21-0631-cv(L), 21-0633-cv(CON)

United States Court of Appeals

for the

Second Circuit

1199 SEIU UNITED HEALTHCARE WORKERS EAST,

Petitioner-Appellee,

– v. –

CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, UNITED JEWISH COUNCIL OF THE EAST SIDE HOME ATTENDANT SERVICE CORP.,

Respondents-Appellees,

– v. –

GAIL YAN, ALVARO RAMIREZ GUZMAN, ELIDA AUGUSTINA MEJIA HERRERA, LETICIA PANAMA RIVAS, EUGENIA BARAHONA ALVARADO,

Appellants,

MEI KUM CHU, SAU KING CHUNG, QUN XIANG LING, EPIFANIA HICHEZ, CARMEN CARRASCO, SEFERINA ACOSTA, MARIA DIAZ,

Intervenors-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE

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Respondents,

RAMONA DE LA CRUZ, DULCE HERRERA PALMA,

Intervenors.

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I. JURISDICTIONAL STATEMENT

On May 8, 2020, Petitioner-Appellee 1199SEIU United Healthcare Workers East ("1199" or "the Union") petitioned the United States District Court for the Southern District of New York to confirm the April 17, 2020 Arbitration Award ("Award") of Arbitrator Martin F. Scheinman, A28, pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 and Section 1 et seq. of the Federal Arbitration Act, 9 U.S.C. § 1. By Opinion and Order dated February 18, 2021, the district court confirmed the Award, and, on February 19, 2021, the district court entered final judgment. A637. No party to the district court proceeding has filed a Notice of Appeal.

On March 19, 2021, Proposed Intervenors Mei Kum Chu, Sau King Chung, Qun Xiang Ling, Epifania Hichez, Carmen Carrasco, and Seferina Acosta ("Proposed Intervenors") filed a Notice of Appeal challenging the denial of their motion to intervene and the district court's confirmation of the Award. A676.[1] The Court has jurisdiction over the Proposed Intervenors' appeal under 28 U.S.C. § 1291.

[1] Maria Diaz also purports to appeal the district court's denial of a motion to intervene, but this individual never moved to intervene. A469.

On March 19, 2021 Non-Parties Gail Yan ("Non-Party Yan"), Alvaro Ramirez Guzman, Elida Augustina Mejia Herrera, Leticia Panama Rivas, Eugenia Barahona Alvarado ("Guzman Non-Parties") (collectively "the Non-Parties") filed a Notice of Appeal challenging the district court's denial of Non-Party Yan's motion to dismiss the Union's petition confirm the Award. A673. On May 17, 2021, 1199 moved to dismiss the Non-Parties' appeal. On September 1, 2021, a motions panel of this Court denied the motion to dismiss without prejudice to 1199 renewing its arguments to the merits panel. Dkt. 76 (Order).

This Court does not have jurisdiction to entertain the Non-Parties' appeal. Non-Party Yan does not have standing to appeal (i) because she lacks standing to challenge the Award, which was rendered in an arbitration to which only the Union and relevant employers were parties, and (ii) because she is a non-party who never moved to intervene in the proceeding below. Thus, Yan lacks standing to appeal the district court's confirmation of the Award. The Guzman Non-Parties do not have standing to appeal because they never participated in the district court proceeding in any way and are not bound by the court's Judgment. The Award explicitly excluded the Guzman Non-Parties. Because the Guzman Non-Parties were excluded from the Award, they are not bound by it and, therefore, they lack standing to appeal the confirmation of the Award.

II. STATEMENT OF THE ISSUES

1. Did the district court correctly find that the Proposed Intervenors and Non-Party Yan lack statutory standing to challenge the Award because the Union is their exclusive bargaining representative and because they do not claim a breach of the duty of fair representation?

2. Did the district court correctly confirm the April 17, 2020 Arbitration Award of Martin F. Scheinman, Esq. where the collective bargaining agreement delegated questions of arbitrability to the Arbitrator who finally decided those questions as submitted by the parties?

3. Did the district court correctly deny the motion to intervene of the Proposed Intervenors because they lacked standing to challenge the award and failed to demonstrate that their interests would be impaired and or that they were being adequately represented?

4. Should the appeal of the Non-Parties be dismissed because they lack standing to appeal?

III. STATEMENT OF THE CASE

A. THE COLLECTIVE BARGAINING AGREEMENTS

1199 is the sole and exclusive representative of the Respondent Employers' home health aide employees for purposes of collective bargaining over the terms and conditions of their employment. A32 ¶ 6. 1199 is a party to a collective

bargaining agreement with each of the Respondents (collectively, "Agreements" or "CBAs"). Id. ¶ 7. All of the Respondents are parties to substantially similar agreements, including the provisions quoted herein. Id. ¶ 7.

The CBAs contain a grievance and arbitration provision which provides, in relevant part:

ARTICLE XXVI
GRIEVANCE AND ARBITRATION PROCEDURE

> 1. A grievance is defined as any dispute between the Union (on its behalf and/or on behalf of any Employee) with the Employer involving the proper application, interpretation, or compliance with the specific written provisions of the Agreement based on facts and circumstances occurring during the term of this Agreement. A grievance is subject to arbitration.
>
> 2. Grievances will be resolved in accordance with the following procedure.
>
> ***
>
> Step 4 -- If the grievance is not resolved at Step 3, the Union and/or Employer may within ten (10) days thereafter request that the matter be submitted for final and binding arbitration under the Labor Arbitration Rules of the American Arbitration Association.
>
> 3. Notwithstanding the foregoing, a grievance that affects a substantial number of Employees and is outside the authority of the Employer's representatives designated in Steps 1 and 2 may be presented initially at Step 3 of the grievance procedures. This grievance must be presented in writing and within ten (10) days of the occurrence which gave rise to the grievance.
>
> ***
>
> 5. The opinion and award of the arbitrator must be made in writing and is final and binding upon all parties. The arbitrator has full

> authority to decide the issue or issues in dispute, except that s/he does not have authority to amend, alter, modify, add to or subtract from the provisions of this Agreement.
>
> ****

A28 ¶ 8 (Ex. B at 28-29).

In or about 2014, the Union signed a Memorandum of Agreement amending the CBA with each of the Respondents and providing that, given changes in federal and state law, the Union and subject Employer would meet in good faith to negotiate an "expeditious and effective alternative dispute resolution procedure for the resolution of claims arising under such laws." A33 ¶ 9. Specifically, the Parties agreed:

> [G]iven changes in federal and state law imposing new obligations on the Employer and exposing Employers to significantly increased level of litigation, it is in the interest of the Union, Employees, and the Employer to develop an expeditious and effective alternative dispute resolution procedure for the resolution of claims arising under such laws. Accordingly, between the execution of this Agreement and December 1, 2014, or as otherwise agreed by the parties, the parties shall meet in good faith to negotiate such an alternative dispute resolution procedure. If the parties are unable to agree to such a procedure in the allotted time, the Employer may submit the dispute to Martin F. Scheinman for final and binding arbitration.

A32 ¶ 9 (Ex. C at 6-7).

In or about December 2015, the Union signed a Memorandum of Agreement with each of the Respondents that further amended the CBA and that provided for the resolution of claims under the Fair Labor Standards Act, the New York Home

Care Worker Wage Parity Law, and/or the New York Labor Law ("Covered Statutes") pursuant to an alternative dispute resolution process:

> **New Article in the CBA, "ALTERNATIVE DISPUTE RESOLUTION", is hereby created, to read . . . as follows:**
>
> 1. The parties agree a goal of this Agreement is to ensure compliance with all federal, state and local wage hour law and wage parity statutes. Accordingly, to ensure the uniform administration and interpretation of this Agreement in connection with federal, state and local wage-hour and wage parity statutes, all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act ("FLSA"), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the "Covered Statutes"), in any manner, shall be subject exclusively, to the grievance and arbitration procedures described in this Article. The statute of limitations to file a grievance concerning the Covered Statutes shall be consistent with the applicable statutory statute of limitations. All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration before Martin F. Scheinman, Esq. The Arbitrator shall apply appropriate law and shall award all statutory remedies and penalties, including attorneys' fees, consistent with the FLSA and New York Labor Law in rendering decisions regarding disputes arising under this Article.

