Volume 1 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. DA VIDSON, 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 T rust, 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. W alls

Argued: November 16, 2000

Before: SLOVITER, AMBRO, and GARTH, Circuit Judges

(Filed: May 9, 2001)

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OPINION OF THE COURT

AMBRO, Circuit Judge:

Janice G. Davidson and Robert M. Davidson, in their individual capacities and as trustees of certain trusts (collectively, the "Appellants"),1 appeal from a final decision of the United States District Court for the District of New Jersey (the "District Court"). That decision, involving a securities class action lawsuit (the "class action"), held that Appellants, as a result of their failur e to opt out of the class, were subject to the class settlement, and could not further pursue arbitration in California of claims they brought against Appellee Cendant Corporation ("Cendant").

Appellants have presented this Court with thr ee issues on appeal. First, they assert that the District Court erred in holding that the class included them. Second, Appellants argue that the District Court abused its discr etion in failing to grant them an extension of time to opt out of the class. Finally, they contend that the District Court err ed in enjoining their arbitration claims and, in doing so, violated the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA"). After considering these arguments, we hold that the District Court did not err in finding that Appellants wer e members of the class and did not abuse its discretion in refusing to grant them an extension of time to opt out of the class. However, 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.

I. Facts and Procedural History

In 1982, Janice Davidson founded Davidson &

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1. Janice G. Davidson and Robert M. Davidson, solely in their individual capacities, are collectively referr ed to as the "Davidsons."

Associates, Inc. ("DAI"), an entity later incorporated in California in 1984. From 1984 until 1996, the Davidsons were officers and directors of DAI. In that capacity, they led the company as it developed, manufactured, published, and distributed educational and entertainment softwar e products for home and school use. The company derived its revenues from sales to software distributors, specialty software stores, computer superstor es and mass merchandisers in international markets, international catalog sales to schools and teachers, and thr ough technology licensing and software manufacturing.

In April 1993, DAI issued an initial public of fering ("IPO"), selling 200 million shares of common stock at $13 per share. Thereafter, DAI listed its stock on NASDAQ. After the IPO, the Davidsons controlled approximately 70% of DAI's outstanding common stock, with a majority of that stock in various charitable and irrevocable trusts contr olled by the Davidsons as trustees.2

Following the IPO, DAI received a number of unsolicited inquiries with respect to possible mergers, acquisitions, joint ventures, and direct investments. No initial inquiry resulted in a transaction. However, in June 1995, the Davidsons were approached by CUC Inter national, Inc. ("CUC") in connection with its possible acquisition of DAI. Although the first round of negotiations ended without an agreement, the negotiations were r esumed in December 1995 and continued until July 1996, when CUC acquir ed DAI through a merger and DAI became a subsidiary of CUC.

In connection with the merger, DAI shar eholders received 85/100 of a CUC share in exchange for each DAI share, as negotiated in part based on the market price of each company's shares. As a result, the Davidsons received 1,259,634 shares of CUC common stock, and the trusts controlled by the Davidsons received 31,245,465 shares of

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2. The Davidsons claim to have controlled 78% of DAI's outstanding shares immediately after the IPO. Cendant alleges that, at the time DAI merged with CUC International, Inc. (later Cendant), the Davidsons controlled 71.3% of the outstanding DAI common shares (1.4% in each person's individual capacity and 68.5% in the various trusts).

CUC common stock. The merger agreement also contained an arbitration provision3 and a "bust out" provision.4

Following the merger, the Davidsons became directors of CUC and officers and directors of CUC's DAI subsidiary. In addition, the DAI shares owned by the public were exchanged for common shares of CUC that could be immediately traded over the New York Stock Exchange ("NYSE"). Appellants' shares, however , could not be immediately traded. Due to the number of shar es Appellants received, they were deemed affiliates of CUC and could not publicly trade their stock on the NYSE unless their shares were subsequently made part of a registered public offering separate from the DAI/CUC merger.5

In January 1997, following several months of acrimony between CUC senior management and the Davidsons, CUC terminated them as corporate officers though they remained directors. In March 1997, Appellants served CUC with a demand for arbitration, asserting claims in connection with the DAI/CUC merger agr eement and specifically as to the Davidsons' employment responsibilities with CUC. In May 1997, Appellants and

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3. The arbitration provision provided:

> 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 . . . . 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 gr ounds for dismissal of any court action commenced by either party with r espect to this Agreement, other than post-arbitration actions seeking to enforce an arbitration award.

4. The "bust out" provision per mitted DAI to terminate the merger agreement if CUC's average share price fell below $29 per share in a defined period in order to protect the bargained-for value to be received by the DAI shareholders.

5. As discussed below, Appellants' shares were restricted pursuant to the Securities Act of 1933. See 17 C.F.R.§ 230.145; infra note 16 and accompanying text. However, the restrictions could be easily circumvented. In fact, just four months after the merger, in October 1996, Appellants sold more than twenty million of the shares they received in the DAI/CUC merger.

CUC entered into a settlement agreement (the "Settlement Agreement"), which provided, inter alia, for the Davidsons to receive options to purchase 1.6 million shares of CUC common stock6 in exchange for a r elease by Appellants and the Davidsons' resignation from all r emaining positions with CUC. The Settlement Agreement also contained an arbitration provision.7

Thereafter, on December 18, 1997, CUC and HFS, Inc. ("HFS") merged, with CUC as the surviving company. Upon completion of the merger the company became known as Cendant.

After the close of the stock market on April 15, 1998, Cendant publicly disclosed that accounting and bookkeeping irregularities had occurred at CUC and that it would restate its earnings for 1997. This caused its stock value to plummet 46% and triggered several class action lawsuits on behalf of investors who purchased CUC or Cendant stock during 1997. In late August 1998, Cendant further disclosed that the irregular accounting activity dated back to 1995, and that in addition to the 1997 restatement, new earnings would be r eleased for 1995 and 1996. This second disclosure triggered several more lawsuits involving purchases of CUC securities during the

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6. Interestingly, at oral argument Cendant conceded that these 1.6 million options are not, and have never been, considered part of the class action.

7. That provision stated:

> Notwithstanding anything to the contrary contained in this Agreement or the Surviving Agreements and Rights, any controversy, dispute or claim 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 . .. . The parties agree that this Section has been included to rapidly and inexpensively resolve any disputes between them with r espect 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 Agr eement or any of the Surviving Agreements and Rights, other than post-arbitration actions seeking to enforce an arbitration awar d.

broader period of alleged fraud. This new time frame presumably included the time during which Appellants engaged in the merger transaction with CUC. In total, Cendant restated and reduced its pr e-tax operating income for the relevant periods by approximately $500 million.

Between April and August 1998, at least sixty-four purported securities fraud class action lawsuits wer e filed as a result of the April 1998 disclosur e. By order of the Judicial Panel on Multidistrict Litigation (the"MDL Panel"), all Cendant cases relating to the accounting irregularities were transferred to the District of New Jersey. During the process to consolidate the class actions in the District of New Jersey, fifteen motions were filed for appointment as the lead plaintiff. On May 29, 1998, the District Court consolidated all of the accounting irregularity actions pending against Cendant under the caption In r e Cendant Corporation Securities Litigation.8 On September 8, 1998, the District Court appointed the California Public Employees' Retirement System, the New Y ork State Common Retirement Fund, and the New York City Pension Funds, all public investment funds, as lead plaintif fs (collectively, the "Lead Plaintiffs").

Following a case management conference, the Lead Plaintiffs on December 14, 1998, filed their Amended and Consolidated Class Action Complaint (the "Complaint"). That Complaint defined the class repr esented as

> [a]ll persons and entities who purchased or otherwise acquired publicly traded securities . . . either of Cendant or CUC during the period beginning May 31, 1995 through and including August 28, 1998 and who were injured thereby, including all persons or entities who exchanged shares of HFS common stock for shares of CUC stock pursuant to the Registration

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8. While this Court has heard arguments on and issued decisions in other Cendant cases involving different subject matters, see, e.g., In re Cendant Corp. Prides Litig., 233 F.3d 188 (3d Cir. 2000) (hereinafter Cendant Prides I); In re Cendant Corp. Prides Litig., 235 F.3d 176 (3d Cir. 2000) (hereinafter Cendant Prides II); In re Cendant Corp. Prides Litig., 243 F.3d 722 (3d Cir. 2001), those decisions do not affect the outcome of this case.

