, 2000 The New Jersey District Court grants preliminary approval of the settlement of the class action.

April 2000 The Davidsons file a motion in the New Jersey District Court for clarification of the class to exclude them or for extension of the opt-out period.

June 20, 2000 The New Jersey District Court enjoins the Davidsons' arbitration and finds that they are class members.

August 15, 2000 The final settlement of the class action is approved by the New Jersey District Court and class members release all claims against Cendant.

that no case authority--I repeat, no case authority--exists which holds that an arbitration initiated prior to class certification, thereafter ordered by a federal district court, and on appeal to its Court of Appeals⁴ may be enjoined, the majority here nevertheless and perplexingly holds that the New Jersey District Court properly enjoined the Davidsons' arbitration of issues covered by the class action.

B.

The majority states that the District Court had authority to enjoin the Davidsons' arbitration under the All Writs Act, 28 U.S.C. § 1651.⁵ The majority goes on, however, to make several points that contravene its own eventual holding: 1) that the Supreme Court, and the FAA, "require[] that arbitrable claims be arbitrated" in most circumstances; 2) that federal district courts may only enjoin state court proceedings and arbitrations under the All Writs Act in rare instances;⁶ and 3) that the Anti-Injunction Act, 28 U.S.C. § 2283, also limits the situations in which injunctions of other proceedings by federal district courts are permissible. (Maj. Op. at 31-39.) By making these points, the majority has, in effect, done much of my work for me.

4. The California Central District Court's order of April 8, 1999 is presently pending before the Ninth Circuit.

5. Incidentally, the New Jersey District Court did not explicitly invoke the All Writs Act in enjoining the Davidsons' arbitration. I will assume, however, that the All Writs Act is where the District Court found its authority to issue the injunction, in light of the lack of such authority under Rule 23 of the Federal Rules of Civil Procedure itself. As the Second Circuit observed in In re Baldwin-United Corp. Litig.:

We do not find independent authority for the issuance of the injunction in the Fed.R.Civ.P. 23(d) provision empowering the district judge to issue orders appropriate "for the protection of the members of the class or otherwise for the fair conduct of the action"; that rule is a rule of procedure and creates no substantive rights or remedies enforceable in federal court.

770 F.2d 328, 335 (2d Cir. 1985).

6. We should not lose sight of the fact that, here, a federal district court in New Jersey enjoined a California arbitration after a California federal district court had previously denied Cendant's application to reject the Davidsons' arbitration claims.

Picking up after the majority's eloquent recitation of these points, one would expect that the majority would logically hold that the District Court's order enjoining the Davidsons' arbitration was without legal foundation and authority and must, therefore, be reversed. Inexplicably, the majority, without basis in reason and without support in the cases and statutes on which it relies, has erroneously held otherwise, leading to this dissent.

1.

The All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). To explain why the majority erred in relying on the All Writs Act to support its affirming the District Court's injunction, I will flesh out in more detail the scope of the Act and the meaning of the phrase "necessary . . . in aid of . . . jurisdiction[]."

In Turner Broadcasting System, Inc. v. Federal Communications Commission, the Supreme Court stated:

The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction. We have consistently stated, and our own Rules so require, that such power is to be used sparingly. "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. . . .

7. Though the All Writs Act contains the phrase "necessary or appropriate in aid of . . . jurisdiction[]," 28 U.S.C. § 1651(a) (emphasis added), the scope of authority to issue injunctions under the Act is necessarily limited by the Anti-Injunction Act, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Therefore, the appropriate inquiry under the All Writs Act in conjunction with the Anti-Injunction Act is whether the injunction is "necessary in aid of . . . jurisdiction." (Emphasis added).

An injunction is appropriate only if (1) it is "necessary or appropriate in aid of [our] jurisdiction," 28 U.S.C. § 1651(a), and (2) the legal rights at issue are "indisputably clear."

507 U.S. 1301, 1303 (1993) (internal citations omitted).

In sanctioning the New Jersey District Court's injunction as authorized under the All Writs Act, the majority erroneously relies on several cases.⁸ First, the majority misapplies In re Baldwin-United Corp. Litig., 770 F.2d 328 (2d Cir. 1985). In Baldwin-United, the district court had issued an injunction against state court actions under the All Writs Act, stating that "the injunction was necessary `in aid of preserving [the court's] jurisdiction.'" 770 F.2d at 333 (quoting 28 U.S.C. § 1651). The district court had found that "the existence of competitive litigation . . . would jeopardize its ability to rule on the settlements, would substantially increase the cost of litigation, would create a risk of conflicting results, and would prevent the plaintiffs from benefiting from any settlement already negotiated or from reaching a new and improved settlement in the federal court." 770 F.2d at 333.

The Second Circuit affirmed the district court's grant of a preliminary injunction in Baldwin-United, observing that an injunction is proper under the All Writs Act when "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." 770 F.2d at 335 (quoting Atlantic Coast

8. The majority also perplexingly contradicts itself in its discussions of the FAA and the Anti-Injunction Act. It correctly observes that "the Supreme Court requires that arbitrable claims be arbitrated, even where the result would be the possible inefficient maintenance of separate proceedings in different forums," and it points out that "the FAA requires piecemeal resolution when necessary to give effect to an arbitration agreement." (Maj. Op. at 32 (internal citations and quotation marks omitted).) However, only two pages later, the majority contradicts this mandate, averring in its discussion of the Anti-Injunction Act that "a class action calls for distinct rules in connection with the need to have as many common issues as possible disposed of in a single proceeding." (Maj. Op. at 34.) This statement is simply incorrect in the context of this case, in light of FAA and Anti-Injunction Act jurisprudence.

Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295 (1970) (dicta)). The Second Circuit held that this standard was met in Baldwin-United because "[t]he existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it [because t]he success of any federal settlement was dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs had against the settling defendants based on the same facts," which release would be uncertain "[i]f states or others could derivatively assert the same claims on behalf of the same class or members of it." 770 F.2d at 337.

The holding in Baldwin-United that an injunction was proper under the All Writs Act is wholly inapplicable to this case for several reasons. First, it concerned derivative lawsuits in state courts by the states themselves, not arbitration by an individual under the FAA. Second, the lawsuits were commenced after the class settlement was reached, contrasted with the Davidsons' arbitration, which was initiated before the CalPERS class was even certified. Finally, whereas the district court in Baldwin-United properly held that the injunction was necessary to preserve its jurisdiction under the All Writs Act because of the dangers to the class settlement from these derivative lawsuits, an injunction of the Davidsons' arbitration is not necessary to the settlement of the claims of the other CalPERS class members because the settlement of the class action here is not at all contingent on the Davidsons' participation in the class action. Moreover, the Davidsons have already received a final judgment in their favor from a competent court--the California Central District Court--holding their claims to be arbitrable. (I discuss this issue of res judicata hereafter.)