A34 ¶ 10 (Ex. D at 9).

Under the terms of the Alternative Dispute Resolution provision ("ADR Provision"), unresolved grievances concerning violations of the Covered Statutes would be submitted to mandatory mediation before Mr. Scheinman. A34 ¶ 11. Following the completion of the mandatory mediation process, the dispute may

proceed to arbitration before Mr. Scheinman. A28 ¶ 11. Specifically, the MOAs provided:

> 2. Whenever the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, before the matter is submitted to arbitration, the dispute shall be submitted to mandatory mediation. The parties hereby designate Martin F. Scheinman, Esq., as Mediator for such disputes. Such mediation shall be requested no more than thirty (30) calendar days following exhaustion of the grievance procedure. Following submission of the dispute to mediation, the parties with the assistance of the Mediator shall establish such procedures as shall expeditiously advance the mediation process, including the scheduling of the exchange of relevant information, submission of position statements, and dates for mediation. In the absence of an agreement, the Mediator shall determine such procedures. Once the matter has been submitted to mediation, the Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Mediator. The fees of the Mediator shall be shared equally by the Union and the Employer.
>
> 3. No party may proceed to arbitration prior to completion of the mediation process as determined by the Mediator. In the event the Union seeks arbitration of a grievance subject to these procedures, the Union shall submit its demand for arbitration to the Employer and the Arbitrator within four (4) months following the Mediator's declaration that mediation has concluded. The Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Arbitrator. Prior to hearing, if noticed, the Union shall also be entitled to depositions of relevant witnesses. The fees of the arbitrator shall be shared equally by the Union and the Employer. The Employer shall upon notice be entitled to take the deposition of any Employee seeking relief in such arbitration or any other relevant witness.
>
> ***
>
> 5. The parties agree not to contest court confirmation of an arbitration award rendered under this Article. . . .

A34 ¶ 11 (Ex. D at 9-10).

B. THE GRIEVANCE

On January 2, 2019, 1199SEIU filed a class action grievance on behalf of all its home care bargaining unit members concerning violations of the CBAs regarding wage and hour claims arising under the Covered Statutes. A36 ¶ 12.

At the time the grievance was filed, some home care workers, who had terminated employment prior to the adoption of the ADR Provision, had initiated putative class action lawsuits in state and federal court to pursue claims under the Covered Statues on their own. A36 ¶ 13. At the time the grievance was filed, no class had been certified in any of these pending lawsuits and, to date, no class has been certified in any of these lawsuits. A36 ¶ 13. In most of these cases filed by home care workers, courts compelled the claims to arbitration. However, in a minority of pending actions involving a total of eight former home care workers, courts held that the individual named plaintiff could not be compelled to arbitrate their claims under the ADR Provision. A28 ¶ 13. These eight former home care workers shall be referred to as the "Excluded Employees," as explained below. A36 ¶ 13.

C. THE MEDIATION AND ARBITRATION

Pursuant to the Agreements, the Parties to the grievance (the Union and Employer Respondents) proceeded to mediation before Mr. Scheinman. A28 ¶ 14.

With the consent of the Union, certain attorneys representing individual home care employees as plaintiffs in pending court cases, most of which had been compelled to arbitration, also participated in the mediation as non-parties (functionally acting as amici). A36 ¶ 15. On December 18, 2019, the Arbitrator held a telephone conference in which the Union and a number of Respondents participated. A635 ¶ 4. On that call Mr. Scheinman informed the Union and Employers that he was inclined to deem mediation concluded and proceed to arbitration. Id. The parties presented their joint position on the importance of the Arbitrator bifurcating the arbitration proceeding and finally deciding the gateway issues of arbitrability and jurisdiction. Id. The Arbitrator agreed that he would set a proposed briefing schedule and hearing date on those issues. Id. Thereafter, the parties submitted their proposed formulations of those issues for final determination by the Arbitrator. Id. On December 24, 2019, the Arbitrator declared the mediation stage complete as the Parties had not been able to reach an agreement. A36 ¶ 16.

Also on December 24, 2019, Arbitrator Scheinman issued a scheduling order setting forth dates for submission of briefs and hearing on the gateway issues as submitted by the parties, including:

> 1. Are the claims encompassed by the wage and hour related grievances involving current and former 1199 bargaining unit members, including those arising under federal, state and local law, arbitrable?

> 2. Does the Arbitrator have jurisdiction to adjudicate the claims asserted in the wage and hour grievances, arising under federal, state and local law, filed by the parties to the Collective Bargaining Agreement ("Agreement") which encompass all claims arising under the federal, state and local laws named in the Agreement, as well as any pending litigation or administrative actions on the identical claims, irrespective of whether employees' employment terminated prior to the effective date of the Memorandum of Agreement providing Alternative Dispute Resolution language for exclusive mediation/arbitration procedures for wage and hour disputes pursuant to the Agreement between the parties?

A37 ¶ 17; A636 ¶ 5.

On January 15, 2020, an oral argument was held by the Arbitrator, on the agreed-upon gateway issues. A636 ¶ 6. With the consent of the Union, the attorneys representing individual home care employees as plaintiffs in pending court cases who had participated in the mediation were given notice of the hearing and invited to submit briefs. A37 ¶ 19. A few attorneys representing such plaintiffs submitted briefs and participated in the hearing. A37 ¶ 19. None of the Respondents challenged or objected to the Arbitrator's planned final determination of the jurisdictional and arbitrability issues. A636 ¶ 6. Following the hearing and submission of briefs, the Arbitrator issued a lengthy Award, dated April 17, 2020, deciding, inter alia, the threshold jurisdictional issues, including that the Parties had granted the Arbitrator authority to determine gateway questions of arbitrability and jurisdiction, and finding as follows:

> 1. The claims encompassed by the wage and hour related grievances involving current and former 1199 bargaining unit

> members, including those arising under federal, state and local law, are arbitrable.
>
> 2. [The Arbitrator has] jurisdiction to adjudicate the claims asserted in the wage and hour grievances, arising under federal, state and local law, filed by the parties to the Collective Bargaining Agreement which encompass all claims arising under the federal, state and local laws named in the Agreement, as well as any pending litigation or administrative action on the identical claims, irrespective of whether employees' employment terminated prior to the effective date of the Memorandum of Agreement providing Alternative Dispute Resolution language for exclusive mediation/arbitration procedures for wage and hour disputes pursuant to the Agreement between the parties.

A38 ¶ 20 (Ex. A at 47). The Arbitrator expressly and by name excluded from the Award the Excluded Employees, specifically holding that the Award was not binding on Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Boris Pustilnik, Maral Agarunova, Epifania Hichez, Carmen Carrasco, and Seferina Acosta. A38 ¶ 21.[2]

The Arbitrator transmitted the Award to counsel via electronic mail on April 17, 2020. A38 ¶ 22.

In May 2020, the Union petitioned the district court to confirm the Award. A28. By the Award, the Arbitrator had made a final determination on threshold

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[2] The following six Excluded Employees and Non-Parties have filed Notices of Appeal before this Court: Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Epifania Hichez, Carmen Carrasco, and Seferina Acosta. A673, A676.

issues of the grievance's arbitrability and the scope of the Arbitrator's jurisdiction, but did not make any determination as to the merits of the Union's underlying class action grievance asserting wage and hour claims on behalf of current and former bargaining unit members employed at more than forty home care agencies.

The Guzman Non-Parties did not appear or otherwise participate in the proceedings below. On May 22, 2020, attorney LaDonna Lusher filed a notice of appearance on behalf of a so-called unnamed "Interested Party," see Dkt. 50 (Decl. of Laureve D. Blackstone, dated May 14, 2021) ¶ 3 (Ex. A), and requested the court's permission to file a motion on behalf of Non-Party Yan, see id. ¶ 4 (Ex. B). On June 29, 2020, Non-Party Yan moved to dismiss the Union's Petition, arguing that the Court lacked subject matter jurisdiction. S.D.N.Y. ECF 101. At no time during the district court proceeding did Non-Party Yan move to intervene.