> Statement . . . . Excluded from the Class ar e: (i) defendants; (ii) members of the family of each individual defendant; (iii) any entity in which any defendant has a controlling interest; (iv) officers and directors of Cendant and its subsidiaries and affiliates; and (iv) [sic] the legal representatives, heirs, successors or assigns of any such excluded party.

Also on December 14, 1998, the Lead Plaintif fs filed a motion for class certification. That motion defined the class as

> all persons and entities who purchased or acquired Cendant Corporation ("Cendant" or the "Company") or CUC International, Inc. ("CUC") publicly traded securities during the period May 31, 1995 thr ough August 28, 1998, inclusive (the "Class Period"), and were injured thereby, including but not limited to all persons who exchanged their HFS Incorporated ("HFS") common stock for common stock of CUC pursuant to a Registration Statement and Joint Proxy Statement/Prospectus dated August 28, 1997. Excluded from the Class are defendants her ein, members of the immediate family of each of the Individual Defendants, officers and directors of Cendant, parents, subsidiaries and affiliates of the Company, and the legal representatives, heirs, successors or assigns of any such excluded party. . . .

Lead Plaintiffs asserted they would be adequate class representatives because they "allege a continuing course of conduct that affected all Class members, whether they bought early or late in the Class Period, or whether they bought Cendant securities on the open market or pursuant to the Registration Statement and Joint Prospectus in the Merger."

Three days later, on December 17, 1998, Appellants initiated arbitration in California against Cendant, seeking rescission of the Settlement Agreement and damages resulting from receipt of the overvalued CUC shares in connection with the DAI/CUC merger. In response, on January 21, 1999, Cendant filed suit in the United States District Court for the Central District of Califor nia (the

"California Central District") seeking to enjoin the arbitration. Cendant's complaint alleged violations of its rights under the FAA and did not interpose the existence of the class action as a ground for seeking injunctive relief from the arbitration.

Meanwhile, on January 27, 1999, the District Court granted Lead Plaintiffs' motion for class certification. Without restating or affirmatively announcing the class definition, the District Court ordered the certified class to represent "all purchasers or acquirers of Cendant Corporation or CUC International, Inc. publicly traded securities between May 31, 1995 and August 28, 1998 who were injured thereby."

In response to Cendant's motion to enjoin pr eliminarily the California arbitration and Appellants' motion for summary judgment to dismiss Cendant's complaint,filed on February 17, 1999, the California Central District, on April 14, 1999, found in favor of Appellants. It ruled that Appellants were entitled to summary judgment because "the evidence indicates that claims for r escission of the agreement are covered by the br oad arbitration provision." The California Central District entered afinal order dismissing Cendant's injunction action, though it did not explicitly compel arbitration. Cendant appealed that order.9

In an exercise of caution, Appellants, on April 14, 1999, filed a "placeholder" action in the Califor nia Central District. They did so to ensure that, in the event a court determined that some or all of their claims were not arbitrable, they nonetheless would comply with the one year statute of limitations applicable to their claims. That complaint expressly stated that they wer e not waiving their right to arbitrate.10

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9. That appeal, Cendant Corp. v. Davidson, J., et al., No. 99-55788, is currently pending before the United States Court of Appeals for the Ninth Circuit. The parties agreed to stay further proceedings in the arbitration until the Ninth Circuit rules on Cendant's appeal.

10. "[T]his Complaint is filed in or der to ensure that plaintiffs have brought an action with respect to the claims asserted herein within any applicable statute of limitation, . . . in the event that any of plaintiffs' claims are determined not to be arbitrable . . . . By bringing this action, however, plaintiffs do not intend to waive, and are not waiving, their rights under various agreements to arbitrate all or any of the claims asserted herein."

Meanwhile, the District Court, on August 6, 1999, approved the form, and order ed dissemination, of the notice to be sent in the class action. In that order , the District Court required that Cendant make available to Lead Plaintiffs the stock transfer recor ds reflecting the names and addresses of Cendant's and CUC's shar eholders. The District Court further required Lead Plaintiffs to mail notice to all record holders of Cendant and CUC stock and to all brokers in the transfer records, and to publish notice of the class action on three different days in The Wall Street Journal, The New York T imes (National Edition), and the Dow Jones Business Newswire. The District Court determined that this notice "constitute[d] the best notice practicable under the circumstances to members of the Class, and will satisfy the requirements of constitutional due process and Rule 23 of the Federal Rules of Civil Procedure."

Thereafter, Cendant petitioned the MDL Panel to transfer Appellants' placeholder action pending in the California Central District. On August 12, 1999, the MDL Panel transferred that action from the Califor nia Central District to the District of New Jersey pursuant to 28 U.S.C.§ 1407.

On October 8, 1999, the accounting firm of Heffler, Radetich & Saitta LLP, the Class Administrator, mailed the class notice to all known potential class members, as well as 239 brokerage firms and 141 banks and other institutions. Initially, 19,069 notices were sent via first class mail. Then, through November 29, 1999, the Class Administrator mailed notice to numerous other potential plaintiffs based on written requests, telephone requests, names supplied by nominees, and bulk requests by nominees. In all the Class Administrator sent 261,224 notices.

Of these notices, at least ten were mailed to Appellants at three separate addresses -- two in Palos Verdes, California and one in Torrance, California. The notices mailed to the Palos Verdes addresses were all returned to the Class Administrator by the United States Postal Service as undeliverable, with no forwarding address. The notice sent to the Torrance address was not r eturned. However, the Davidsons claim never to have received the individual

notice because they had moved to Incline Village, Nevada and did not inform Cendant of their change of address. The Davidsons also claim to have missed the published notice.

Both the individually mailed notices and the published notice included the definition of the class as stated in the Complaint. Further, in accordance with an order of the District Court, the class notice warned potential class members that if they failed to follow the specific exclusion procedures, they would be deemed class members and would be bound by any settlement or judgment. The individual notice stated:

> 15. If you are a member of the Class . .. and you wish to remain a member of the Class, you need not take any further action at this time. . . .
>
> 16. As a Class member (unless you request to be excluded from the Class), you will be bound by any judgment, whether favorable or unfavorable, enter ed in this Action. . . .
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> . . .
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> 19. How To Be Excluded From The Class: YOU WILL BE EXCLUDED FROM THE CLASS ONLY UPON SPECIFIC REQUEST AS DESCRIBED BELOW. If you request to be excluded, you will not be entitled to share in the proceeds of a recovery obtained by settlement or favorable judgment in the litigation, if any. Y ou also will not be bound by a judgment, if any, in favor of either the Class or defendants.
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> 20. If you wish to be excluded from the Class, you must so indicate by filing a written Request for Exclusion, POSTMARKED ON OR BEFORE December 27, 1999 . . . .

The published notice similarly warned:

> IF YOU PURCHASED OR ACQUIRED THE PUBLICL Y TRADED SECURITIES . . . OF CENDANT OR CUC AS DESCRIBED ABOVE, AND YOU DO NOT REQUEST EXCLUSION FROM THE CLASS, YOUR RIGHTS WILL BE AFFECTED BY THIS LITIGATION. . . .

> If you wish to be excluded from the Class, you must, in accordance with the instructions contained in the Notice, submit a written request for exclusion . . . .

Additionally, the class action received considerable media coverage independent from the published notices.

On December 7, 1999, almost three weeks befor e the final opt-out date, Cendant announced a pr oposed settlement that would require it to pay $2.85 billion to the class members (the "Class Action Settlement"). 11 On December 27, 1999, pursuant to the class notice, the opt-out period closed. The Appellants never filed a written opt-out, as required by the District Court and the class notice.

In February 2000, Appellants claim that Cendant indicated, for the first time, that it would take the position that they were class members. On March 17, 2000, Cendant and the Lead Plaintiffs submitted settlement documents to the District Court, including a Plan of Allocation for the distribution of settlement pr oceeds among class members. Then, on March 29, 2000, the District Court preliminarily approved the Class Action Settlement12 and enjoined all actions or claims that were contemplated by it. Pursuant to the order containing that approval, the Class Administrator on April 7, 2000, mailed notice of the Class Action Settlement and proof of claim for m packages to Appellants at their new Nevada address. This package included Lead Plaintiffs' Plan of Allocation of the settlement funds.