The majority also cites In re PaineWebber Partnership Litig., 1996 WL 374162 (S.D.N.Y. July 1, 1996), a case that the District Court relied upon in enjoining the arbitration. The majority observes that, in PaineWebber, "the court denied fifteen plaintiffs' attempts to arbitrate claims covered by a class action where they all failed to opt out of the class before the deadline," a situation which the majority apparently likens to the instant case. (Maj. Op. at 32.)

In PaineWebber, after the opt-out period had expired and a tentative settlement had been reached, fifteen class members who had failed to opt out initiated separate state court litigation and arbitration, both covering similar claims to those in the class action. Relying on Baldwin-United, the district court enjoined the state litigation and the arbitration under the All Writs Act, observing that such an injunction was appropriate "where a federal court is on the verge of settling a complex matter, and state court proceedings may undermine its ability to achieve that objective." 1996 WL 374162, at 3 (quoting Standard Microsystems Corp. v. Texas Instruments, Inc., 916 F.2d 58, 60 (2d Cir. 1990)). The district court further noted that "this consolidated class action is analogous to a res over which the Court requires full control, thereby justifying a stay pursuant to the All Writs and Anti-Injunction Acts, at least to the extent that parties to this litigation seek to bring a new action in a different forum." 1996 WL 374162, at 3.

In fact and in law, PaineWebber is wholly inapposite to this case, and I fail to understand why the majority has relied upon it. In PaineWebber, the plaintiffs did not seek arbitration until after the class had been certified, after notice of the class action had been sent out, after the opt-out period had expired, and after a tentative settlement of the class action had been reached. The observations by the district court in PaineWebber that "the Court has the ability to enjoin further litigation by class members involving the subject matter of this class action," 1996 WL 374162, at 4 (S.D.N.Y. July 1, 1996) (emphasis added), and that an injunction was proper "to the extent that parties to this litigation seek to bring a new action in a different forum," 1996 WL 374162, at 3 (emphasis added), have no relevance or application here, where the Davidsons' arbitration did not constitute "further litigation" or "a new action" but rather was commenced before class certification and was confirmed as the appropriate course of action by a federal district court in California long before class notice was disseminated. Accordingly, the reasoning employed by the district court in PaineWebber to issue an injunction under the All Writs Act cannot be used to justify the injunction here.

Another case cited by the majority, In re Joint Eastern and Southern Districts Asbestos Litig., 134 F.R.D. 32 (E.D.N.Y. 1990), concerned consolidation of asbestos-related proceedings against the defendant. Class counsel and the defendant reached a proposed settlement, after which "the court directed that all interested parties appear . . . and show cause why the proposed class should not be certified and asbestos-related proceedings in other forums stayed." 134 F.R.D. at 35. After these hearings, a class action complaint and motion for certification was filed, which motion was granted by the court in conjunction with a stay of "any pending asbestos-related proceedings brought on behalf of class members." 134 F.R.D. at 35.

In asserting that the injunction in Asbestos was "necessary and appropriate in aid of" the district court's jurisdiction of the class action under the All Writs Act, the district court pointed out that:

To permit pending actions against [the defendant] to proceed in their present form would substantially impair or impede the interests of other asbestos claimants and would significantly deplete the assets available to resolve all pending and future cases. These pending cases, if allowed to continue independently, will seriously hinder the ability of the court to evaluate the adequacy and fairness of the proposed settlement of the class action by constantly depleting [the defendant]'s assets.

134 F.R.D. at 36. In addition, the district court in Asbestos described asbestos litigation as having reached "crisis proportions." Specifically, the district court observed:

Over 100,000 pending asbestos personal injury and wrongful death cases have backlogged the courts--preventing many injured persons from obtaining much needed compensation in a timely and efficient manner. Even more troubling is the current realization that each day, as more judgments are paid, the possibility that similarly situated claimants will not receive the full value of their claims becomes increasingly likely. A fundamental tenet of our legal system--equal treatment--no longer exists for asbestos victims.

To suggest that the necessity of enjoining the Davidsons' arbitration is even remotely comparable to the national "crisis" of asbestos litigation is preposterous. The District Court in this case was not faced with hundreds of thousands of individual actions threatening to impair the settlement of the class action before it. Indeed, the District Court was faced with only a single arbitration proceeding that had been decided and was on appeal in another Circuit, that had been commenced before class certification pursuant to arbitration agreements between Cendant and the Davidsons, and that made claims available to no other Cendant shareholders. In other words, whereas the injunction in Asbestos served to stay countless actions by class members, which actions could of course seriously impact the possibility and quality of settlement of the class action, the District Court here enjoined one arbitration arising out of circumstances peculiar to the Davidsons and which could not have any imaginable impact on the administration and disposition of other class members' claims.

The case before us simply does not meet the requirements for issuance of an injunction under the All Writs Act, and none, I repeat, none, of the cases that the majority cites furnishes even a modicum of authority for the conclusion that the majority desires to reach. Unlike Baldwin-United, PaineWebber, and Asbestos, the injunction issued by the New Jersey District Court was not "necessary in aid of its jurisdiction." The Davidsons initiated their arbitration against Cendant under an agreement between the Davidsons and Cendant not applicable to other class members and, as will be discussed infra, the claims in their arbitration overlapped only slightly with the claims in the class action. In addition, there is no threat that allowing this arbitration, initiated before class certification and long before expiration of the opt-out period, to proceed would expose Cendant to future claims by other putative class members, because such claims would necessarily be commenced much later in the course of the class action and would therefore be more analogous to the cases relied upon by the majority and discussed above.

The arbitration would neither "interfer[e] with [the New Jersey District Court's] consideration or disposition" of the class action, nor would it "seriously impair the [New Jersey District Court's] flexibility to decide" the class action, nor would it "undermine [the New Jersey District Court's] ability to achieve" class settlement. Baldwin-United, 770 F.2d 328, 335 (2d Cir. 1985); PaineWebber, 1996 WL 374162, at 3 (S.D.N.Y. July 1, 1996). Accordingly, I fervently disagree with the majority's holding that the New Jersey District Court had authority to enjoin the arbitration under the All Writs Act.⁹

2.