On December 14, 2020, during oral argument on, inter alia, Non-Party Yan's motion to dismiss, Judge Koeltl asked Non-Party Yan's counsel:

> I have an initial question, which is why should I listen to Ms. Yan? Ms. Yan hasn't made a formal motion to intervene. She's not a party. She's listed on the docket sheet as an interested party, but she's been submitting lots of paper. It's not clear to me what her right to participate, other than [as] an amicus, is, and she never even sought leave to participate as an amicus. She's simply been filing papers. If I denied any of her applications, she would have no right to appeal because she's not a party.

Dkt. 50 (Blackstone Decl.) ¶ 5 (Ex. C) at 24. In response, Non-Party Yan's counsel stated, " . . . . she never formally did that, it's true. She's just always been a nonparty." Id. at 27. Judge Koeltl continued,

> So if I denied any relief that she was seeking, there would be no recourse for Ms. Yan because she is not a party, with no right to appeal. She would end up being in the same status in the Court of Appeals: Filing a brief, advising the court that, in her view, there was no jurisdiction in the district court, and the Court of Appeals should sua sponte find that there was no jurisdiction, is that right?

Id. Non-Party's Yan counsel conceded that Judge Koeltl was correct. Id. Judge Koeltl also advised counsel that a reference in a footnote in Non-Party Yan's legal memorandum requesting that she be permitted to join the motion to intervene by non-parties the Proposed Intervenors could not properly be considered a motion to intervene by her. Id. at 28. Nevertheless, in the nine weeks between oral argument on the motions and the district court's issuance of its Opinion and Order on February 18, 2021, Non-Party Yan never filed a motion to intervene in the district court proceeding. A638 at 2 n.2. ("Non-Party Gail Yan has not filed a motion to intervene.").

On February 18, 2021, the district court confirmed the Award and on February 19, 2021 Judgment was entered. A672. On March 19, 2021, the Non-Parties filed a Notice of Appeal. A673. While the Notice of Appeal indicates, inter alia, that the Non-Parties "appeal . . . from the Order denying the Proposed Intervenors' Motion to Intervene and Dismiss or Stay," the Non-Parties had not

filed a motion to intervene, did not move to dismiss (aside from Non-Party Gail Yan), and were not a party to the motion to intervene filed by the Proposed Intervenors.

IV. SUMMARY OF THE ARGUMENT

On February 18, 2021, the district court granted the Union's petition and confirmed the Award which determined the arbitrability of the Union's grievance and clarified the scope of an arbitration brought on behalf of more than 100,000 bargaining unit members. None of the parties to the proceeding seek to challenge the district court's Judgment. Rather, before this Court are two appeals filed by two groups of non-parties to the district court proceeding.

Applying the deferential standard of review applicable to an arbitration award, the district court properly confirmed the Award, which was the arbitrator's final determination of the arbitrability of and his jurisdiction over the Union's grievance. The Award was final, consistent with this Court's case law, and ripe for confirmation, because it determined with finality the bifurcated issues of arbitrability and jurisdiction jointly submitted by the parties to the Arbitrator.

The Proposed Intervenors and the Non-Parties, a handful of individuals, raise a number of irrelevant arguments before this Court in an attempt to overturn the district court's Judgment. First, the Non-Parties seek to create a jurisdictional issue where none exists. The proceeding before the district court was one arising

under Section 301 of the LMRA and Section 1 of the FAA. The finality of the April 2020 Arbitration Award was a precondition to the confirmation of the Award, see 9 U.S.C. § 10(a)(4), but that precondition goes to the merits of the claim, not to the court's subject matter jurisdiction. Second, the Non-Parties incorrectly argue that the district court should have applied a de novo standard in reviewing the Award, rather than the deferential standard applicable to review of an arbitration award. Because the parties' clearly and unmistakably delegated the question of arbitrability to the Arbitrator, the district court correctly applied the deferential standard for review. Third, the Non-Parties attempt to argue that the Union cannot represent former employees in the Union's arbitration, while failing to acknowledge that the Union is the federally-certified, exclusive bargaining agent and has the exclusive authority to pursue claims under the CBA on behalf of bargaining unit members that arose during their employment. Fourth, the Non-Parties ask this Court to rely on irrelevant state court decisions, to which the Union was not a party, that improperly decided issues of the Arbitrator's jurisdiction and arbitrability. Fifth, the Non-Parties make a number of arguments, including abstention and issue preclusion, that were never raised below, and therefore, should not be considered by this Court. Finally, the Non-Parties ask this court to reverse the district court's denial of their request to stay confirmation, where there is no basis whatsoever for staying the proceeding, in particular where the pending

arbitration, which is nearing conclusion, concerns more than 100,000 current and former employees, in which the Union, as the federally certified collective bargaining representative, has pursued their wage and hour claims under the CBAs.

The district court correctly denied the Proposed Intervenors' motion to intervene, as none of them have standing to intervene in a proceeding in which only the Union and Respondent Employers were the parties. Moreover, the Proposed Intervenors have not alleged that their interests would be impaired, but simply a personal preference to pursue their claims in another forum.

In addition to their claims lacking in merit, the Non-Parties also lack standing to appeal. Non-Party Yan cannot challenge an Award issued in a proceeding in which she was not a party and, particularly where she consciously chose not to move to intervene in the proceeding below, and in which she lacks standing to appeal the district court's judgment. Likewise, the Guzman Non-Parties, who were explicitly excluded by the Award, are not bound by the district court's Judgment for purposes of standing to appeal, and, moreover, never participated in the district court proceeding. The Guzman Non-Parties cannot show they have an interest affected by the judgment, because they were excluded and thus, have no legal interest in the Judgment entered below.

Finally, the district court correctly denied, as meritless, a motion, in the alternative, for a stay of the confirmation proceeding, as there is absolutely no

basis on which to stay a proceeding which would only serve to delay the resolution of claims brought on behalf of tens of thousands of bargaining unit members. In any event, at this late date, the arbitration has already proceeded to the merits phase and an award is expected imminently.

ARGUMENT

V. STANDARDS OF REVIEW

"'A federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law.'" A&A Maint. Enter., Inc. v. Ramnarain, 982 F.3d 864, 868 (2d Cir. 2020) (internal citation omitted). The Court reviews "'a district court's decision to confirm an arbitration award de novo to the extent it turns on legal questions, and. . . review[s] any findings of fact for clear error.'" Id.

A district court's denial of a motion to intervene is reviewed for abuse of discretion. R. Best Produce, Inc. v. Shulman-Rabin Marketing Corp., 467 F.3d 238, 240 (2d Cir. 2006).

A district court's denial of a motion to stay the proceedings is reviewed for abuse of discretion. AEP Energy Services Gas Holding Co. v. Bank of America, 626 F.3d 699, 719 (2d Cir. 2010).

VI. THE DISTRICT COURT PROPERLY CONFIRMED THE AWARD

A. THE AWARD IS FINAL FOR PURPOSES OF CONFIRMATION

The Non-Parties argue that the Award was not final for purposes of confirmation because it did not decide liability and damages, but the Non-Parties apply the wrong standard for finality. Non-Parties Mem. at 22-23. The district court correctly found that the Award was final for purposes of confirmation and no party to this proceeding disputes that conclusion. A655. The parties to the arbitration, the Union and Respondent Employers, "agreed that two threshold issues relating to the scope of the arbitration warranted bifurcation and should be submitted for final resolution by the Arbitrator." Id.

In order for an award to be final, and not interlocutory, it must resolve with finality the issue presented by the parties to the arbitrator. See Corp. Printing Co. v. N.Y. Typographical Union No. 6, No. 93 Civ. 6796 (Sotomayor, J.), 1994 WL 376093, at *4 (S.D.N.Y. July 18, 1994) ("It is well-settled in this Circuit that a court should restrict its review to awards where the arbitrators 'resolve finally the issues submitted to them...'") (quoting Michaels v. Mariforum Shipping, S.A., 624 F.2d at 414 (2d Cir.1980)); see also Ward v. Ernst & Young, LLP, Nov. 19 Civ. 6667 (Koeltl, J.), 2020 WL 3428162, at *6 (S.D.N.Y. June 23, 2020) (arbitration award not final where arbitrator panel "may still revisit" its ruling).