The Plan of Allocation provided that any losses class members suffered from their transactions in CUC and Cendant securities would be offset by any gains they received through transactions in CUC and Cendant securities prior to Cendant's April 15, 1998 disclosure of the alleged accounting fraud. Thus, any damages Appellants suffered as a result of the DAI/CUC merger would be offset by the substantial gains they received in the

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11. It is interesting to note that the Davidsons never claim that they were unaware of this announcement.

12. Formal approval of the Class Action Settlement occurred on August 15, 2000.

sale of over twenty million shares of the artificially-inflated stock before the disclosure.

On April 27, 2000, possibly after learning of their discounted recovery under the Class Action Settlement and Plan of Allocation, Appellants filed a motion seeking clarification of the class definition, or in the alternative an extension of the time period to opt out of the class. Cendant opposed Appellants' motion, and cross-moved to enforce the injunction against other proceedings. The Lead Plaintiffs filed a brief responding to Appellants' motion, asserting that they did not represent the interests of Appellants in prosecuting their claims.13

Finally, on June 20, 2000, the District Court ruled that Appellants were within the class, denied them an extension of time to opt out, and enjoined them from arbitrating their claims in California. See In re Cendant Corp. Sec. Litig., 194

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13. The Lead Plaintiffs stated:

> Lead Plaintiffs agree that the Davidsons are excluded from the Class. The Davidsons were officers and dir ectors of CUC and its DAI subsidiary during the Class Period. CUC was the surviving entity in the merger of HFS into CUC; the name was simply changed to Cendant after the merger. Thus, while it was necessary to make it clear to Class Members in the Notice of Pendency that whether they purchased Cendant or CUC publicly-traded securities, they were all part of the same Class, the exclusion of Cendant's officers and directors applied to all such officers and directors, whether before or after the name change. Indeed, it would make no sense to exclude only officers and directors of Cendant after the merger, when it was CUC's fraudulent financial statements -- issued by the officers and directors of the company before the mer ger (when the company was named CUC) -- that formed the heart of this Action. Lead Plaintiffs did not prosecute this class action to pr otect the interests of Cendant's officers and directors, whether they served before or after the CUC/HFS merger, and such officers and directors should not be allowed to participate in the distribution of the Settlement Funds that have now been recovered.
>
> As a result, the Davidsons are, and should be, excluded from the Class.

At oral argument before the District Court the Lead Plaintiffs took the position that the trust shares were included in the class.

F.R.D. 158, 165-66 (D.N.J. 2000). First, the District Court held that Appellants were within the class because their shares were publicly traded within the meaning of the class definition. See id. at 164. Second, it looked to the class exclusions and determined that, despite the exclusion of officers and directors of Cendant, the Davidsons, as former officers and directors of CUC, were not excluded from the class. See id. Further, it found that Appellants did not meet their burden of showing excusable neglect for an extension of time to opt out of the class pursuant to Federal Rule of Civil Procedure 6(b), and therefor e denied their request. See id. at 165. Finally, the District Court held that it had the authority to enjoin the ongoing California arbitration between Appellants and Cendant in order to implement the proposed Class Action Settlement, and thus it enjoined that arbitration. See id. at 165-66.

On July 19, 2000, Appellants filed a timely notice of appeal.

II. Discussion

A. Class Membership

Appellants claim initially that the District Court erred in holding that they were class members. The District Court concluded that their shares were publicly traded, and thus were within the class definition.14 See Cendant Sec. Litig., 194 F.R.D. at 163-64. It further found that the Davidsons were not "officers and directors of Cendant and its subsidiaries and affiliates," and concluded that they did not qualify for exclusion from the class on those grounds. See id. at 164.

We accord a District Court's interpr etation of its own orders "particular deference." In re Fine Paper Antitrust Litig., 695 F.2d 494, 498 (3d Cir . 1982). The District Court, in determining whether Appellants were class members, interpreted its own orders, the or der certifying the class

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14. As previously noted, the class definition included "all persons and entities who purchased or acquired Cendant. . . or CUC . . . publicly traded securities during the period May 31, 1995 thr ough August 28, 1998," and excluded "officers and dir ectors of Cendant."

and the order approving the class notice, both of which contained the class definition. Therefor e, its interpretation of the class definition in those orders is entitled to "particular deference."15

1. The Class Definition

The class definition begins: "[A]ll persons and entities who purchased or acquired" stock. Appellants received their shares through the DAI/CUC merger . This Court has defined "purchasers" of stock to include those who buy on an open market and those who exchange stock in one company for stock in another company pursuant to a merger between the two companies or an acquisition of one company by the other. See In re Penn Cent. Sec. Litig., 494 F.2d 528, 533 (3d Cir. 1974) (citing SEC v. Nat'l Sec. Inc., 393 U.S. 453, 467 (1969)). By virtue of the DAI/CUC merger, Appellants "purchased" stock.

The class definition then requires that the purchaser or acquirer obtained "Cendant . . . or CUC . . . publicly traded securities." As a result of the DAI/CUC mer ger Appellants received a total of 32,505,099 shares of CUC stock. The question that we must address is whether that stock was "publicly traded" so as to fall within the class definition.

Appellants argue the District Court err ed in holding that their shares were publicly traded securities because the Court did not give the term "publicly traded" its commonly-used definition. They assert that "publicly traded" means

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15. Appellants' attempt to distinguish Fine Paper by relying on Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co., 824 F.2d 249, 254 (3d Cir. 1987), is unfounded as the Pittsburgh T erminal court itself distinguished its case from Fine Paper as well as the current situation. Pittsburgh Terminal did not involve a court interpreting its own order, but instead dealt with the court interpreting a stipulation by the parties. "There is no basis for extending this principle [of "particular deference" articulated in Fine Paper] to demand similar deference in the present case to the district court's interpretation of a stipulation underlying a previous order . . . ." Id. Moreover, "Fine Paper is further distinguishable because it was a class action and because it involved distribution of a single fund." Id. at 254 n.5. Just as in Fine Paper, this case is a class action where the District Court is interpreting its own or ders and ultimately distributing a single fund of $2.85 billion.

tradeable on the public markets. Because the shar es they received were newly issued, had not been traded on any market, and were precluded when issued fr om being traded on those markets, Appellants argue that these shares could not, in the plain sense of the term, have been"publicly traded." In essence, they contend that because their shares were not immediately tradeable publicly, they could not be deemed "publicly traded" within the meaning of the class definition. We believe the publicly traded/publicly tradeable argument to be a distinction without a dif ference and agree with the District Court that Appellants' shar es were indeed "publicly traded" securities.

At the outset, Appellants' argument does not paint the picture fully. While it is true that their shar es differed from the shares issued to other public investors as a result of the DAI/CUC merger (the difference being that Appellants' shares were not immediately tradeable), that difference was not due to the quality of the shares received. Appellants received exactly the same type of shares of common stock as all other DAI shareholders, specifically a class of CUC security that was publicly traded on the NYSE.

The restriction on sale of the CUC stock held by Appellants emanated solely from the quantity of shares they received as a result of the mer ger, not in any way from the type of security they received. Due to the number of shares Appellants received, they wer e deemed to be affiliates of CUC and their ability immediately to resell these shares was subject to the limitations of the Securities Act of 1933,16 as well as the ter ms of affiliate agreements signed by the Davidsons in connection with the DAI/CUC merger agreement.17

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16. While Cendant alleges that the restriction is based on Rule 144A, it seems that Appellants were restricted fr om immediately selling their shares pursuant to Rule 145. See Cendant Sec. Litig., 194 F.R.D. at 163. That rule deems Appellants to be affiliates for Rule 145 purposes and thus subjects them to the registration r equirements for sale of those securities pursuant to the Securities Act of 1933. See 17 C.F.R. § 230.145.

17. The affiliate agreements, signed by the Davidsons, provided in part, "I understand that I may be deemed to be an `affiliate' of the Company, as such term is defined for purposes of Rule 145 . . . promulgated under the Securities Act of 1933 . . . and that the transferability of the shares of common stock . . . is restricted."

These restrictions could be avoided entir ely, however, if Appellants were to sell shares of CUC stock under any subsequent registration statement. Noticing the burden placed on Appellants, CUC granted Appellants liberal rights to demand a second registration statement that would allow them to "piggyback" their shares and ther efore remove any sales restriction from the securities. In fact, Appellants did just that, selling more that twenty million shares just four months after the transfer. In all, by January 16, 1998, Appellants had disposed of more than twenty-five million of their thirty-two and a half million CUC shar es for proceeds totaling more than $635 million. This exposes a logical disconnect in Appellants' argument. Having 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. Thus, despite the restriction on immediate resale, Appellants did receive "publicly traded" securities within the meaning of the class definition.