Because the Davidsons initiated arbitration so early, indeed before the class had even been certified, those cases cited by the majority which permit injunctions of arbitrations initiated by class members at the time when the class action is nearing settlement are just not applicable to this appeal, and the majority has erred grievously in attempting to support its holding based on such authority. In light of the fact that the Davidsons commenced arbitration pursuant to unique agreements

9. The majority cites still another case, In re Prudential Partnership Litig., 158 F.R.D. 301, 304 (S.D.N.Y. 1994), which it claims bolsters its unsupportable conclusion that one district court can enjoin an arbitration that another district court has ruled must go forward. In re Prudential does not invoke the All Writs Act but should be discussed briefly because it too is completely distinguishable from the instant case. The court in In re Prudential Partnership Litig. stated: "Class members who wish to opt out in order to . . . seek arbitration in a forum in existence at the time of the original opt-out deadline have no excuse for their neglect to opt out; they are simply seeking to escape consequences known to them at the time they chose to remain in the class." 158 F.R.D. 301, 304 (S.D.N.Y. 1994); (See Maj. Op. at 36). By contrast, in this case, the Davidsons did not "wish to opt out in order to . . . seek arbitration." They had already sought arbitration almost a year before the opt-out period even began and over a year before the expiration of the opt-out period and, most importantly, had received a final judgment in their favor. This is not a case in which the Davidsons received notice of the class settlement and then suddenly decided to arbitrate their claims instead of participating in the settlement. Rather, they sought to compel arbitration before the class was even certified.

between themselves and Cendant, the majority's holding that the injunction was "necessary . . . in aid of " the District Court's jurisdiction under the All Writs Act is equally untenable. Indeed, the one case where the facts are analogous to this appeal, in that the arbitration commenced before the class was certified and notices were distributed, is the Eighth Circuit case of In re Piper Funds, Inc., Inst. Gov't Income Portfolio Litig., 71 F.3d 298 (8th Cir. 1995), a case relying on the FAA rather than the All Writs Act to reverse a district court's injunction of an arbitration initiated before class certification.

In Piper Funds, the Eighth Circuit held that the district court had improperly enjoined an arbitration commenced, as here, before class certification and before the notice of class action had been disseminated and the opt-out period had begun. Piper Funds differs slightly from this case in that the plaintiff in Piper Funds, Park Nicollet, had specifically expressed its desire to opt out of the class before the opt-out period had even begun. The Eighth Circuit pointed out that "the FAA does not authorize a district court to enjoin arbitration" and observed that "there are very few reported cases in which a federal court has enjoined arbitration." 71 F.3d at 302. It listed three reasons why the district court's reasons for the injunction were not sufficient, all of which are equally applicable in this case: 1) "Park Nicollet has a contractual right to immediate submission of its securities law claims to arbitration," 71 F.3d at 303; 2) "Park Nicollet's contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management," 71 F.3d at 303; and 3) the Court did not accept "the class action parties' conclusory assertion that immediate arbitration by Park Nicollet (and perhaps others) will frustrate their class action settlement." 71 F.3d at 303.

Though relying on the FAA to hold that the district court's injunction of the arbitration had been in error, the Eighth Circuit did address the All Writs Act, stating:

The district court based its injunction on the All Writs Act, 28 U.S.C. § 1651, which has been invoked by federal class action courts to enjoin persons not within the court's jurisdiction from frustrating a court order

or court-supervised settlement. We agree with the district court that it has the power, under Fed.R.Civ.P. 23 augmented by the All Writs Act, to control conduct by absent class members that affects management or disposition of the class action. However, exercise of this power must be "agreeable to the usages and principles of law," § 1651(a), which in this case include the FAA as well as Rule 23.

71 F.3d at 300 n.2 (internal citations omitted).

To put the Eighth Circuit's holding more firmly in the context of the All Writs Act, the FAA's clear preference for arbitration over other forms of litigation dictates that an injunction can never be appropriate in a case such as this one because "the legal rights at issue [can never be] 'indisputably clear' " where issuance of an injunction would violate the principles of the FAA, and, therefore, the second prong of the test of the propriety of an injunction, set forth by the Supreme Court in Turner Broadcasting System, Inc. v. Federal Communications Commission, can never be met.

It is true that the Court in Piper Funds noted in dictum that the district court may properly have denied the party's request to opt out if, for example, "its request to opt out was too late." 71 F.3d at 304. The majority seizes upon that language as reason enough to justify its holding in this case, disregarding the Eighth Circuit's indisputable reasoning that it is inappropriate under the FAA for a district court to enjoin a previously initiated arbitration simply because the party did not follow the standard opt-out procedure. (See Maj. Op. at 35-36.) However, the majority's willful blindness to the similarities between this case and Piper Funds is just another example of the majority's unwillingness to accept the fact that the arbitration sought by the Davidsons preempted any class membership and could not be enjoined.

In fact, in both this case and Piper Funds, the plaintiffs did not follow the standard opt-out procedure. In Piper Funds, the plaintiff attempted to opt out before the opt-out period had begun, and, here, the Davidsons initiated arbitration well before the opt-out period began but did not explicitly opt out of the class. The Davidsons did not opt

out at that time, undoubtedly because neither the Davidsons nor Cendant believed that the Davidsons were class members. Moreover, when the Davidsons filed their motion in the District Court seeking clarification of the class definition, the Lead Plaintiffs filed a brief stating that "Lead Plaintiffs agree that the Davidsons are excluded from the class." (App. 918.) The Davidsons obviously could not have been found to be members of the class if the District Court had honored the California District Court's order compelling arbitration.¹⁰

Moreover, the majority errs in relying on In re VMS Sec. Litig., 21 F.3d 139 (7th Cir. 1994), to support its point that a late opt-out terminates a party's right to arbitrate. Though, as the majority notes, the plaintiffs in VMS "had obtained an award in the arbitration filed before resolution of the class action," (Maj. Op. at 35), the progression of events in that case differed markedly from this case. In VMS, class actions were filed and consolidated into one class action, and a proposed settlement was approved, subject to notice to class members, hearing, and final approval. Then, the Hubbards initiated arbitration. Subsequently, class notice was disseminated and the opt-out period expired without the Hubbards opting out. The district court then enjoined the Hubbards' arbitration, but the arbitrators heard the Hubbards' claims anyway and granted them an award.

The Seventh Circuit held that "[t]he arbitrators 'exceeded their power' when they decided to act on the Hubbards' claims [because t]he Hubbards' claims against Prudential arising from their investment in the VMS Mortgage Investment Fund were subject to the class action settlement, and had already been resolved." VMS, 21 F.3d at 145. Indeed, the claims in VMS had been resolved in the class settlement before the Hubbards even initiated arbitration.

10. Additionally, in Section IV, infra, I discuss the New Jersey District Court's failure to comply with this court's directions in noting that, after the California arbitration had been enjoined, the Davidsons were too late to opt out of the class. The District Court failed to apply the Supreme Court's Pioneer analysis and our instructions in its opinion.