Contrary to the Non-Parties' assertion, an award need not resolve all issues pending in an arbitration to be confirmable. See Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986) (Where an arbitration award "finally and conclusively disposed of a separate and independent claim," it "may be confirmed although it does not dispose of all the claims that were submitted to arbitration."); see also Ward v. Ernst & Young U.S. LLP, 2020 WL 3428162 at *6 ("If 'arbitrators make an interim ruling that does not purport to resolve finally the issues submitted to them, judicial review is unavailable.'") (quoting Michaels v. Mariforum Shipping, S.A., 624 F.2d at 414). "In keeping with the purpose of arbitration, the Second Circuit has 'encouraged district courts to confirm separable arbitration awards, even where the petition to confirm is brought prior to the conclusion of all arbitration proceedings between two parties.'" Andrea Doreen, Ltd. v. Bldg. Material Local Union 282, 250 F. Supp. 2d 107, 116 (E.D.N.Y. 2003) (quoting Compania Chilena De Navegacion Interoceanica v. Norton, Lilly & Co. Inc., 652 F.Supp. 1512, 1515 (S.D.N.Y. 1987)).

An arbitrator issues a "'final, albeit interim award'" "'where the parties agree to submit to arbitration part of their dispute, with the intent that the arbitrator's decision be a final determination on the issue submitted.'" Pfizer Inc. v. ICWUC/UFCW Local 95C, No. 13 Civ. 1998 (AJN), 2014 WL 1275842, at *4 (S.D.N.Y. Mar. 24, 2014) (quoting Corp. Printing Co. v. N.Y. Typographical

Union No. 6, 1994 WL 376093, at *4 (S.D.N.Y. July 18, 1994); see also Trade & Transport, Inc. v. Natural Petroleum Charterers Inc., 931 F.2d 191, 195 (2d Cir. 1991) ("[I]f the parties agree that the panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so. [And] once [they] have finally decided the submitted issues, they are, in common-law parlance, "functus officio," meaning that their authority over those questions is ended."); Andrea Doreen, Ltd. v. Bldg. Material Local Union 282, 250 F. Supp. 2d at 112 (confirming an award where "'[t]here is nothing in the record that even remotely suggests that the parties and the [Arbitrator]... believed that the [Arbitrator's] decision on liability would be anything less than final'") (punctuation in original) (quoting McGregor Van De Moere, Inc. v. Paychex, Inc., 927 F.Supp. 616, 618 (W.D.N.Y.1996).

The Non-Parties argue that the Award is not final because it was not a determination of all claims in the arbitration, but that is not the standard for finality. The Non-Parties' reliance on Kalyanaram v. Am. Ass'n of Univ. Professors at the N.Y. Inst. of Tech. is misplaced, because that decision does not contradict this Court's prior decisions which permit an interim award to nonetheless be final for purposes of confirmation, even if it does not determine liability and damages. In Kalyanaram, the arbitrator's award "constituted the final decision of the arbitrator on whether Kalyanaram's termination was justified"

which was the issue submitted to the arbitrator. 742 F.3d 42, 51 (2d Cir. 2014). Just as here, the Arbitrator's Award constituted his final decision on the issues of jurisdiction and arbitrability which were bifurcated by the parties and will not be revisited again. Similarly, Offshore Expl. & Prod., LLC v. Morgan Stanley Private Bank, N.A., 626 F. App'x 303 (2d Cir. 2015) is entirely consistent with the authority relied upon by the district court. Like Offshore, the Non-Parties' "conception of finality is too narrow." See 626 F. App'x at 307. The Award here resolves "with finality the issue that the parties submitted for arbitration" namely important questions on the scope of the arbitration. Id.

> Such an award is not 'interim' in the sense of being an 'intermediate' step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties' rights in the [arbitration], pending a final decision on the merits.

Id. (quoting S. Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mex. City, 606 F.Supp. 692, 694 (S.D.N.Y.1985) (Weinfeld, J.). The district court's decision is entirely consistent with its decision in Mitsubishi Heavy Indust., Ltd. v. Stone & Webster, Inc., No. 08 Civ. 00509 (JGK), 2009 WL 3169973, at *5, where the parties did not agree to submit a discrete issue for resolution and it was clear that both liability and damages were pending before the tribunal.

The Non-Parties' argument that the district court erred by relying on language from the CBA to assess finality are unavailing. Non-Parties Mem. at 23-24. The district court correctly found that "[i]t is plain the CBA and the 2015

MOA" intend that matters put to the arbitrator are to be final. A658. The Non-Parties ask this court to view a later-added provision providing for the arbitration of statutory claims as a standalone provision without reference to the rest of the CBA. Non-Parties Mem. at 23-24. To do so would contradict the plain language of the CBA and the intent of the parties to view the CBA, including amendments, in its entirety. The parties' use of the word "exclusively" in the provision providing for arbitration of statutory claims refers to arbitration as the exclusive forum for resolution of these claims, not to suggest that the CBA, including the grievance and arbitration provision, does not apply to them.

The district court's conclusion that the CBA intends matters presented to the arbitrator to be final is not inconsistent with this Court's non-precedential, summary order in Agarunova v. Stella Orton Home Care Agency, Inc., 794 F. App'x 138 (2d Cir. Feb. 24, 2020), which is distinguishable for a number of reasons. First, in Agarunova, the Court was not presented with the question of whether arbitrability was for the court or arbitrator to determine, since the district court had no opportunity to decide that issue. Id. Second, Agarunova concluded that the arbitration of statutory claims did not become part of the CBA until 2015, but not that the CBA's underlying grievance and arbitration procedure was inapplicable to statutory claims brought under the 2015 MOA. See id. Third, Agarunova did not involve and does not affect the Union's right to bring claims on

behalf of former employees and arbitrate them under the collective bargaining agreement. 794 F. App'x at 139-40. Fourth, the Union was not a party to Agarunova.

As the district court concluded, "the question of whether the Arbitrator's jurisdiction extended to former employees' statutory claims is a question of arbitrability, and the CBA delegated such questions to the Arbitrator." A670. Given that delegation of authority to the arbitrator, the Court should, as the district court did, apply the highly deferential standard of review accorded an arbitration award, as discussed further below. See A671.

B. THE QUESTION OF SUBJECT MATTER JURISDICTION IS NOT BEFORE THIS COURT AS FINALITY GOES TO THE MERITS OF THE PETITION TO CONFIRM

Finality was a defense to have been raised by Respondents, but Respondents waived that defense by not raising it. Non-Party Yan argued before the district court that she did not have to be a party to raise a question as to the court's subject matter jurisdiction. Dkt. 50 (Blackstone Decl.) ¶ 5 (Ex. C) at 27. The Non-Parties' characterization of finality as going to the court's subject matter jurisdiction is incorrect as a matter of law. Non-Parties Mem. at 20-22.

The Supreme Court has termed characterizations of federal statutory provisions as jurisdictional in such circumstances as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on whether the federal

court had authority to adjudicate the claim in such suit. Arbaugh v. Y & H Corp., 546 U.S. 500, 511 (2006) (internal citation omitted); Lotes Co. v. Hon Hai Precision Industry, 753 F.3d 395, 405-406 (2d Cir. 2014) (applying Arbaugh); AEP Energy Services Gas Holding Co., 626 F.3d at 719 (discussing Arbaugh). The Supreme Court's decision in Arbaugh "concern[ed] the distinction between two some-times confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." Arbaugh, 546 U.S. at 503.

In determining whether a statute is jurisdictional or merely provides a merits ingredient, the Court provided this rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue….But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16; see Lotes Co., 753 F.3d at 405 (quoting Arbaugh).

The specific question in Arbaugh was whether the statutory prerequisite for suing a company, in 42 U.S.C. § 2000e(b), that it employ at least 15 employees, "affects federal-court-subject-matter jurisdiction or, instead, delineates a substantive ingredient of a Title VII claim for relief." Arbaugh, 546 U.S. at 503. Applying the quoted rule, the Court held that the 15-employee minimum for

coverage by Title VII is an ingredient of a Title VII plaintiff's claim for relief, not a jurisdictional prerequisite.

Here, as in Arbaugh, there are two expressly jurisdictional bases for the Union's petition to confirm – Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), and 28 U.S.C. § 1331 – and neither of these jurisdictional statutes "specifies any threshold ingredient." Id. at 515. Also as in Arbaugh, the relevant statutory provision here, the finality requirement, appears "in a separate provision that does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." Id. (quotations and citation omitted).