The class definition sets the relevant period of trading as "May 31, 1995 through and including August 28, 1998." The DAI/CUC merger, in which Appellants"purchased" their shares, took place in July 1996. This clearly places Appellants within the relevant period under the class definition.

The relevant part of the class definition concludes: "and who were injured thereby." Appellants' alleged injury is shown by the fact that they pursued their claims against Cendant. Yet they posit that the class did not adequately represent them in redressing the injury they actually received, as the class relied on the fraud on the market theory. Appellants proffer that the claims pursued by the Lead Plaintiffs on behalf of the class r elating to the accounting irregularities affected those who purchased CUC and/or Cendant stock on the open market. However , they argue that the only way the fraud on the market theory could have affected the DAI/CUC merger was to keep CUC's price inflated so that the "bust out" pr ovision that could have terminated that merger was not triggered. Because Appellants did not purchase their securities on the open market, but instead acquired them through individual

negotiations with CUC, they argue that the fraud on the market theory is not applicable to them.

We find this argument unavailing. First, the fraud on the market theory did affect the DAI/CUC mer ger because, during the negotiations between DAI and CUC, the purchase price was determined by "r eference to, among other factors, the range of prices at which CUC stock was trading." This demonstrates that Appellants' Rule 10(b)(5) claim rests, at least in part, on the same fraud on the market theory pursued by the class, as the mer ger negotiations were based on artificial market prices. In fact, Cendant points out that membership in the class actually gave Appellants an advantage in their Rule 10(b) claim by lessening their burden of proof because in a typical Rule 10(b) claim a plaintiff must show individual r eliance on a material misstatement, whereas under the fraud on the market theory reliance is presumed. See In re Apple Computer Sec. Litig., 886 F.2d 1109, 1113-14 (9th Cir. 1989).

Cendant further points this Court to In r e Discovery Zone Securities Litigation, 181 F.R.D. 582 (N.D. Ill. 1998), to show that Appellants' fraud on the market ar gument is incorrect. In that case, the court consider ed whether an entity that acquired newly-issued shares of common stock through a merger that were not immediately tradeable (just as Appellants' shares were not) was a member of a class proceeding under a fraud on the market theory. See id. at 590-92. The court concluded that the fact that the acquiring entity's claims were based on its individual negotiations with the defendant, rather than on pur chases in the open market, did not exclude it from a"fraud-on-the-market class" given that its claims and the claims of open market purchasers were based on the same"overall scenario" of conduct by the defendants. See id. at 591-92; see also In re Scorpion Techs., Inc. Sec. Litig., No. C 93-20333, 1994 WL 774029, at *5 (N.D. Cal. Aug. 10, 1994); In re Nat'l Student Mktg. Litig., M.D.L. Docket No. 105, 1973 WL 431, at *5 (D.D.C. Oct. 2, 1973).

Appellants cannot argue that their claims ar e based on a qualitatively different "overall scenario" from the claims raised in the class action. Under Discovery Zone ,

Appellants' claims would be properly included in the class despite their individual negotiations with CUC that shape their particular fraud claim. Accordingly, we believe that Appellants' injuries fit within the class definition.

2. Class Exclusions

Having concluded that Appellants are within the class because they purchased or acquired CUC publicly traded securities during the relevant class period and allege they were injured thereby, we must next determine whether they fall within any of the exclusions. The only exclusion possible is that the Davidsons are excepted fr om the class as "officers and directors of Cendant." The District Court determined that, pursuant to the plain meaning of the class definition, the exclusion only disqualified officers and directors of Cendant, and did not exclude for mer officers and directors of CUC. See Cendant Sec. Litig., 194 F.R.D. at 164.

The Davidsons submit that Cendant, as the surviving entity of the CUC/HFS merger, is mer ely a continuation of CUC and therefore the exclusion includes all officers and directors of CUC and Cendant. Most important, the Davidsons point to the Lead Plaintiffs' belief that they did not represent the interests of the Davidsons, as Lead Plaintiffs believed that the Davidsons wer e excluded from the class due to their former positions as officers and directors of CUC. See supra note 13.

Again, we accord "particular deference" to the District Court's interpretation of its own orders. See Fine Paper, 695 F.2d at 498. While we find the Lead Plaintiffs' statement to be of interest, we do not believe that the District Court erred in finding that the officer and director exception did not apply to the Davidsons. In fact, the plain meaning rule, as well as other canons of construction, require such a finding.

When the language of an instrument is plain, we look no further than the words of that document itself to determine its meaning. See Tamarind Resort Assocs. v. Govt. of V.I., 138 F.3d 107, 110 (3d Cir. 1998) ("It is axiomatic that where the language of a contract is clear and unambiguous, it must be given its plain meaning."); Mellon Bank v. Aetna

Bus. Credit, Inc., 619 F.2d 1001, 1010 (3d Cir. 1980) ("A court is not authorized to construe a contract in such a way as to modify the plain meaning of its wor ds, under the guise of interpretation.") (internal quotations omitted); see also Richard A. Lord, 11 Williston on Contracts § 32:3, at 408 (4th ed. 1999).

Further, we look by analogy to canons of interpretation for statutes. One is that "[w]e presume that [Congress's] clear use of different terminology within a body of legislation is evidence of an intentional dif ferentiation." Lankford v. Law Enforcement Assistance Admin., 620 F.2d 35, 36 (4th Cir. 1980); accord Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congr ess includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted); Barmes v. United States, 199 F.3d 386, 389 (7th Cir. 1999) ("Different language in [a] separate clause in a statute indicates Congress intended distinct meanings."); Cabell Huntington Hosp. v. Shalala, 101 F.3d 984, 988 (4th Cir. 1996) ("Where Congress has chosen dif ferent language in proximate subsections of the same statute, courts are obligated to give that choice effect.") (internal quotations omitted); Fla. Public Telecomms. Assoc., Inc. v. FCC, 54 F.3d 857, 860 (D.C. Cir. 1995) (stating that when Congress uses different language in differ ent sections of statute, it does so intentionally). Cf. Booth v. Churner, 206 F.3d 289, 294 (3d Cir. 2000) ("[It is the] normal rule of statutory construction that identical words used in differ ent parts of the same act are intended to have the same meaning.") (internal quotations omitted). Thus, the choice of dif ferent words to address analogous or related issues signifies different meanings. See E. Allan Farnsworth, 2 Farnsworth on Contracts § 7.11, at 284 & n.12 (2d ed. 1998).

Similarly, we look to the canon expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) for the proposition that when parties list specific items, without any more general or inclusive term, they intend to exclude unlisted items, even though they are similar to listed items. See id. at 281. Finally, this

Court has stated that we "must give full cr edit to the language the parties have chosen to include -- or not include -- in their agreement." Orlando v. Interstate Container Corp., 100 F.3d 296, 301 (3d Cir. 1996).

Applying these rules of interpretation to the language of the class definition, we find that the District Court correctly interpreted the class exclusion to include only officers and directors of Cendant and not any of its pr edecessors in interest, including pre-merger officers and directors of CUC. The language used in the class definition clearly excludes only Cendant's officers and directors. Because the Davidsons were never officers and dir ectors of Cendant, the plain language excludes them.

Looking to the class definition as a whole supports the conclusion that the intention was only to exclude Cendant's officers and directors. We need not look further than the first sentence of the class definition to confirm this view. It begins by stating that the class intends to cover all purchasers of Cendant or CUC securities. This indicates that the drafter, as well as the adopting court, intended to include purchasers of either company's stock. However, the language of the class exclusion only excludes officers and directors of Cendant. Following the canons of construction, the choice of different words --"Cendant or CUC" as opposed to "Cendant" -- indicates that the two clauses have different meanings. To conclude otherwise is counterintuitive.

Further, we look to the canon of expr essio unius est exclusio alterius for the proposition that when parties list specific items, without a term of general inclusion, they intend to exclude unlisted items. Here the class definition's language indicates that it intentionally excluded CUC from the class exception. Because we must give ef fect to the language included, as well as not included, we conclude that the District Court was correct in holding that the Davidsons were not excluded from the class as former officers and directors of pre-mer ger CUC.