By contrast, the Davidsons' arbitration commenced before the class was even certified. Additionally, the Davidsons initiated arbitration pursuant to broad and binding arbitration agreements (see Part II.C.2, infra),¹¹ the predominance of which had already been confirmed by a federal district court in California, whereas the Hubbards' arbitration was not pursuant to such an agreement.¹² Accordingly, the Seventh Circuit's opinion in VMS understandably contained no reference to the guiding principles of the FAA. Because of these significant differences between VMS and this case, the Seventh Circuit's decision that the Hubbards were bound to the class settlement after they failed to opt out has no relevance to the instant case. Indeed, I have no quarrel with the VMS decision and might very well have joined in the VMS holding if that case were before me.

By asserting that the Davidsons' right to arbitrate is not extinguished by their failure to opt out of the class, I am not "gloss[ing] over" the Eighth Circuit's statement in Piper Funds regarding late opt outs as the majority suggests. (Maj. Op. at 36.) I am simply affording more importance to the Eighth Circuit's actual holdings regarding the predominance of the FAA than to its fleeting statement in dictum regarding late opt-outs. The majority, by contrast, has attempted to support and justify its holding here by resorting to odd and assorted dicta from the cases which it has cited and I have distinguished, all of which, other than Piper Funds, are irrelevant to the issue presented here of arbitration preceding class action. (See Maj. at 35-36 (quoting In re VMS Sec. Litig., 21 F.3d 139 (7th Cir. 1994); In re PaineWebber P'ship Litig., 1996 WL 374162 (S.D.N.Y. July 1, 1996); In re Prudential P'ship Litig., 158 F.R.D. 301 (S.D.N.Y. 1994).)

I believe, as I have earlier stated, that the only case relevant to the issue before us is Piper Funds, which, while

11. Singularly, the majority opinion makes no mention of the terms and breadth of the arbitration agreements entered into by the Davidsons and Candant in its discussion and analysis.

12. In addition, as will be discussed in Part III infra, the class settlement here did not "resolve" the Davidsons' claims.

not binding on us in the Third Circuit, nonetheless, with unimpeachable reasoning, supports a holding that, under the FAA, and despite the All Writs Act, the New Jersey District Court could not have and should not have enjoined the Davidsons' arbitration.

C.

1.

The Davidsons argue that the New Jersey District Court should have given res judicata effect to the decision by the California Central District Court. In addressing this argument by the Davidsons, the New Jersey District Court stated:

Plaintiffs' assertion that the Court is res judicata-barred from hearing this action is meritless. The Central District of California was not presented with the issue before this Court--whether the Davidsons are within the CalPERS settling class. While the Court directed arbitration of claims arising from the 1996 acquisition and 1997 Settlement Agreement, that direction was made under different factual (and procedural) circumstances. As Cendant says, it did not argue that the Davidsons were class members--at most, they were potential members. Obviously, that issue was not before the Central District of California impliedly or actually.

194 F.R.D. 158, 166 (D.N.J. 2000). I believe that the New Jersey District Court incorrectly applied the doctrine of res judicata and that the Davidsons are correct that the California Central District Court's decision precluded the New Jersey District Court from enjoining the Davidsons' arbitration.

Initially, I should explain that there are two forms of preclusion under the doctrine of res judicata: claim preclusion and issue preclusion (also referred to as collateral estoppel). As the Third Circuit stated in In re Graham:

Claim preclusion applies to claims that 'were or could have been raised' in a prior action involving the 'parties or their privies' when the prior action had been resolved by 'a final judgment on the merits.' Claim preclusion thus bars relitigation of any claim that could have been raised in the prior action even if it was not so raised.

In re Graham, 973 F.2d 1089, 1093 (3d Cir.1992) (internal citations omitted). Issue preclusion, on the other hand, "bars relitigation only of an issue identical to that adjudicated in the prior action." Witkowski v. Welch, 173 F.3d 192, 198 n.8 (3d Cir. 1999); see also In re Braen, 900 F.2d 621, 628-29 n. 5 (3d Cir.1990).

Here, we are considering Cendant's motion for an injunction of the arbitration, a motion made in both California and in New Jersey. The California Central District Court dismissed Cendant's action seeking an injunction, and that decision is currently on appeal before the Ninth Circuit Court of Appeals.¹³ The decision of the California Central District Court constitutes a "final judgment on the merits" and that the doctrine of claim preclusion applies to that decision.

The Supreme Court has described the doctrine of claim preclusion as follows: "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." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). Therefore, it must be determined whether Cendant's motion for an injunction of the Davidsons' arbitration in the New Jersey District Court was "or could have been raised" in the California Central District Court.

Cendant's complaint before the California Central District Court asking the court to enjoin the arbitration was based solely on the several agreements between Cendant and the Davidsons and did not mention the issue of the Davidsons'

13. Under federal law, a judgment on appeal is still a final judgment for res judicata purposes. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 188-89 (1941); Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 540 (2d Cir. 1996).

putative class membership at all. In addition, as the New Jersey District Court pointed out, the issue of the Davidsons' class membership could not have been before the California Central District Court because, at the time of the California Central District Court's decision, the opt-out period had not even begun and, therefore, the Davidsons had not yet irrevocably failed to opt out of the class action.

The New Jersey District Court found this distinguishing feature to be dispositive of the res judicata question, as does the majority here, which describes the fact that the Davidsons' putative class membership was not addressed in the California injunction action as a "fatal flaw." (Maj. Op. at 30-31 n.22.) Indeed, the New Jersey District Court reasoned that, because the Davidsons' class membership "was not before the Central District of California impliedly or actually," 194 F.R.D. at 166, the California court's decision that the Davidsons' could not be enjoined did not preclude the New Jersey District Court from enjoining the arbitration after the expiration of the opt-out period.

However, it is the New Jersey District Court's and the majority's analyses, not mine, that are fatally flawed. What the New Jersey District Court and the majority fail to realize is that the Davidsons' class membership is irrelevant to the issue of whether to enjoin the arbitration. Because of the timing of the arbitration and the class action and because of the lack of authority to enjoin the Davidsons' arbitration under the All Writs Act, all discussed in detail in the preceding sections, the New Jersey District Court could not base its authority to issue an injunction on the (arguable) fact of the Davidsons' class membership. Therefore, contrary to the majority's position, it is far from "spurious to suggest that res judicata precludes the District Court from deciding whether Appellants' claims could be decided in the class action." (Maj. Op. at 30-31 n.22.) The issue before the New Jersey District Court, whether to enjoin the Davidsons' arbitration at Cendant's request, was precisely the same issue that was before the California Central District Court and that the California court decided more than a year before the New Jersey District Court dealt with the issue. Thus, it is completely irrelevant that "Cendant's complaint [in the California Central District

Court] . . . did not interpose the existence of the class action as a ground for seeking injunctive relief from the arbitration." (Maj. Op. at 9.)