Section 10(a)(4) is the last of four provisions that set out the grounds for setting aside an arbitration award:

> where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

§10(a)(4). The grounds in § 10(a)(1)-(3) for such relief are procurement of an award by corruption, fraud or undue means, evident partiality or corruption in an arbitrator and misconduct or misbehavior by an arbitrator in the conduct of the arbitration proceeding. None of these relate to a court's subject matter jurisdiction; rather, each simply states a ground for vacating an award, that is, a merits ingredient, on a claim over which the court already has subject matter jurisdiction by virtue of Section 301(a) and/or § 1331. That finality appears in Section 10(a) in

a list of circumstances where every other entry is non-jurisdictional further undermines any contention that Section 10(a) contains a "clear statement" that Congress intended finality to be a prerequisite to a court's subject-matter jurisdiction.

Except for Mason Tenders Dist. Council of Greater N.Y. & Long Island v. CAC of N.Y., Inc., 46 F. Supp.3d 432, 435-36 (S.D.N.Y. 2014), none of the cited cases by the Non-Parties, including Mason Tenders, clearly treat an arbitration award's lack of finality as depriving the court of subject matter jurisdiction. See, e.g., General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co., Inc., 372 U.S. 517, 520 (1963) (observing only that if the award were not final and binding, "no action under § 301 to enforce it will lie."). Moreover, none of the cases cited offer the slightest rationale or explanation for why the FAA finality requirement might be jurisdictional rather than simply an ingredient of the merits.

Accordingly, Proposed Intervenors have failed to establish that any alleged lack of finality would deprive this Court of subject matter jurisdiction.

C. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ANY QUESTION OF ARBITRABILITY WAS TO BE DETERMINED BY THE ARBITRATOR AND NOT BY THE COURTS

1. The Applicable Legal Standard Applied by the District Court

Under the applicable deferential standard of review for a labor arbitration award, "a court's role, is 'simply to determine whether the arbitrator acted within

the scope of his authority as defined by the collective bargaining agreement.'" A663 (quoting New York City & Vicinity Dist. Council of United Bhd. of Carpenters & Joiners of Am. v. Ass'n of Wall-Ceiling & Carpentry Indus. of New York, Inc., 826 F.3d 611, 618 (2d Cir. 2016). "'Just as a court may not decide a merits questions that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.'" A665 (quoting Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019).

2. The Non-Parties Incorrectly Argue that the District Court Should Have Applied a De Novo Standard

The Non-Parties incorrectly argue that the district court should have applied a de novo standard in reviewing the question of arbitrability decided by the arbitrator. Non-Parties Mem. at 43-44. The Non-Parties rely on First Options of Chicago, Inc., 514 U.S. 938, 942-44 (1995) in support of their argument, but that case requires application of a de novo standard only where it is not clear and unmistakable that the parties have delegated the question of arbitrability to the arbitrator. Where there is "clea[r] and unmistakabl[e]" evidence that the parties delegated the question of arbitrability to the arbitrator, a district court applies the deferential standard requiring that the court "will set that decision aside only in very unusual circumstances" (i.e. corruption, fraud, or undue means; arbitrator exceeded his powers). First Options of Chicago, Inc., 514 U.S. 938, 942-44

(1995); Nicosia v. Amazon.com, 834 F.3d 220, 229 (2d Cir. 2016) ("The question of whether the parties have agreed to arbitrate, i.e., the "question of arbitrability," is an issue for judicial determination *unless the parties clearly and unmistakably provide otherwise*.") (emphasis added). Here, the CBA clearly and unmistakably provides that "arbitrations occur pursuant to AAA Rules, including AAA Rule 3(a), which delegates questions of jurisdiction and 'arbitrability' to the Arbitrator." A664. "Courts in this Circuit have recognized that when 'parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability,' such as the AAA Rules, 'the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.'" A667 (quoting Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005). Accordingly, given the clear and unmistakable evidence demonstrated through the parties' incorporation of the AAA Rules in the CBA, the district court applied the appropriate level of review of an LMRA arbitration award which is "'narrowly circumscribed and highly deferential.'" A663 (quoting A&A Maint. Enter., Inc. v. Ramnarain, 982 F.3d 864, 868 (2d Cir. 2020).

D. IN APPLYING THE DEFERENTIAL STANDARD OF REVIEW, THE DISTRICT COURT CORRECTLY CONFIRMED THE AWARD

1. The District Court Correctly Concluded that the Award Drew Its Essence from the CBA

Neither the Proposed Intervenors nor the Non-Parties have presented any reason to question the district court's application of the highly deferential standard in reviewing an arbitration award. As the district court concluded, "the Arbitrator's conclusions are more than his own brand of 'industrial justice.' A668 (quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987). In Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016) this Court explained:

> [A] federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law. . . . Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (the "LMRA"). We must simply ensure that the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.

Here, as the district court noted,

> given the absence of temporal limitations in the CBA or 2015 MOA . . . [the] [c]ourt [could] not say that the Arbitrator's finding that claims

> based on violations of the Covered Statutes that occurred prior to the 2015 MOA's effective date were arbitrable either failed to draw its essence from the CBA or was outside the scope of his authority.

A668. The Arbitrator concluded that the Union's entire grievance was arbitrable and that he had jurisdiction over the Union's wage and hour grievance irrespective of whether some claims covered by the grievance related to employees whose employment terminated prior to the effective date of the 2015 MOA. A87. As the district court concluded, the Arbitrator acted within the scope of his authority in reaching this conclusion and followed the plain language of the contract. See A668. Therefore, the district court properly granted the Union's petition to confirm the Award.

2. The District Court Correctly Concluded That the Union as Exclusive Bargaining Agent Had Authority to Enter Into CBAs On Behalf of its Bargaining Unit Members

The Non-Parties' attempt to argue that the Union cannot represent former employees in the Union's grievance and arbitration. Non-Parties Mem. at 33. As the district court described, this argument "misconceives the relationship between a Union and its bargaining unit members and oversimplified the CBA at issue." A668-669. The Union is the federally-certified, exclusive bargaining agent of the employees covered by the CBA and has the exclusive right to pursue claims under the CBA concerning any employee that arose during that employee's time in the bargaining unit. See A32. The Non-Parties cannot prevent the Union from

pursuing claims on behalf of current and former bargaining unit members, which it has already done and continues to do. In any event, the Non-Parties and Proposed Intervenors combined represent only eleven former employees, of which six were expressly excluded from the Award (Hichez, Acosta, Carrasco, Guzman, Mejia Herrera, Panama Rivas) and thus, not affected by it. This handful of employees seek to disrupt an arbitration on behalf of more than 100,000 current and former bargaining unit members, which has continued to proceed during the pendency of this appeal.

E. THE STATE COURT CASES ARE NOT RELEVANT TO THIS COURT'S REVIEW

The state court decisions invoked by the Non-Parties have no bearing on this proceeding. Non-Parties Mem. at 37-40. First, to the extent the state court cases cited by the Non-Parties determined questions of the Arbitrator's jurisdiction, they improperly did so. None of the state court cases determining issues of arbitrator jurisdiction and/or arbitrability had any jurisdiction to do so, since, pursuant to the CBA's delegation clause, it was for the Arbitrator, not the state courts, to determine questions of his jurisdiction and arbitrability. See Section VI.C supra. To the extent the Non-Parties argue that the Court should "abstain, based on principles of federalism and comity," that argument was not raised below and should not be considered by this Court. Non-Parties Mem. at 49. Nevertheless, it was the state courts which should have refrained from deciding the issue that the

parties expressly delegated to the Arbitrator and which, as a matter of federal labor law, was, therefore, not for them to decide. In any event, the Non-Parties have not met any of the criteria for abstention by a federal court, in particular, where the applicable substantive law is federal. See Woodford v. Community Action Agency of Greene County, Inc., 239 F.3d 517, 523 (2d Cir. 2001) ("Plainly, '[w]hen the applicable substantive law is federal, abstention is disfavored.'") (internal citations omitted).