3. Opt-Out by Implication

After finding that Appellants fit within the class definition, and that the Davidsons are not excluded under

the exceptions, we must determine if Appellants opted out of the class. At oral argument and thr oughout their briefs, Appellants concede that they did not follow the for mal opt-out procedure provided in the class notice, but appear to argue that they impliedly opted out of the class. They contend that the purpose of an opt-out requir ement is to force a party to take a position in or out of a class so that, in attempting to resolve claims against it, a defendant knows the exposure it faces, both to the class and to the opt-outs. Appellants further argue that they clearly took a position outside the class by filing the Califor nia arbitration and by reaffirming their unequivocal desire to arbitrate in the placeholder action. They cite In re Piper Funds, Inc., Institutional Government Income Portfolio Litigation, 71 F.3d 298 (8th Cir. 1995), for the proposition that a formal opt-out is not always necessary. See id. at 304.

However, we find Piper Funds distinguishable from this case. In Piper Funds, the appellant attempted to opt out of the class by formally advising the district court through a letter of its intention and desire to opt out before an opt-out period and procedure had been developed by the court. Although the district court denied that request, the Eighth Circuit reversed, stating that it did not dispute the normal rule forbidding an opt-out until after a Rule 23 notice, but believed that in some cases there must be an exception. It found that the exception applies when a party with an immediate right to arbitrate attempts to opt out before the Rule 23 procedure is initiated but is denied that request. See id. Here Appellants never infor med the District Court of their intention to opt out, neither before nor after the Rule 23 class notice was distributed. Thus, Piper Funds does not advance their argument.

Moreover, numerous courts have held that the mere pendency of an individual litigation or arbitration does not relieve a plaintiff of the obligation to opt out of a class action. See, e.g., In re Prudential Sec. Inc. Ltd. P'ship Litig., 164 F.R.D. 362, 370 (S.D.N.Y. 1996) ("It is well-established that pendency of an individual action does not excuse a class member from filing a valid request for exclusion.") (internal quotations omitted); In r e Prudential-Bache Energy Income P'ship Sec. Litig., No. MDL-0888, 1995 WL 20613, at

*2 (E.D. La. Jan. 6, 1995) (rejecting class member's claim that pending arbitration proceeding was sufficient notice of intent to opt out); Supermarkets Gen. Corp. v. Grinnell Corp., 59 F.R.D. 512, 513 (S.D.N.Y . 1973) ("[T]he existence of [the individual] action did not automatically exclude plaintiffs as potential members of the class. The exclusion could only be effected by compliance with the provisions of Rule 23(c)(2)(B)."). In this context, Appellants cannot succeed in their argument that Cendant's knowledge of the arbitration was sufficient notice for their opting out, and thus Appellants did not opt out of the class impliedly.

* * * * *

In sum, Appellants fall within the class definition because they purchased or acquired CUC or Cendant publicly traded securities. The Davidsons wer e not excluded from the class as former officers and directors of pre-merger CUC because the exception only excluded officers and directors of Cendant. Furthermor e, we conclude that Appellants failed to opt out of the class and thus are bound by the class settlement. We therefor e affirm the District Court's finding that Appellants are within the class.

B. Extension of the Opt-Out Deadline

Appellants further allege that the District Court erred in refusing to grant them an extension of time to opt out of the class. They maintain that if they are enjoined from pursuing the arbitration and are found to be within the class definition, they should still not be included as class members because the District Court abused its discr etion in failing to extend the time for them to opt out of the class.

Federal Rule of Civil Procedure 6(b) pr ovides:

> When by these rules or by a notice given ther eunder or by order of court an act is requir ed or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Fed. R. Civ. P. 6(b). The definition of"excusable neglect" recently has been discussed in a related litigation, In re

Cendant Corp. Prides Litigation. There, the United States District Court for the District of New Jersey, District Judge Walls (the same District Judge as in this case), stated:

> The Supreme Court has decreed that the determination of whether one party's neglect to adhere to a deadline is excusable should take into account all relevant circumstances surrounding the delay. See Pioneer Invest. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395 (1993). Relevant factors include"the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable contr ol of the movant, and whether the movant acted in good faith." Id. at 395. To this roster, the Third Circuit has added "(1) whether the inadvertence reflected pr ofessional 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 v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988).

In re Cendant Corp. Prides Litig., 189 F.R.D. 321, 324 (D.N.J. 1999), aff 'd, 233 F .3d 188, 196-97 (3d Cir. 2000) (alteration in original).

This Court reviews a District Court's findings concerning excusable neglect for abuse of discretion. See Cendant Prides I, 233 F.3d at 189, 197; Jones v. Chemetron Corp., 212 F.3d 199, 205 (3d Cir. 2000); see also In re PaineWebber Ltd. P'ship Litig., 147 F .3d 132, 135 (2d Cir. 1998); Silber v. Mabon, 18 F.3d 1449, 1453 (9th Cir. 1994). An abuse of discretion occurs when the action of the District Court is clearly contrary to reason and not justified by the evidence. See Springfield Crusher , Inc. v. Transcontinental Ins. Co., 372 F.2d 125, 126 (3d Cir. 1967). A District Court also abuses its discretion if it is influenced by erroneous legal conclusions or applies the wrong legal standards. See Cendant Prides I, 233 F .3d at 192 (holding that an abuse of discretion occurs when the District Court's decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law

to fact.") (internal quotations omitted); Oddi v. Ford Motor Co., 234 F.3d 136, 146 (3d Cir. 2000); Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 127 (3d Cir. 1993); see also Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1052 (7th Cir. 1998). In addition, we have stated that "[a]n abuse of discretion can occur when no r easonable person would adopt the district court's view." Rode v. Dellarciprete, 892 F.2d 1177, 1182 (3d Cir. 1990).

Here the District Court found that Appellants' alleged failure to receive notice did not warrant an extension of the opt-out deadline. See Cendant Sec. Litig., 194 F.R.D. at 165; In re NASDAQ Market-Makers Antitrust Litig., No. 94-3996, 1999 WL 395407, at *2 (S.D.N.Y. June 15, 1999); Gross v. Barnett Banks, Inc., 934 F . Supp. 1340, 1345 (M.D. Fla. 1995) (finding that no extension was warranted where the class notice was sent to a potential class member's old address despite having been advised of the change of address). The District Court found unconvincing Appellants' argument that Cendant had not tr eated them as class members until after the class opt-out deadline had passed. It found that Appellants did not become class members until they failed to opt out before the deadline. Consequently, Cendant had no reason to tr eat Appellants as class members or inform them of their potential class status. Finally, the District Court did not accept Appellants' explanation of their delay as warranting an extension of time to opt out. See Cendant Sec. Litig., 194 F.R.D. at 165.

We hold that the District Court did not abuse its discretion in refusing to allow Appellants an extension of time to opt out of the class. As stated above, we will not find an abuse of discretion unless the decision is clearly contrary to reason and not justified by the evidence or prevailing law. Here the District Court found that Appellants did not meet the excusable neglect standard simply because they allegedly did not receive notice and because Cendant (the defendant) did not infor m potential plaintiffs (Appellants) of their rights and duties. See In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 231 (D.N.J. 1997) ("[D]ue process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise

interested parties."). The District Court pointed to the individually mailed notice, the published notice, and the press coverage that the initiation of the class action and the proposed settlement received in holding that Appellants should have been aware of the class action and the potential it had to affect their inter ests. See Cendant Sec. Litig., 194 F.R.D. at 165.

In addition to the District Court's reasoning, Appellants do not qualify for the excusable neglect exception because their actions cause prejudice to Cendant and may not comport with the good faith requirement. 18 See Cendant Prides I, 233 F.3d at 195. While Appellants argue that

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18. The dissent argues that "the majority's attempt to cure the deficiencies of the District Court's analysis[is in]consistent with our jurisprudence which requires the District Court to explain its excusable neglect reasoning." It points out that our most recent articulation of this principle is in In re Orthopedic Bone Scr ew Products Liability Litigation, No. 99-2054, wherein we assert that we " `have imposed a duty of explanation on District Courts when they conduct"excusable neglect" analysis.' " Id. at 13 (quoting Cendant Prides I, 233 F.3d at 196). From these statements the dissent makes the leap of logic that the duty to explain the rationale for excusable neglect deter minations means that all Pioneer factors must be explicitly consider ed by the District Court. While a consideration of all relevant Pioneer factors is optimal, this best practice is not our law. Our law is that " `it is a salutary practice [for a court] to give the litigants, either orally or in writing, at least a minimum articulation of the reasons for its decision.' " Orthopedic Bone Screw, No. 99-2054, at 13 (quoting Interpace Corp. v. City of Philadelphia, 438 F.2d 401, 404 (3d Cir. 1971)). What the District Court did in this case, unlike in Orthopedic Bone Screw in which no explanation was given, meets the minimum articulation threshold.