Because the injunction issues before the California and New Jersey courts were the same, the New Jersey District Court was required to afford the decision of the California court res judicata effect. The California Central District Court held that, with regard to the Davidsons' claims regarding rescission of the Settlement Agreement, "[t]he Supreme Court has held that an arbitrator must resolve a claim to rescind a contract based upon fraud in the inducement when the contract contains a broad arbitration provision." (App. 705 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-05 (1967).) The court also held that the remaining claims, regarding the merger of CUC and DAI, should also be submitted to arbitration because "whether or not the claims were released depends on whether the settlement agreement can be rescinded, and depends also on the scope of the release in the agreement. Both of these issues must be determined by an arbitrator, pursuant to the clear intent of the parties to submit such disputes to binding arbitration." (App. 706.) This clear holding by the California Central District Court left no room for the New Jersey District Court to enjoin the Davidsons' arbitration, and the New Jersey District Court erred in doing so. The majority has similarly erred in upholding the New Jersey court's injunction.

2.

It is worth mentioning briefly that a review of the arbitration clauses in the February 19, 1996 Merger Agreement and the May 27, 1997 Settlement Agreement between the Davidsons and Cendant makes clear that the California Central District Court's decision to dismiss Cendant's injunction action and to allow the arbitration to go forward was the correct decision. The arbitration clause in the Merger Agreement states: "Any controversy, dispute or claim arising out of or relating to this Agreement or the breach hereof which cannot be settled by mutual agreement . . . shall be finally settled by arbitration . . ." (App. 524.) The clause goes on to state that "[t]he decision of the

arbitrator on the points in dispute will be final, unappealable and binding and judgment on the award may be entered in any court having jurisdiction thereof." (App. 524.) Additionally, the clause states:

The parties agree that this clause has been included to rapidly and inexpensively resolve any disputes between them with respect to this Agreement, and that this clause shall be grounds for dismissal of any court action commenced by either party with respect to this Agreement, other than post-arbitration actions seeking to enforce an arbitration award.

(App. 524-25 (emphasis added)).

The Settlement Agreement contains similar language. The agreement to arbitrate states:

Notwithstanding anything to the contrary contained in this Agreement or the Surviving Agreements and Rights, any controversy, dispute or claims arising out of or relating to this Agreement or any of the Surviving Agreements and Rights or the breach hereof or thereof which cannot be settled by mutual agreement shall be finally settled by binding arbitration in accordance with the Federal Arbitration Act . . .

(App. 668.) The arbitration clause in the Settlement Agreement also states that "[t]he decision of the arbitrator on the points in dispute will be final, unappealable and binding, and judgment on the award may be entered in any court having jurisdiction thereof." (App. 669.) Finally, as in the Merger Agreement, the arbitration clause in the Settlement Agreement states:

The parties agree that this Section has been included to rapidly and inexpensively resolve any disputes between them with respect to this Agreement or any of the Surviving Agreements and Rights, and that this Section shall be grounds for dismissal of any court action commenced by any party with respect to this Agreement or any of the Surviving Agreements and Rights, other than post-arbitration actions seeking to enforce an arbitrator award.

(App. 669-70 (emphasis added).)

In their Notice of Claims for arbitration, the Davidsons raised claims in connection with both the Merger Agreement and the Settlement Agreement. They explicitly invoked both arbitration clauses in support of arbitrating these claims, stating that "[t]his dispute properly is before this arbitration tribunal by virtue of an arbitration provision set forth in the Settlement Agreement between the Davidsons and CUC," and "[t]his dispute also is properly before this arbitration tribunal by virtue of an arbitration provision set forth in . . . the `Merger Agreement.'" (App. 535-36.) The Davidsons also cited similarly worded arbitration provisions in their Employment Agreements with CUC and in their Noncompetition Agreements with CUC in support of arbitrating their claims. (App. 537-38.)

These broad arbitration clauses clearly preclude a court from mandating that the Davidsons participate in a class action concerning the claims for which they sought arbitration, and the clauses support the California Central District Court's decision.

3.

One final point in connection with the preclusive effect of the California Central District Court's decision: in light of the California court's clear holding that the arbitration could not be enjoined, the majority misapplies our decision in Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997). This court held in Peacock: "Once a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration. . . . It would be anomalous for a court to decide that a claim should be referred to an arbitrator rather than a court, and then, by deciding issues unrelated to the question of forum, foreclose the arbitrator from deciding them." 110 F.3d at 230-31.9

The majority perplexingly fails to realize that the dispute between the Davidsons and Cendant has already been "determined to be validly arbitrable" by the California Central District Court. Accordingly, it is "anomalous" and indeed erroneous for the majority here to issue this opinion which clearly "foreclose[s] the arbitrator from deciding" the very issues raised in the arbitration, which a competent

court with jurisdiction over both parties has held to be arbitrable.

D.

Because of the timing of the Davidsons' commencement of the arbitration and the initiation of the class action, because of the fact that the requirements of the All Writs Act were not met in this case for issuance of an injunction, because of this case's dissimilarity to Baldwin-United, PaineWebber, and Asbestos and its similarity to Piper Funds, and because of the appropriate application of the doctrine of res judicata to this case, there can be no doubt that the New Jersey District Court grossly abused its discretion in enjoining the Davidsons' arbitration.

Accordingly, I am satisfied that, at this point, the issue of whether the Davidsons can be deemed to fall within the class definition is irrelevant. The Davidsons sought arbitration pursuant to the arbitration clauses in the Merger Agreement and the Settlement Agreement, and the California Central District Court confirmed that arbitration was proper. As noted earlier, that order is presently on appeal to the Court of Appeals for the Ninth Circuit and should have been given res judicata effect by the New Jersey District Court. The only way the issue of the Davidsons' class membership could become relevant is if the Ninth Circuit reversed the California Central District Court's decision and held that the Davidsons' claims were not properly before the arbitrator. Because of that remote possibility, I will nonetheless discuss below the issue of the Davidsons' class membership.

III.

The majority holds that the District Court did not err in finding that the Davidsons were within the class definition. It bases its holding in part on its interpretation of the term "publicly traded" in the class definition, which the majority reads to include the Cendant shares acquired by the Davidsons in the Merger Agreement. The majority concedes that there were restrictions placed on the Davidsons' sales of the stock they acquired in the Merger Agreement, but

observes that "[t]he restriction on sale of the CUC stock held by Appellants emanated solely from the quantity of shares they received as a result of the merger, not in any way from the type of security they received." (Maj. Op. at 16.)

Further, the majority notes that the restrictions on the Davidsons' sale of their shares "could be avoided entirely . . . if Appellants were to sell shares of CUC stock under any subsequent registration statement." (Maj. Op. at 17.) Accordingly, the majority reaches the conclusion--a conclusion for which no relevant authority is cited--that the Davidsons' shares were "publicly traded," asserting that "[h]aving traded publicly tens of millions of shares of CUC common stock so soon after the DAI merger, and then to claim that they are not 'publicly traded' securities within the class definition, is a non sequitur." (Maj. Op. at 17.)