To the extent the Non-Parties argue that issue preclusion bars Respondent-Employers from submitting an arbitrability determination to the Arbitrator, the Court should decline to consider that argument, as it was not raised below. Non-Parties Mem. at 45. The Non-Parties raised other preclusion doctrine arguments below, but those, as the district court noted, are "affirmative defenses and not jurisdictional bars" and, in any event, any arguments raised were without merit. A659. The Union was not a party to prior litigations, nor was it in privity with the Respondents. See A660.

The state court decisions cited by the Non-Parties affect a handful of employees in total, some of whom are not even governed by 1199 collective bargaining agreements. See, e.g., Konstantynovska v Caring Prof'ls, Inc., 172 A.D.3d 486, 487, 103 N.Y.S.3d 364 (1st Dep't 2019) (case involving a different union and collective bargaining agreement). These cases, to the extent they

involve plaintiffs who were 1199 bargaining unit members (i) only concern individual former employees who had terminated their employment prior to the Union's 2015 MOAs with Respondents; (ii) do not apply generally to former employees who left employment prior to the 2015 MOAs as none of the decisions were applicable to a putative class; and, perhaps most importantly, (iii) do not apply to former employees who terminated employment after the 2015 MOA was effective since the state court decisions acknowledge those employees are bound by the MOA.

Accordingly, the question of arbitrability is properly one for the Arbitrator and was finally decided by him in the pending proceeding between the parties to the CBA (Union and Employers).

VII. THE DISTRICT COURT CORRECTLY DENIED THE MOTION TO INTERVENE

The Proposed Intervenors cannot establish that the district court abused its discretion in finding that Mei Kum Chu, Sau King Chung, Qun Xiang Ling, Epifania Hichez, Carmen Carrasco, Seferina Acosta, Maria Diaz, and Dulce Herrera Palma lacked standing to challenge the Award. A648. The district court also found that the Proposed Intervenors failed to demonstrate that they satisfy the requirements of Fed. R. Civ. P. 24, because each of them "have at minimum failed to demonstrate that their interests would be impaired and are not being adequately represented." Id. at 13.

A. PROPOSED INTERVENORS HAVE NO STANDING TO INTERVENE

"[A]n individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties." Katir v. Columbia Univ., 15 F.3d 23, 24-25 (2d Cir. 1994); see also Bryant v. Bell Atl. Maryland, Inc., 288 F.3d 124, 131 (4th Cir. 2002) ("An individual employee represented by a union . . . generally does not have standing to challenge, modify, or confirm an arbitration award because he was not a party to the arbitration"); Anderson v. Norfolk & W. Ry. Co., 773 F.2d 880, 882 (7th Cir.1985) ("What the employees seek is to overturn an arbitration award made in a proceeding in which they did not participate, and in which they were represented by the [union]. . . . [W]e conclude they are without standing to do so."). None of the limited exceptions to this general rule apply here. See Katir, 15 F.3d at 24-25 (citing Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239, 1244 (7th Cir.1990) (exceptions include employees defending against a suit seeking to vacate an arbitration award favorable to the Union when the Union chooses not to but otherwise acquiesces in the employees' action or where employees state a claim for breach of the duty of fair representation and the challenge or confirmation is integral to the case) and Vosch v. Werner Continental, Inc., 734 F.2d 149, 154 (3d Cir.1984) (noting exceptions include a breach of the

duty of fair representation claim or that 'the grievance procedure was a sham, substantially inadequate or substantially unavailable.')).

The Proposed Intervenors' attempts to call into question this well-settled principle must fail, as they rely on a inapplicable case in which the non-party seeking to challenge the award at issue was another union in a jurisdictional dispute with the union that was party to the arbitration and the award "directly affect[ed] [the other union's] rights" in the jurisdictional dispute. Ass'n of Contracting Plumbers of the City of New York, Inc. v. Local Union No. 2 United Ass'n of Journeyman and Apprentices, 841 F.2d 461, 466-67 (2d Cir. 1988). In holding that the non-party union had standing, this Court expressly distinguished cases in which individual union members, like the Proposed Intervenors here, sought to challenge an award in an arbitration between the employee's union and employer. Id. at 467. The court noted that these cases "reasoned that allowing an individual employee to challenge the arbitration award would undermine the union's ability to pursue grievances on behalf of all its members and would destroy the employer's confidence in the union's authority." Id.

Further, the Proposed Intervenors do not have standing to intervene on behalf of putative class members. To date, no class has been certified in any of the pending actions in which they are named plaintiffs. See Hichez v. United Jewish Council of the East Side, No. 653250/2017, 2020 N.Y. Slip Op. 31676(U), 2020

WL 2747784, at *3 (N.Y. Cty. May 27, 2020) (Freed, J.) (acknowledging that the court's injunctive relief is only binding on named plaintiffs); see also Astil v. Kumquat Properties, LLC, 125 A.D.3d 522 (1st Dep't 2015) (holding that dismissal of class claims does not bind unnamed plaintiffs where class had not been certified). Even assuming they could argue on behalf of a putative class, such arguments are speculative. The Proposed Intervenors' reliance on Irvin v. Harris, 944 F.3d 63 (2d Cir. 2019) is misplaced. First, in Irvin, a class of incarcerated individuals had been certified and the question was whether the named plaintiffs could continue to adequately represent the class when none of them remained incarcerated. The court concluded they could not continue to adequately represent the class because they were no longer inmates and no longer pursuing litigation. Id. at 71. Here, no class has ever been certified and the question of the Proposed Intervenors' adequacy as class representative is not before this Court. If the Proposed Intervenors lack standing themselves, they also lack standing on behalf of a putative class, regardless of whether they could properly represent such a class.

The Proposed Intervenors mistakenly argue in an attempt to confer standing where none exists that the district court "ignored" their status as former employees. Proposed Intervenors Mem. at 13. To the contrary, the district court considered and rejected this argument (in addition to concluding that all of the Proposed

Intervenors' alleged impairment was speculative) given that (i) four of the Proposed Intervenors (Herrera Palma, Acosta, Carrasco, and Diaz) continued to be "Union members at the time the 2015 MOA was executed and took effect;" and (ii) three were expressly excluded from the Award (Hichez, Acosta, and Carrasco). A637 at 16-17. The district court's factual finding that the Proposed Intervenors did not "cease[] working" prior to the effective date of the 2015 MOA is not clearly erroneous because, as the district court noted, they presented no evidence to the contrary. See id. at 10 n.6; see Fed. R. Civ. P. 52(a)(6).

B. PROPOSED INTERVENORS HAVE FAILED TO SATISFY THE REQUIREMENTS OF RULE 24 AS THEY HAVE FAILED TO ALLEGE THAT THEIR INTERESTS WOULD BE IMPAIRED

In denying the motion to intervene, the district court held that the Proposed Intervenors "at minimum failed to demonstrate that their interests would be impaired and are not being adequately represented." A649. The district court found that the Proposed Intervenors' "apparent argument that confirmation of the Award may impair their ability to assert their claims in state court [was] too contingent or remote to be cognizable under Rule 24. A650. The district court recognized that:

> pursu[ing] their claims in the manner they may now wish despite the terms of the CBA or their Union's efforts to pursue their claims on their behalf is not sufficiently direct, substantial, and legally protectable to be cognizable as an interest under Rule 24.

A651.

The Proposed Intervenors presented no evidence that the Union has not been adequately representing them in the pursuit of their claims or that any interest of theirs would be impaired. Indeed, they made no claim to that effect. The Union's pending Arbitration covers the claims of current and former employees and thus, the interests of the Proposed Intervenors are represented by the Union. The Proposed Intervenors' personal preference that their claims not be arbitrated by the Union does not impair their interests or constitute harm. They merely assert a "desire" not to have the Union pursue her claims but assert no facts that would translate that desire into concrete harm arising from the Union's pursuit in arbitration of claims on their behalf.