The dissent then castigates our opinion for noting additional reasons not to find excusable neglect in this appeal. Y et we are merely following precisely what we did in one of the Cendant opinions the dissent cites to support its position. In Cendant Prides II, 235 F.3d 176 (3d Cir. 2000), this Court, after holding that the District Court abused its discretion by failing to analyze the Pioneer excusable neglect factors, went on to analyze those factors, including prejudice and bad faith, the same factors the dissent finds us in error for analyzing. After determining that any delay or neglect on the part of appellant was excusable neglect, the Cendant Prides II Court remanded "solely for inclusion in settlement proceedings," not for analysis of the excusable neglect factors, as the dissent seems to imply is required. See id. at 182, 183-84.

Cendant will not be prejudiced by excluding them from the class because Cendant knew of their claims befor e it reached the class settlement, their argument is unpersuasive. Reliance by Appellants on Mars Steel Corp. v. Continental Illinois National Bank & Trust Co. of Chicago, 120 F.R.D. 51 (N.D. Ill. 1988), In r e Del-Val Financial Corp. Securities Litigation, 154 F.R.D. 95 (S.D.N.Y. 1994), and Dominic v. Hess Oil V.I. Corp., 841 F .2d 513 (3d Cir. 1988), is unavailing, as those cases are easily distinguishable on the prejudice issue. In Mars Steel, the court granted an extension of time to opt out because the defendant did not even argue that it would suffer pr ejudice. See Mars Steel, 120 F.R.D. at 53. Similarly, in Del-V al, the court extended the time to opt out of the class action because the party seeking exclusion intended to proceed with arbitration against a non-settling defendant, and therefor e the settling defendant would not be prejudiced by the extension. See Del-Val, 154 F.R.D. at 97 n.2. Finally, Dominic did not even involve a class action. In that individual pr oducts liability action, the District Court granted plaintiff an extension of

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The dissent argues as pungently as possible that the procedural posture of the Cendant Prides II case makes its excusable neglect analysis unavailable for support by the majority her e in analyzing whether the District Court correctly denied Appellants' motion to extend the time for them to opt out of the class. Cendant Prides II made a de novo determination with respect to the excusable neglect factors not applied by the District Court in that case afterfinding that the District Court abused its discretion by failing to apply the Pioneer factors in denying the late filing of a proof of claim in a class action. Cendant Prides II, 235 F.3d at 183. Here we conclude that the District Court did not abuse its discretion in denying the motion to extend the time for Appellants to opt out of the class. In so doing, we apply the same standard of review (abuse of discr etion) as our Court applied in Cendant Prides II. While we also discuss other Pioneer factors supporting our affirmance, this discussion is not necessary to our decision to affirm. But in Cendant Prides II the analysis of Pioneer factors was necessary to the decision and thus required de novo consideration.

In this context, we find the dissent's characterization of our excusable neglect analysis as "[in]consistent with[this Court's] jurisprudence" to be unsupported. Moreover, for the dissent to conclude that a duty of explanation meeting a minimum articulation thr eshold equals full blown articulation is fallacious.

time to serve notice and the complaint on a thir d party defendant who was already subject to personal jurisdiction of the court. See Dominic, 841 F.2d at 516. This Court affirmed, finding no prejudice to the third-party defendant because it was already a party to the suit and knew of all the claims and specific allegations.

Here Cendant, the settling defendant, would clearly be prejudiced by a finding that Appellants ar e not within the class. Appellants' substantial holdings could subject Cendant to additional liabilities for the accounting fraud allegations that they settled in the class action vis-a-vis all eligible persons who did not opt out of the class. Permitting Appellants to opt out now will deprive Cendant of the finality it sought in settling the class action, r egardless whether the March 24, 2000 letter from Appellants' counsel, see infra note 21, put it on notice of Appellants' claims and specific allegations before the District Court formally approved the settlement.19 Cf. Prudential Sales Practices Litig., 164 F.R.D. at 371-72 ("Defendants would be loath to offer substantial sums of money in compromise settlements of class actions unless they can r ely on the notice provision of Rule 23 to bind class members.").

Finally, it is plausible to argue that Appellants do not meet the excusable neglect standard because the record draws into question whether they may have failed to comport with the good faith requirement. See Mars Steel, 120 F.R.D. at 52 (holding that a party's tar diness designed to gain a tactical advantage violates the good faith requirement). Appellants, in their brief to this Court, claim that "[t]hey did not wait strategically to see what kind of settlement was proposed before communicating their intent to arbitrate their claims." Yet it is possible to infer they did

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19. One could argue that because Cendant pr oposed a settlement before the opt-out period passed it could not have known whether Appellants later would opt out. While it is true that Cendant proposed a settlement on December 7, 1999, three weeks before the final opt-out date, December 27, 1999, that settlement was not appr oved until March 29, 2000, three months after the final opt-out date. Therefore, because the Appellants did not opt out, it is fair to say that Cendant was bargaining for finality as to the Appellants' claims when its settlement was approved.

just that, seemingly seeking a strategic advantage in not filing a formal opt-out, and in the timing of their motion for clarification of the class or in the alter native for an extension of time to opt out of the class.

From the time of the initial disclosure of the accounting irregularities through the present, Appellants have acted with abundant caution. First, they filed a placeholder suit in the California Central District to ensur e that they complied with the statute of limitations in the event that the Ninth Circuit ruled against them (thus for eclosing their opportunity to arbitrate). In addition, Appellantsfiled objections to the Class Action Settlement and Plan of Allocation, just in case this Court, as we have, determines that they are class members subject to the ter ms of the settlement.20 However, even though they were aware of the existence of the class action before the opt-out date passed, Appellants never filed a protective opt-out to ensure that their claims would be arbitrated. With sophisticated investors such as the Davidsons, who were assisted by exceptional counsel, it is not a leap of faith to make the logical inference that their failure tofile a formal opt-out was a strategic decision.

Additionally, as previously mentioned, the opt-out period closed on December 27, 1999. Appellants contend in their brief to this Court that they learned in February 2000 that Cendant considered them class members. Y et, they took no court action until after they received the Plan of Allocation mailed on April 7, 2000.21 Only after they discovered that their recovery under the Class Action Settlement was significantly less than expected did they file, on April 27, 2000, a motion for clarification of the class definition, or in the alternative for an extension of time to opt out of the class. This tardiness again points to Appellants attempting to gain a tactical advantage and counsels against extending the opt-out period.

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20. That case is currently pending befor e this Court, No. 00-2709.
21. While Appellants' counsel did send Cendant's counsel a letter on March 24, 2000, indicating that Appellants did not consider themselves to be part of the class, they took no formal action to ensure this position until three weeks after the Class Administrator provided them with the Plan of Allocation.

As a result, we find that the District Court did not abuse its discretion in refusing to grant Appellants an extension of time to opt out. We agree with the District Court that Appellants did not qualify for the excusable neglect exception and therefore affirm its holding.

C. Enjoining of the California Arbitration

Finally, Appellants and the dissent argue that the District Court erred in enjoining the ongoing Califor nia arbitration. They specifically contend that it violated the F AA by enjoining the arbitration mandated by the Califor nia Central District as well as several agreements among the Appellants, DAI, and CUC/Cendant calling for , inter alia, arbitration of disputes.22

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22. Conversely, Appellants and the dissent ar gue that the District Court should have been res judicata bound by the decision of the California Central District with respect to its decision to deny Cendant's motion to enjoin the arbitration. In other words, they allege that the District Court should have given preclusive effect to the California Central District's decision that the Appellants' claims were arbitrable and, under the doctrine of res judicata, referred their claims back to arbitration in California. The fatal flaw of this contention is acknowledged by the dissent. The parties before the Califor nia Central District Court did not brief, and that Court in its three and one-half page decision did not mention, whether any of the Appellants were putative class members. Without even acknowledgment of the class action, it is spurious to suggest that res judicata precludes the District Court from deciding whether Appellants' claims could be decided in the class action, i.e., whether they were class members. See Hopewell Township Citizens I-95 Comm. v. Volpe, 482 F.2d 376, 381 (3d Cir. 1973) (finding res judicata does not apply where "at least much of the subject matter of the present lawsuit has not been and could not have been ar gued in the previous actions"); see also Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd., 99 F.3d 746, 756 (5th Cir . 1996) (holding that res judicata did not apply on the basis that it "is axiomatic that a claim that has not yet accrued is not ripe for adjudication, and hence it is not a claim that `could have been litigated' in a previous lawsuit").