I cannot agree with the majority's holding on this issue, because the Davidsons' shares were not "publicly traded," and I would hold that the District Court and the majority of this court have erred in holding otherwise.

Pursuant to the Agreement and Plan of Merger of DAI and CUC, shares of DAI were to be converted as follows: "each share of common stock, par value \$0.00025 per share, of [DAI] issued and outstanding immediately prior to the Effective Time . . . shall, by virtue of the Merger . . . be converted into and shall become 0.85 of one fully paid and nonassessable share of common stock, \$.01 par value per share, of [CUC]." (App. 475.) The Agreement was entered into on February 19, 1996. Also on that date, the Davidsons signed letters upon which the merger was conditioned. The letters stated, inter alia:

I hereby represent, warrant and covenant to [CUC] that:

(a) I will not transfer, sell or otherwise dispose of any of the [CUC] shares except (i) pursuant to an effective registration statement under the Securities Act, or (ii) as permitted by, and in accordance with, Rule 145, if applicable, or another applicable exemption under the Securities Act; and

(b) I will not (i) transfer, sell, or otherwise dispose of any [DAI] Shares prior to the Effective Time (as defined in the Merger Agreement) or (ii) sell or otherwise reduce my risk (within the meaning of the Securities and Exchange Commission's Financial Reporting Release No. 1, "Codification of Financial Reporting Policies," Section 201.01 [47 F.R. 21028] (May 17, 1982) with respect to any [CUC] shares until after such time (the "Delivery Time") as consolidated financial statements which reflect at least 30 days of post-merger combined operations of [CUC] and [DAI] have been published by [CUC], except as permitted by Staff Accounting Bulletin No. 76 issued by the Securities and Exchange Commission.

(App. 1129, 1131.)

In light of these limitations on the Davidsons' shares, the District Court clearly erred in finding that they were "publicly traded," and the majority compounded that error by subscribing to the District Court's ruling. The Davidsons' shares were certainly "common stock," but not all common stock is necessarily "publicly traded." The Merger Agreement placed restrictions on the Davidsons' trading of their CUC shares, differentiating them from freely and publicly traded CUC common stock. Further, there is no basis for the majority's speculative assertion that the restrictions were entered into because of the quantity, and not the quality, of the shares. Regardless of the reason, there were restrictions on the Davidsons' shares of CUC common stock, and, therefore, those shares were not "publicly traded."

Nor am I convinced by the majority's argument that the Davidsons could have avoided the restrictions on their shares by selling under subsequent registration statements. The fact that the Davidsons were able to overcome the restriction on their shares (in other words, that the restriction did not amount to an absolute prohibition on trading) does not suddenly transform the restricted shares which are not publicly traded into "publicly traded securities." Whether the restriction made the Davidsons' shares wholly untradeable or tradeable only after some

maneuvering, the fact remains that the shares simply were not "publicly traded securities."

I agree with the majority that the Davidsons meet the class definition in other respects, because they "purchased or otherwise acquired" their shares within the relevant time period, they were "injured thereby," and they are not "officers and directors of Defendant." However, the dispositive point, and the point on which I diverge from the majority, is the majority's position that the Davidsons' shares are "publicly traded securities." "Publicly traded securities" is the cornerstone of "class membership" as the class was certified. Because the Davidsons' shares were not "publicly traded," they do not meet the class definition. Accordingly, the District Court erred in finding the Davidsons to be class members, even according "particular deference" to the District Court on this finding.¹⁴

14. The majority uses the "particular deference" standard of review in referring to the District Court's interpretations of the District Court's own orders. I do not think that it is appropriate to accord the District Court "particular deference" on this issue because I do not believe that the District Court's finding as to the Davidsons' membership in the class amounted to an "interpretation of its own order." The majority asserts that, "[h]ere, the District Court, in determining whether Appellants were class members, interpreted its own orders, the order certifying the class and the order approving the class notice, both of which contained the class definition." (Maj. Op. at 14-15.) In so holding, the majority accords a "particular deference" to the District Court's interpretations.

While it is true that those orders gave content to the class definition, the District Court did not draft the definition itself. I believe that "particular deference" can be accorded when the District Court claims to have a better insight on the meaning of an order as the author of that order. This is not such a case.

Indeed, I believe that the orders in this case approving class certification and approving class notice are analogous to consent decrees approved by courts, in that they are "hybrid[s] of . . . contract[s] and . . . court order[s]." Holland v. New Jersey Dept. of Corrections, Nos. 00-1801, 2356, 2357, at 20. As this court has just recently held in Holland, the appropriate standard of review for such decrees is plenary or de novo review, and not the "particular deference" review held by the majority. Holland, at 21-24. Hence, the majority exercised an incorrect standard of review over the District Court's orders certifying the class and approving class notice.

My interpretation of "publicly traded" as not including the Davidsons' shares is bolstered by the definition of "publicly traded" in the Internal Revenue Code Regulations. Regulation § 1.170A-13 defines "publicly traded securities" as follows:

In general. Except as provided in paragraph (c)(7)(xi)(C) of this section, the term `publicly traded securities' means securities . . . for which (as of the date of contribution) market quotations are readily available on an established securities market.

I.R.C. Reg. § 1.170A-13(c)(7)(xi)(A). The exceptions section states:

Exception. Securities described in paragraph (c)(7)(xi)(A) or (B) of this section shall not be considered publicly traded securities if-- (1) The securities are subject to any restrictions that materially affect the value of the securities to the donor or prevent the securities from being freely traded. . . .

I.R.C. Reg. § 1.170A-13(c)(7)(xi)(C)(1) (emphasis added).

The Davidsons' shares precisely fall into this exception, in that restrictions were placed on the shares that prevented them from being freely traded. Therefore, according to the definition of "publicly traded" in the Internal Revenue Code Regulations, the Davidsons' shares were not "publicly traded."

Moreover, the majority once again turns a blind eye to the Amended and Consolidated Class Action Complaint ("ACCAC"), which by its terms supports the Davidsons' position that the class action was not intended to cover their claims. The ACCAC describes the class members "as purchasers on the [NYSE] and acquirers pursuant to the Registration Statement and the Joint Proxy Statement/Prospectus [of the merger of CUC and HFS]." (App. 156.) In addition, the ACCAC states:

Lead Plaintiffs' claims are typical of the members of the Class. Plaintiffs and all other members of the Class acquired their CUC common stock pursuant to the Registration Statement and Joint Proxy Statement/Prospectus, and purchased their CUC and

Cendant publicly traded securities on the open market and sustained damages as a result of defendants' wrongful conduct complained of herein.