C. THIS VALIDITY OF THE CBAS' ARBITRATION PROVISION IS NOT BEFORE THIS COURT

The Proposed Intervenors mistakenly suggest that the district court improperly "downgraded" their right to proceed in a judicial forum and improperly invite this Court to review the arbitration provision in the CBAs. Proposed Intervenors Mem. at 15-16. However, the validity of the arbitration provision was not raised below and is not before this Court. In any event, under well-established Supreme Court and Second Circuit law, a collectively bargained arbitration provision which "clearly and unmistakably" requires arbitration of statutory claims must be enforced by the judiciary. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247

(2009) (holding that provision in CBA that clearly and unmistakably required union members to arbitrate statutory claims was enforceable as matter of federal law). Acknowledging a union's "'broad authority . . .in the negotiation and administration of [the] collective bargaining contract,'" the Supreme Court cautioned courts against "interfer[ing] in this bargained-for exchange" where a union likely "agree[d] to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer." Id. at 255-57 (quoting Commc'ns Workers v. Beck, 487 U.S. 735, 739 (1988)). Freedom of contract is, as the Supreme Court recognized, "'one of the fundamental policies of the National Labor Relations Act.'" Id. at 257 (quoting NLRB v. Magnavox Co., 415 U.S. 322, 328 (1974)).

Moreover, recently, the Second Circuit held that an arbitration agreement which "clearly and unmistakably encompasses the plaintiff's statutory claims" is enforceable and that the "clear and unmistakable standard does not reflect disfavor of union-negotiated arbitration agreements." Abdullayeva v. Attending Homecare Services LLC, 928 F.3d 218, 223 (2d Cir. 2019) (emphasis in original). Applying that standard, the court "ha[d] no trouble concluding both that the Union agreed to mandatory arbitration in the CBA on behalf of its members and the arbitration agreement at issue clearly and unmistakably encompasses [plaintiff's] FLSA and NYLL claims." Id.

VIII. THE COURT SHOULD DISMISS NON-PARTY YAN'S APPEAL.

The Court should dismiss Non-Party Yan's appeal because (i) she lacks standing to challenge the Award, which was rendered in an arbitration, to which only the Union and relevant employers were parties, and (ii) she is a non-party who deliberately refused to intervene in the proceeding below and, therefore, lacks standing to appeal the District Court's confirmation of the Award.

"'As a general rule, only parties to a lawsuit, whether from the outset or through intervention, may appeal an adverse judgment.'" Bloom v. F.D.I.C., 738 F.3d 58, 62 (2d Cir. 2013) (internal citations omitted); Official Comm. of Unsecured Creditors or Worldcom, Inc. v. S.E.C., 467 F.3d 73, 77-78 (2d Cir. 2006). This Court has recognized two exceptions to this general rule, neither of which apply to the Non-Parties. First, "'a nonparty may appeal a judgment by which it is bound.'" Bloom, 738 F.3d at 62. The second exception requires non-parties to show they have "'an interest affected by the judgment.'" Id. (internal citations omitted).

A. YAN HAS NO RIGHT TO INTERFERE WITH THE UNION'S AUTHORITY UNDER FEDERAL LAW AS EXCLUSIVE BARGAINING REPRESENTATIVE OF HER INTERESTS UNDER THE APPLICABLE COLLECTIVE BARGAINING AGREEMENT

The Union is the certified bargaining representative of the employees employed by the employers who were respondents in the arbitration. A32 at ¶ 6.

As such, the Union is the exclusive bargaining agent for those employees under federal law. See 29 U.S.C. § 159(a); see also A669 ("As the 'exclusive bargaining' agent for home care employees of the Respondents, the Union had authority to enter into CBAs and subsequent agreements on behalf of its bargaining unit members."). It is undisputed that at all relevant times, the Union was Non-Party Yan's exclusive bargaining agent. See Dkt. 50 (Blackstone Decl. ¶ 7) (Ex. E) (Decl. of Brijesh Shah). In the district court proceeding, Yan conceded that she had been an 1199 bargaining unit member from June 2010 until approximately June 2014. Id. (Blackstone Decl. ¶ 6) (Ex. D) (Aff. of Gail Yan).

As a former bargaining unit member, the Award covers Yan and the Union continues to represent her interests, as well as the interests of approximately 100,000 other current and former bargaining unit members represented by the Union in the arbitration. A644. Even assuming Yan is bound by the Judgment by virtue of her membership in the Union's bargaining unit, only the Union, as the exclusive bargaining representative, can challenge the Award. Katir v. Columbia Univ., 15 F.3d 23, 24-25 (2d Cir. 1994) (per curiam) ("If there is no claim that the union breached its duty of fair representation, an individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties."); U.S. Postal Serv. v. Am. Postal Workers Union, 564 F.Supp. 545, 550 (S.D.N.Y. 1983) (quoting Acuff

v. Papermakers and Paperworkers, AFL–CIO, 404 F.2d 169, 171 (5th Cir.1968) (“‘[i]t would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union membe[r] immediately concerned.’”). Accordingly, the Union is the sole legal representative of the interests of all members of the bargaining unit under the collective bargaining agreement, including Non-Party Yan.

In this case, the parties to the arbitration are the Union and respondent employers, not individual employees like Yan. Because the Union is the exclusive bargaining agent, only the Union could challenge the Award. Individual employees lack standing to do so. Katir, 15 F.3d at 24-25. Yan, an individual employee, cannot be permitted to interfere with the Union’s authority as exclusive bargaining agent, in defiance of 29 U.S.C. § 159(a). To the extent Yan may be dissatisfied with the Union’s representation, her recourse is to pursue an action for breach of the duty of fair representation at the appropriate time, A652, not to appeal the district court’s Judgment confirming the Award, when she was a not a party to the arbitration in which the Award was rendered. See U.S. Postal Serv., 564 F.Supp. at 550 (holding that individual employee was not a “party” to the challenged arbitration proceeding, and therefore had no standing to seek modification of the

arbitrator's award absent a showing that the union breached its duty of fair representation).

B. YAN NEITHER WAS NOR SOUGHT TO BE A PARTY BELOW NOR HAS SHE ANY COGNIZABLE INTEREST IN THE JUDGMENT BELOW

Without filing a motion to intervene and without being afforded leave to intervene, Yan sought dismissal of the Union's petition to confirm the Award and now seeks to appeal the district court's confirmation of the Award. The Award did not reach, in any respect, the merits of the Union's claims on Yan's behalf. It simply decided two "gateway" issues: (i) whether the parties to the applicable collective bargaining agreements and to the arbitration proceeding clearly delegated to the Arbitrator the authority to determine the scope of the arbitration, that is, the issues to be decided by the Arbitrator, and (ii) whether the substantive wage and hour guarantees in the CBA apply to persons like Yan whose employment supposedly ceased in 2014. Because Yan did not seek to become a party below, Yan lacks standing to appeal therefrom.

First, Yan's filing of briefs below without leave of court and her attorneys' questioned participation in oral argument did not make her a party in the district court. Official Comm. Of Unsecured Creditors of WorldCom, Inc. v. S.E.C., 467 F.3d 73, 77 (2d Cir. 2006) (noting an objection in the district court did not make non-party a party); New York by Vacco v. Reebok Int'l, 96 F.3d 44, 47-48 (2d Cir.

1996). And, as noted, not only did Yan fail to move to intervene, she deliberately declined to do so even after the district court pointed out to her attorney the consequence of her inaction.

Second, because the Award and its confirmation by the court below did not finally dispose of the wage and hour claims asserted by the Union on Yan's behalf, Yan cannot be said to be bound by the district court's Judgment that Yan seeks to appeal, as that term is used in the case law. Bloom v. F.D.I.C, 738 F.3d 58, 62 (2d Cir. 2013) (would-be appellant not bound by judgment he would appeal because ruling below "did not directly implicate the merits of Bloom's claims. The District Court made no factual findings and drew no legal conclusions that bore on the merits of Bloom's claims.").

"For similar reasons, [Yan] has also failed to show that [s]he has 'an interest affected by the judgment.'" Id. (quoting Official Comm., 467 F.3d at 78). In Bloom, this Court held that an unnamed putative class member did not have an "interest affected by the judgment" decertifying a class in which the would-be appellant would have been a member. Id. Here, the Judgment simply confirmed the Arbitrator's rulings that he was empowered to decide questions of arbitrability and that the Union could assert a particular claim.