Here the California Central District"was not, and could not have been, presented with -- and thus did not, and could not, decide -- the issue of whether the Davidsons and the Trusts ar e Class Members." The California Central District issued its or der on April 14, 1999, over eight months before the final opt-out date for the class action in New Jersey

The District Court's authority to enter such an injunction derives from the All Writs Act, 28 U.S.C. § 1651. Under that Act, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agr eeable to the usages and principles of law." When a federal court has jurisdiction over a case, the All Writs Act grants it ancillary jurisdiction to issue all writs "necessary or appropriate in aid of " that jurisdiction. See In r e Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985). Ther e is an analogous provision in the Anti-Injunction Act. 28 U.S.C.§ 2283 ("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.").

The power given to federal courts under the All W rits Act and the Anti-Injunction Act allows them to enjoin state court proceedings when necessary to protect federal court judgments. See Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 985 F.2d 1067, 1068-69 (11th Cir. 1993). "Such `federal injunctive relief may be 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.' " Baldwin-United, 770 F .2d at 335 (quoting Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970)). In class actions, this power allows federal courts to protect settlement efforts and to prevent "inconsistent and inequitable results." In re Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 38 (S.D.N.Y. 1990). Further, "the All-Writs Act per mits courts to certify a national class action and to stay pending federal and state cases brought on behalf of class members." Id. at 37.

-- December 27, 1999. Consequently, at the time the California Central District issued its ruling, Appellants were no more than potential class members, with every right to opt out of the class to pursue their arbitration claims. Cendant could not have asked the California Central District to declare Appellants class members given their unilateral right to opt out of the class up until December 27, 1999. Because the issue of whether Appellants were class members could not have been argued in the previous action, res judicata is inapplicable.

The All Writs Act and the Anti-Injunction Act also give the federal courts the power to enjoin arbitrations. See Kelly, 985 F.2d at 1069; PaineW ebber P'ship Litig., 1996 WL 374162, at *4 ("[A] Court may enjoin arbitration -- even before judgment has been entered in this action -- where that injunction would be `in aid of its jurisdiction' within the terms of the Baldwin-United line of cases."). The District Court, in finding that it had the authority to enjoin the continued prosecution of class members' claims, relied on PaineWebber for the proposition that a district court has the ability to enjoin an ongoing arbitration in or der to give effect to a class settlement. See PaineW ebber, 1996 WL 374162. In that case, the court denied fifteen plaintiffs' attempts to arbitrate claims covered by a class action where they all failed to opt out of the class befor e the deadline. See id. at *4-5.

We agree that, notwithstanding the federal courts' power to enjoin other proceedings, there ar e strong policies that support giving effect to agreements to arbitrate. "The FAA was enacted to reverse centuries of judicial hostility to arbitration agreements by placing arbitration agreements upon the same footing as other contracts." Pritzker v. Merrill Lynch, Fenner & Smith, Inc., 7 F.3d 1110, 1113 (3d Cir. 1993) (internal quotations omitted). Put another way, the FAA seeks "to assure those who desir ed arbitration and whose contracts related to interstate commer ce that their expectations would not be undermined by federal judges." Southland Corp. v. Keating, 465 U.S. 1, 13 (1984). In particular, our Court recognizes that"federal law presumptively favors the enforcement of arbitration agreements." Harris v. Green T ree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999).

We also recognize that the Supreme Court requires that arbitrable claims be arbitrated, "even wher e the result would be the possible inefficient maintenance of separate proceedings in different forums." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985); accord Piper Funds, 71 F.3d at 303. In fact, the FAA "r equires piecemeal resolution when necessary to give effect to an arbitration agreement." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 20 (1983) (emphasis omitted). Securities lawsuits

often may require bifurcated pr oceedings in order to give effect to arbitration agreements. See Dean Witter, 470 U.S. at 218 n.5.

In the same vein, the mere existence of a parallel proceeding that seeks to adjudicate the same in personam cause of action does not in itself provide sufficient grounds for an injunction against a state action or arbitration in favor of a pending federal action. See Carlough v. Amchem Prods., Inc., 10 F.3d 189, 202 (3d Cir. 1993); see also Baldwin-United, 770 F.2d at 336 (citing Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977) ("We have never viewed parallel in personam actions as inter fering with the jurisdiction of either court.")); PaineW ebber, 1996 WL 374162, at *3. Even actions derived from the same cause against the same defendants may be maintained simultaneously in federal and state courts. See Carlough, 10 F.3d at 202; see also Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F .2d 932, 937 (9th Cir. 1993) (refusing to apply the All Writs Act because the state complaint alleged a contract breach independent of the District Court's protective order, and thus the state court adjudication would not affect interpretation or enforcement of the order). "Any doubts as to the pr opriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion . . . ." Atlantic Coast Line R.R., 398 U.S. at 297.

Moreover, an injunction may only be issued under the Anti-Injunction Act when there is a "r eal or potential conflict [that] threatens the very authority of the federal court." Vernitron Corp. v. Benjamin, 440 F.2d 105, 108 (2d Cir. 1971). For an injunction to be "necessary . . . in aid of . . . jurisdiction" "it is not enough that the requested injunction is related to that jurisdiction, but it must be necessary in aid of that jurisdiction." Carlough, 10 F.3d at 202 (internal quotations and emphasis omitted). That is, an injunction will only be "necessary" "to pr event a state court [or arbitrator] 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." Id.

Yet 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. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978) ("Ther e are special rules relating to class actions and, to that extent, they are a special kind of litigation."); Henry v. City of Detroit Manpower Dept., 763 F.2d 757, 763 (6th Cir. 1985) (same); Avila v. Van Ru Credit Corp., No. 94-c-3234, 1995 WL 41425, at * 9 (N.D. Ill. Jan. 31, 1995) ("[C]lass actions involve complex litigation and special rules."); Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co. , 98 F.R.D. 254, 271 (D. Del. 1983) ("[C]ommon issues should be resolved in one class proceeding."); Fed. R. Civ. P. 23 (b)(3) (stating that a class action is maintainable when"questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). For example, in multidistrict class actions consolidated in a single district court, sound authority exists to enjoin other parties, even states, from bringing actions that would affect the rights of any plaintiffs or class members. In Baldwin-United, the Second Circuit found that the existence of multiple and harassing state actions could only frustrate the district court's effort to craft a settlement because the success of any federal settlement depended on the parties agreeing to release "any and all related civil claims the plaintif fs had against the settling defendants based on the same facts." See Baldwin-United, 770 F.2d at 337. The court concluded "that the existence of actions in state court would jeopar dize [the district court's] ability to rule on the settlements, would substantially increase the cost of litigation,[and] would create a risk of conflicting results . .. . Under the circumstances we conclude that the injunction .. . was unquestionably `necessary or appropriate in aid of ' the federal court's jurisdiction." Id. at 333, 338. Similarly, in Asbestos Litigation, the court's injunction was necessary to implement the settlement covering "all pr esent and future persons injured by asbestos-containing pr oducts." Asbestos Litig., 134 F.R.D. at 38.

In deciding whether to enter the injunction that Cendant sought enjoining the California arbitration, the District Court here had to reconcile two seemingly conflicting lines of authority and policies: the one giving it authority to issue all orders to maintain and preserve its jurisdiction over the consolidated multidistrict litigation cases in this Cendant group of actions, and the public policy favoring giving effect to arbitration agreements such as those enter ed between Cendant and Appellants.

Appellants and the dissent rely on the Eighth Circuit's decision in Piper Funds, 71 F.3d 298, in support of their argument that the District Court violated the FAA by enjoining the California arbitration. Despite their assertions to the contrary, Piper Funds is of little help to Appellants. Although the Eighth Circuit did find that the district court there should not have enjoined the arbitration, it did so under circumstances far different fr om ours. It found that because the appellant clearly, in writing, expr essed its desire to opt out of a class before the class notice and opt-out procedure were even developed, the injunction violated the FAA and appellant's immediate right to arbitrate by enjoining the arbitration pending a formal opt-out. See Piper Funds, 71 F.3d at 303-04; see also VMS Sec. Litig, 21 F.3d 139, 141-42 (7th Cir. 1994) (holding that where class members had not opted out of class action, they wer e bound by class action settlement which released their claims against the defendant even though they had obtained an award in the arbitration filed before resolution of the class action).

In Piper Funds, the Eighth Circuit stated:

> [P]roper regard for the F AA required that the court promptly take one of three actions: it could stay the class action while [the potential class member's] claim is arbitrated; it could deny the request to opt out (for example, because [the potential class member's] arbitration claim is not arbitrable or its r equest to opt out was too late); or it could grant the r equest to opt out.

71 F.3d at 304 (emphasis added). Its acknowledgment that proper regard for the FAA allows a court to deny a request

to opt out, because that request came too late, concedes the merits of the situation we have here, a point the dissent glosses over. Where a party who desir es arbitration fails timely to opt out of the class, the FAA does not preclude a district court from denying a class member's r equest to pursue arbitration. Thus, Piper Funds is, by its own words, unavailing where Appellants fail to opt out of the class. See PaineWebber, 1996 WL 374162, at *5 (finding that case inapposite to Piper Funds where the plaintiffs did not immediately express their position that they would opt out but instead waited until after the opt-out deadline had passed); Prudential P'ship Litig., 158 F .R.D. at 304 ("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.").

Appellants and the dissent cite no case law holding that the FAA trumps, and thereby forgives, Appellants' failure to opt out. This presages 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. See, e.g., VMS Sec. Litig., 21 F.3d at 141-42.

As for the enjoining of the California arbitration in its entirety, we review the terms of an injunction for abuse of discretion. John F. Harkins Co. v. W aldinger Corp., 796 F.2d 657, 658 (3d Cir. 1986). Any finding that is a prerequisite to the issuance of an injunction (here whether Appellants were subject to the class action, e.g., were members of the class and were properly denied an extension of time to opt out) is reviewed according to the standar d applicable to that particular determination, and we willfind an abuse of discretion vis-a-vis the injunction if the District Court's prerequisite finding was in error under the applicable standard of review. See id.

We note, however, that the District Court could enjoin only claims in arbitration that were resolved by the Class Action Settlement. Conversely, the District Court could not enjoin the arbitration with respect to any claims that were

not covered by the Class Action Settlement. In its June 20, 2000 Order, the District Court granted Cendant's cross-motion to enforce the March 29, 2000 injunction against continued prosecution by Appellants of their arbitration proceeding against Cendant. To the extent that their prior agreements to arbitrate covered claims not disposed of or released in the Class Action Settlement, the District Court was without the authority to enjoin those pr oceedings because its action was not "necessary or appr opriate in aid of [its] . . . jurisdiction." The arbitration of issues outside the scope of the class action, e.g., possibly the 1.6 million stock options that Cendant concedes were beyond the scope of the class action, does not interfer e with the District Court's disposition and does not seriously impair its flexibility and authority to decide the class action. Further, arbitration of issues outside the bounds of the class action issues cannot lead to inconsistent and inequitable results, as that arbitration pr esents no "real or potential conflict that threatens the very authority of the federal court." Vernitron Corp., 440 F.2d at 108. These "parallel" actions can be maintained without conflict. See Carlough, 10 F.3d at 202.

Unlike Baldwin-United and Asbestos Litigation, where the proposed settlements called for enjoining all claims, as they would have affected the settlement and pr ovided for inconsistent holdings, the settlement in this case only requires that the class members release claims dealing with "publicly traded securities."23 The arbitration of peripheral claims, possibly including the 1.6 million options, cannot affect the District Court's ability or authority to settle the class claims dealing with publicly traded securities. An injunction preventing the arbitration of those claims is clearly not necessary in aid of the District Court's jurisdiction in the class action. Therefor e, we find the District Court abused its discretion in enjoining, in its entirety, the California arbitration, as it did not have the

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23. "Each Class Member shall release all`Released Claims,' which include any and all claims . . . that are based upon, related to, arise from, or are connected with the pur chase, acquisition, sale or disposition of CUC, HFS, or Cendant publicly-traded securities .. . during the Class Period . . . ."

authority, under the All Writs Act, to enjoin those actions or proceedings that were outside the scope of the class action and could not have had any effect on its flexibility and authority to decide and settle the class action. 24

It must be noted that through this opinion we take no position on whether any issues remain for r esolution in arbitration. It is entirely possible that all of the issues before the arbitrator have been settled and/or released by the class action. We make no determination on this issue because we believe it is for the arbitrator, not the District Court, to determine whether a claim befor e him was decided in the class action. See, e.g., Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 232 (3d Cir. 1997) ("[A] court compelling arbitration should pr eserve the remaining disputed issues for the arbitrator to decide.").

Respecting the principles of the FAA, as well as the opt-out requirement of class actions, we will allow the California arbitration to proceed, subject to affirmance by the Court of Appeals for the Ninth Circuit, but only to the extent of arbitrating claims that were not settled and released in the class action. We further hold that it is for the arbitrator to determine whether the claims Appellants are pursuing in the California arbitration were disposed of in the Class Action Settlement. To the extent that the claims were not included in the class action, the arbitrator has the power to decide those issues. He is only pr ecluded from deciding any issues that were r esolved (either through a court decision or release of claims) as part of the class action. See PaineWebber, 1996 WL 374162, at *4 ("[T]he Court has the ability to enjoin further litigation by class members involving the subject matter of this class action, pursuant to the reasoning of Baldwin-United and its progeny.").

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24. Strangely, the dissent gives the strong impression that we approve and are not reversing the District Court's order enjoining the arbitration. As review of this opinion shows, that is misleading. What the dissent really argues is that, in limiting our r eversal to only those issues outside the scope of the class action, we are not r eversing the District Court enough. In our view, the dissent's position -- that reversal of the injunction is called for as to all issues included as well as not included in the class action -- simply goes too far .

We close with a general comment on the well-crafted dissent of Judge Garth challenging, inter alia , our holding that the District Court can enjoin those claims in the arbitration resolved in the Class Action Settlement. Hyperbole aside, the dissent's theme is implicitly as follows. The FAA trumps the All Writs Act. If arbitration is elected as a means to resolve a dispute, a subsequent injunction, the dissent argues, "can never be appr opriate in a case such as this one." Because arbitration was elected by Appellants the month prior to class certification, and because the California District Court ruled over Cendant's objection that the California arbitration should not be enjoined, the New Jersey District Court in a class action is shorn of the ability to enjoin any aspect of Appellants' claims in that arbitration.

The dissent's theme is counterposed by our theme: Appellants -- who concededly knew of the class action, filed their arbitration complaint after the class action was begun, knew that there was an opt-out r equirement in that action (though they claim not to have received notice of the precise date), and did not request an extension of time to opt out until no less than two months after they learned of the opt-out deadline -- can no longer seek to arbitrate claims already decided in the class action. Appellants (and no one else) controlled whether they wer e in or out of the class. They could have opted out of the class at any time during the opt out period, covering almost a full year after they sought arbitration, but never did so. Had they done so, they could have arbitrated their claims en toto .25

This theme, juxtaposed against that of the dissent, follows a reasoning tailored to the specific facts of each case rather than a certitude generalized to exclude all consideration of when class action determinations prevail over arbitration. We leave for another day that issue. Also not before us is whether the claims of Appellants are enforceable under the FAA. They ar e. But not always! As noted in Piper Funds, in quoting § 12(d) of the National Association of Security Dealers' Code with r espect to

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25. Thus, we disclaim the dissent's Rabelaisian r emark that enjoining an arbitration in this case "can never be appr opriate."

arbitration as a means of resolving disputes in the securities industry, " `such claims shall be eligible for arbitration . . . pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.' " Piper Funds, 71 F.3d at 302. Here Appellants failed to demonstrate that they affirmatively elected not to participate in the putative or certified class and did not comply with any conditions for withdrawing fr om that class. They are left with the consequences of their failure to act.

III. Conclusion

For the foregoing reasons, we affir m the District Court's rulings as to the inclusion of Appellants in the class as well as its refusing to grant them an extension of time to opt out. However, we reverse the District Court's enjoining of the entire arbitration and will allow that arbitration to proceed, though only as to issues not r esolved as part of the class action. We further hold that it is for the arbitrator, not the District Court, to determine which, if any, of Appellants' claims are ripe for decision in accordance with this Opinion and the Class Action Settlement.