(App. 156.) These statements make clear that the lead plaintiffs intended the class to consist only of purchasers of the Cendant shares on the market and purchasers pursuant to the HFS/CUC merger. The Davidsons fall into neither of these categories.

In addition, the fact that the claims in the ACCAC for the most part differ from the Davidsons' claims against Cendant lends still further support to excluding the Davidsons from the class. Of the fourteen counts in the ACCAC, only five cover the time period during which the Davidsons acquired their shares. In addition, as the Davidsons point out, the ACCAC alleges claims for violation of Section 11 of the Securities Act, 15 U.S.C. § 77k, only in connection with the HFS/CUC merger. The Davidsons would (and did) pursue such claims on their own behalf in arbitration, but the ACCAC does not make those claims for the Davidsons.¹⁵ The ACCAC only intended to cover merger-related claims in connection with the HFS/CUC merger and further reinforces the point that the CalPERS class did not include the Davidsons.¹⁶

I therefore disagree with the majority's holding regarding the Davidsons' class membership, because I am convinced that the District Court clearly erred in finding that the Davidsons are within the class.

15. In their Notice of Claims for arbitration, the Davidsons made claims under §§ 11, 12(a)(2), and 17 of the Securities Act, 15 U.S.C. § 77a, et seq., § 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j(b), as well as under various sections of the California Corporations Law and common law. The ACCAC also alleges violations of sections 11 and 12 of the Securities Act and § 10(b) of the Securities and Exchange Act, but its section 11 and section 12 claims are not the same claims that the Davidsons have asserted in arbitration, and only the § 10(b) claims in the ACCAC arguably cover claims of the Davidsons.

16. See note 4, supra.

IV.

I have still another disagreement with the majority opinion and its holdings. The majority holds that the District Court did not abuse its discretion in its analysis of whether to grant the Davidsons' request for an extension of the time to opt out. In considering the Davidsons's request for an extension of the opt-out deadline under Rule 6(b) of the Federal Rules of Civil Procedure, the District Court described the factors to be considered in connection with the excusable neglect standard in detail, citing the Supreme Court's decision in Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395 (1993), and the Third Circuit's earlier opinion concerning this standard, Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988). See In re Cendant Corp. Sec. Litig., 194 F.R.D. 158, 165 (D.N.J. 2000).

However, the District Court in this case, as in other cases when it gave only lip service to the Pioneer factors, did not comply with the Supreme Court's or our instructions. See In re Cendant Corp. PRIDES Litig., 235 F.3d 176 (3d Cir. 2000); In re Cendant Corp. PRIDES Litig., 234 F.3d 166 (3d Cir. 2000).¹⁷ The District Court here stated only that the Davidsons' "alleged failure to receive notice . . . does not warrant an extension of the exclusion deadline." 194 F.R.D. at 165. It gave as its reasons: class notice was adequately published; the case got independent press coverage; "the Davidsons' assertion that their failure to opt out is excusable because Cendant acted as though they were not

17. The majority cites another Cendant appeal in which we affirmed the District Court's decision that certain plaintiffs' late filing of proofs of claim was "excusable neglect." (Maj. Op. at 28 (citing In re Cendant Corp. PRIDES Litig., 233 F.3d 188 (3d Cir. 2000)).) Because that appeal concerned a situation in which the District Court had found excusable neglect, it does not particularly illuminate our analysis of the District Court's failure to conduct a complete excusable neglect analysis here. Moreover, as I note in the text above, at least two other Cendant cases have been remanded because the same District Court judge who presided over the instant case failed to explain his analysis in those cases as well. See In re Cendant Corp. PRIDES Litig., 235 F.3d 176 (3d Cir. 2000); In re Cendant Corp. PRIDES Litig., 234 F.3d 166 (3d Cir. 2000).

class members is not convincing"; and Cendant's "defensive maneuvers" in reaction to the Davidsons' arbitration before the expiration of the opt-out period "are irrelevant." 194 F.R.D. at 165.

The District Court said nothing about "the danger of prejudice" to Cendant if an extension were granted, "the length of the delay and its potential impact" on the case, or "whether the defendant acted in good faith," Pioneer, 507 U.S. at 395, nor did the District Court consider "(1) whether the inadvertence reflected professional incompetence such as ignorance of the rules of procedure, (2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, and, (3) a complete lack of diligence." Dominic, 841 F.2d at 517.

It does not suffice for the majority to attempt to fill in the gaping gaps left by the District Court in its aborted Pioneer analysis. Nor is the majority's attempt to cure the deficiencies of the District Court's analysis consistent with our jurisprudence which requires the District Court to explain its excusable neglect reasoning.

When we direct a district court to take a particular action, it is not only customary but I suggest it is our mandate that the issue or case be returned to the district court for compliance with our instructions. See, e.g., In re Orthopedic Bone Screw Prods. Litig., 2001 WL 377052, at 5 (3d Cir. Apr. 16, 2001). It is the district court's discretion and findings, not our discretion and findings, that are called for in relating the facts found to the principles that we have established. Appellate fact finding and "shortcuts" taken by an appellate court as the majority has taken here are rarely if ever prudent and sage and, unfortunately, such fact finding and shortcuts may lead to misunderstandings in the case sub judice, to say nothing of eroding our established jurisprudence. See Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982) (appellate fact finding); Chalfant v. Wilmington Institute, 574 F.2d 739 (3d Cir. 1978) (same). We have consistently followed the practice of having the district court in the first instance determine whether the factors we have established meet

18. Our cases are legion in which we have set forth factors which are to be met and analyzed by evidence in the record. See, e.g., Holland v. New

evidentiary requirements. Why now in this case has it become so necessary to turn our backs on established procedures, practices, and our announced jurisprudence by usurping the District Court's role?

As we observed in another Cendant appeal: "In the wake of Pioneer, we have imposed a duty of explanation on District Courts when they conduct 'excusable neglect' analysis." In re Cendant Corp. PRIDES Litig., 234 F.3d 166, 171 (3d Cir. 2000). Indeed, in that case, regarding appellant's motion pursuant to Federal Rule of Civil Procedure 60(b) to excuse its late filing of its proof of claim, we vacated the District Court's finding that there was no excusable neglect "because the District Court did not make clear its reasoning and application of the 'excusable neglect' factors," and, therefore, "we do not have a sufficient basis to review the District Court's ruling for abuse of discretion." 234 F.3d at 168.