In the district court, Yan could not articulate any reason other than her personal preference as to why any interest of hers would be adversely affected by

confirmation of the Award. As the district court acknowledged, "beyond her stated interest that she 'want[s]' certain named plaintiffs in a parallel suit to 'continue representing' her claims against [her former employer]," Yan failed to "articulate[] any other interests that would be cognizable" in the district court. A654. In the same way as the district court found with respect to the Proposed Intervenors, "[t]he possibility that the Award might make it more difficult for [Yan] to pursue [her] claims in the manner [she] may now wish, despite the terms of the CBA or [her] Union's efforts to pursue [her] claims on [her] behalf, is not sufficiently direct, substantial, and legally protectable to be cognizable as an interest." Id. at 15. Moreover, like the Proposed Intervenors, Non-Party Yan cannot show "that [her] interest in the resolution of [her] claims against the Respondents is not being adequately represented." Id. Non-Party Yan has "not represent[ed] that [she has] attempted to pursue the Union's internal grievance procedures and been rebuffed, or that the Union's representation of [her] claims is inadequate." Id. at 16.

Accordingly, Non-Party Yan may not appeal the Judgment as a non-party and no exception to the general rule applies.

C. THE COURT SHOULD DISMISS THE GUZMAN NON-PARTIES' APPEAL BECAUSE THEY ARE NON-PARTIES WHO ARE NOT BOUND BY THE COURT'S JUDGMENT FOR PURPOSES OF STANDING TO APPEAL

This Court should dismiss the Guzman Non-Parties' appeal because they are non-parties who never participated in the district court proceeding and are not

bound by the court's Judgment for purposes of standing to appeal. The Award explicitly excludes the Guzman Non-Parties. A644 ("the Arbitrator expressly excluded from the Award eight employees [including] Alvaro Ramirez Guzman, Elida Augustina Mejia Herrera, Leiticia Panama Rivas . . ."). Because the Guzman Non-Parties are excluded from the Award, they could not be bound by it, and therefore, they could not be bound for purposes of standing to appeal the February 21, 2021 Judgment. See Bloom, 738 F.3d at 62.

The Guzman Non-Parties also have failed to demonstrate they meet the second exception which requires them to show they have "an interest affected by the judgment." Bloom, 738 F.3d at 62. Because they were excluded by the Award, they have no legal interest in the judgment entered below. As Judge Koeltl concluded with respect to the Proposed Intervenors, their "only 'interest . . . would be their potential entitlement to compensation for potential violations of labor laws or the terms of the CBA" but their "apparent argument that confirmation of the Award may impair their ability to assert their claims in state court is too contingent or remote to be cognizable." A650. Just as the Proposed Intervenors' interest was too contingent or remote for purposes of intervention, likewise the Guzman Non-Parties' interest here is even more speculative, as they are not bound by the Award and failed to even participate in the district court proceeding. Again, because

Guzman Non-Parties are excluded from the Award, they cannot claim that any interest of theirs is affected by the Award's confirmation.

The Guzman Non-Parties did not seek, and were not granted, leave to represent anyone before the district court. In this circumstance, they do not and may not represent anyone on their attempted appeal in this Court. To the extent the Guzman Non-Parties are plaintiffs in pending litigation, they do not represent anyone but themselves in that litigation and cannot represent the interests of putative class members, because no class has been certified in the state action or the federal court proceeding below; indeed, the Guzman Non-Parties have not made any motion to certify a class in either court. A647 n. 7. In any event, putative class members are already represented by the Union in the arbitration, where the Union represents current and former bargaining unit members.

Accordingly, the appeal of the Guzman Non-Parties should be dismissed because they are non-parties who did not appear in the district court proceeding and cannot meet either non-party exception to the general rule barring their attempted appeal here.

IX. THE DISTRICT COURT CORRECTLY DENIED THE MOTION, IN THE ALTERNATIVE, FOR A STAY OF THE CONFIRMATION PROCEEDING AS THERE IS NO BASIS ON WHICH TO STAY THE UNION'S PROCEEDING

The Non-Parties argue that a stay of the district court proceedings was warranted with respect to employees who left employment pre-2015 because of the

Non-Parties' pending litigation.[3] Non-Parties Mem. at 50. The Non-Parties incorrectly argue that this Court should review the district court's denial of the motion for a stay de novo. The case on which the Non-Parties rely is a case in which this Court reviewed the denial of a motion to stay an action pending arbitration. See Mediterranean Shipping Co. S.A. Geneva v. POL-Atlantic, 229 F.3d 397, 402 (2d Cir. 2000). The Non-Parties did not make such a motion. Rather, they moved the district court for a stay of the confirmation proceedings while their state court litigation remained pending. Accordingly, the appropriate standard of review is abuse of discretion. AEP Energy Services Gas Holding Co., 626 F.3d at 719.

The district court did not abuse its discretion in denying a discretionary stay of the district court proceedings where none of the applicable factors for

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[3] To the extent that the Non-Parties also argue that the district court procedurally erred by confirming the Award while their motions to vacate the Award were pending without giving them an opportunity to be heard, that argument is entirely without merit. Non-Parties Mem. at 41. Rather than ask the district court to rule on the motions to vacate, the Non-Parties instead moved to remand those cases back to state court. No. 20-cv-3929-JGK, Dkt. No. 15 (Notice of Motion to Remand). In any event, the district court certified for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), its denial of the motion to remand, and that appeal will be heard in tandem with the present appeal. Guzman v. First Chinese Presbyterian Community Affairs Home attend Corp., No. 20-cv-3929-JGK, 2021 WL 1852038, at *1 (S.D.N.Y. May 7, 2021); see Dkt. 76 (Order providing that appeals be heard in tandem).

determining whether a stay is appropriate were present. See Kappel v. Comfort, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996) (listing factors to be evaluated when considering a motion for a stay).

As an initial matter, the Non-Parties, a handful of employees, do not represent all employees who left employment pre-2015, given that no class has been certified by a state court, and thus, they have no standing to make such a demand on behalf of a group they do not represent. There is absolutely no basis on which to stay this proceeding. The Arbitrator explicitly excluded the Guzman Non-Parties from the Award. Contrary to the Non-Parties' representation, the Award does not violate any state court decision. No prior decision has said anything about the Union's right to pursue the claims of former employees and, consistent with the collective bargaining agreement and federal labor law, the Award held that the Arbitrator has jurisdiction over such claims. The pending arbitration concerns more than 100,000 current and former employees, in which the Union, as federally certified collective bargaining representative, has pursued their wage and hour claims under the CBAs. Neither of the unpublished district court cases cited by the Non-Parties suggest that the district court abused its discretion in denying a stay of the proceedings. See Hausman v. Earlswood Enters., No. 95 Civ. 9088 (JSM), 1996 WL 527335, at *6 (S.D.N.Y. Sept. 16, 1996); Eddystone Rail Co. v. Jamex Transfer Servs., LLC, No. 17 Civ. 1266 (WHP), 2019 WL 181308 (S.D.N.Y. Jan.

11, 2019). Contrary to the cases cited, there is no dispute over whether the parties to the arbitration are bound to arbitrate or a concern that the Non-Parties will not have an opportunity for their claims to be heard. The Non-Parties are not parties to the arbitration proceedings and the Guzman Non-Parties were explicitly carved out of the Arbitrator's Award.

In any event, it is unclear what would be achieved by a stay other than delay of the resolution of the claims of tens of thousands of home care workers in New York City and the surrounding counties. Because the Guzman Non-Parties have been excluded from the Award, confirmation of the Award would have no impact on their claims.

The Non-Parties have not established that any of the factors considered by a court in granting a stay exist. First, a stay would only serve to harm the actual parties to this proceeding, who have a strong interest in the stability and finality of the Award, in particular where the merits of the Union's grievance are already pending before the Arbitrator and an award is expected imminently. A stay would only serve to further delay the resolution of the Union's claims. The interest of a handful of workers cannot outweigh the collective interests of tens of thousands of workers represented by a federally-certified collective bargaining agent seeking to vindicate their claims before an industry-designated Arbitrator. Finally, the

public's interest in the resolution of these claims in one forum, rather than piecemeal resolution, weighs against a stay.

CONCLUSION

Petitioner-Appellee 1199 respectfully requests that this Court dismiss the Non-Parties' appeal for lack of standing and affirm the Judgment of the district court in its entirety.

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New York, New York

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