In yet another Cendant case, also concerning a party's Rule 60(b) motion to allow its late filing of a proof of claim, we reversed the District Court's finding that there had not been excusable neglect, pointing out that "the District Court failed to apply properly the standards for determining 'excusable neglect' outlined in Pioneer." In re Cendant Corp. PRIDES Litig., 235 F.3d 176, 180 (3d Cir. 2000). We held "that the District Court's misapplication of the Pioneer factors in denying Santander's Rule 60(b) motion [was] beyond the sound exercise of its discretion." In re Cendant Corp. PRIDES Litig., 235 F.3d at 184.

Indeed, in a recent opinion, the author of the majority opinion has himself acknowledged our requirements for

Jersey Dept. of Corrections, Nos. 00-1801, 2356, 2357, at 34-43 (findings of fact in connection with enforcement of compliance with consent decrees); Cendant Corp. PRIDES Litig., 243 F.3d 721 (3d Cir. 2001) (awards of attorneys' fees in class actions); Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000) (deciding whether to conduct Daubert hearings); In re TMI Litig., 193 F.3d 613 (3d Cir. 1999) (admission of expert testimony); United States v. Iannone, 184 F.3d 214 (3d Cir. 1999) (sentencing decisions in criminal cases); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984) (the dismissal of a complaint).

district courts denying parties' "excusable neglect" motions. In In re Orthopedic Bone Screw Prods. Liab. Litig., Judge Ambro observed that "[g]enerally we require further explanation of an order terminating a litigant's claim." In re Orthopedic Bone Screw Prods. Liab. Litig., 2001 WL 377052, at 5 (3d Cir. Apr. 16, 2001). He then asserted that "[w]e have imposed a duty of explanation on District Courts when they conduct 'excusable neglect' analysis." In re Orthopedic Bone Screw Prods. Liab. Litig., 2001 WL 377052, at 5 (quoting In re Cendant PRIDES Litig., 233 F.3d 188, 196 (3d Cir. 2000)). In light of the majority's apparent understanding of what is required of district courts under Pioneer, as evidenced by the recent opinion in Orthopedic Bone Screw Prods., it is thoroughly perplexing to me that the majority fails to hold the District Court to that standard and instead takes on the District Court's job itself.

The precedent is clear: the District Court must satisfy its duty of explanation. When it does not, the case must be remanded for the District Court to do so. This conclusion is by no means a "leap of logic" as the majority suggests (Maj. Op. at 26-27 n.18); it is the proper and the only application of the rule of law in this Circuit.

In re Cendant PRIDES Corp. Litig., 235 F.3d 176 (3d Cir. 2000), relied upon by the majority as support for its own consideration of the Pioneer factors, is entirely distinguishable. In that case, our court reviewed the District Court's denial of a Rule 60(b) "excusable neglect" motion for an abuse of discretion. We concluded "that the District Court's decision [denying the motion for 'excusable neglect'] was not consistent with the sound exercise of its discretion." 235 F.3d at 181. Because we held that the District Court abused its discretion, we were obliged to reach the merits of excusable neglect and answer the "second question . . . : whether 'excusable neglect' excused Santander's duty. . . . This involves a review of the matter de novo, applying the law to the facts." 235 F.3d at 181.

It was only in that procedural posture--reviewing under a de novo standard--that we applied the Pioneer factors in Cendant PRIDES, 235 F.3d 176. Therefore, by relying on that case, the majority is relying on a case in which we exercised de novo review in order to support its actions in

this case where we must exercise abuse of discretion review. Such misplaced reliance does not constitute "merely following precisely what we did in" Cendant PRIDES, 235 F.3d 176, as the majority suggests. (Maj. Op. at 26-27 n.18.) That is, in effect, like saying that it is appropriate to reconsider facts already found by a jury because a prior appellate court had reviewed de novo a grant of summary judgment on a factually similar case. There is simply no language strong enough to describe how seriously the majority has erred. Its error not only affects the decision in this case, but it also confounds our jurisprudence involving our own standards of review.

Indeed, no matter how the majority tries to spin and justify its holding here and Judge Ambr o's recent holding in Orthopedic Bone Screw Prods., in derogation of its own admonition that "[w]e [should] refrain from substituting our judgment for that of the District Court," see In re Orthopedic Bone Screw Prods. Litig., 2001 WL 377052, at 5, it is the majority that has found: that the Davidsons do not qualify for the excusable neglect exception because their actions caused prejudice to Cendant; that their actions do not comport with the good faith requirement; that their claims would subject Cendant to additional liabilities; that permitting the Davidsons to opt out would deprive Cendant of the finality it bargained for; and that the Davidsons sought a strategic advantage in not filing a formal opt-out request. (Maj. Op. at 26-29.) These were findings that the District Court did not make but was obliged to make under Pioneer and was then obliged to include in its analysis. Nor can I understand why the majority has so blithely undercut our directions to the District Court which have now been emphasized not just once but at least twice in the Cendant cases. See In re Cendant Corp. PRIDES Litig., 235 F.3d 176 (3d Cir. 2000); In re Cendant Corp. PRIDES Litig., 234 F.3d 166 (3d Cir. 2000); see also In re Orthopedic Bone Screw Prods. Litig., 2001 WL 377052 (3d Cir. Apr. 16, 2001).

We have said, and this majority is bound by our holdings, that the District Court must satisfy its "duty of explanation . . . when . . . conduct[ing] 'excusable neglect' analysis" under Pioneer. In re Cendant Corp. PRIDES Litig., 234 F.3d at 171; In re Orthopedic Bone Screw Prods. Litig., 2001 WL

377052, at 5. The District Court's mere citation of Pioneer and recitation of its factors do not satisfy this "duty of explanation." Nor, I suggest, does the majority's untoward attempt to furnish its own findings and its own explanations satisfy the excusable neglect standard that the District Court failed to furnish itself. Now, it may well be that, had the District Court considered the Pioneer factors explicitly, it still could have reached its same conclusion. But that cannot excuse the District Court's flagrant failure to comply with this Court's mandate, nor can it excuse the majority for attempting to brush this issue under the carpet by substituting its discretion for that of the District Court.

V.

In conclusion, I am more than satisfied that the New Jersey District Court egregiously erred in enjoining the Davidsons' arbitration. After a review of the statutes and case law, there can be no question that the Davidsons' claims were properly in arbitration and the California Central District Court's decision to that effect precluded the New Jersey District Court from enjoining the arbitration.

Additionally, I am satisfied that the Davidsons did not fit within the class definition because their Cendant shares were not "publicly traded securities." In finding that they were, the New Jersey District Court clearly erred.

Finally, I believe that the New Jersey District Court, in failing to comply with the Supreme Court's and our own unequivocal directions, again clearly erred in denying the Davidsons' request to extend the opt-out deadline without explaining the application of the Pioneer factors as it was required to do.

I therefore respectfully dissent, and I would reverse and vacate the District Court's order which enjoined an arbitration ordered by the California Central District Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit