21-0631-cv(L),
21-0633-cv(CON), 22-1587-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,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR PETITIONER-APPELLEE

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– v. –

GAIL YAN, ALVARO RAMIREZ GUZMAN, ELIDA AUGUSTINA MEJIA HERRERA, LETICIA PANAMA RIVAS, EUGENIA BARAHONA ALVARADO, RAFAELA CRUCETA, VIRTUDES DURAN, WAI KAM LOU, YUE MING WU and CUI YING MAI,

Appellants,

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

Intervenors-Appellants,

PSC COMMUNITY SERVICES, NEW PARTNERS, INC., DBA Partners in Care, STELLA ORTON HOME CARE AGENCY, INC., RICHMOND HOME NEEDS, SUNNYSIDE HOME CARE PROJECT, SUNNYSIDE CITYWIDE HOME CARE, FAMILY HOME CARE OF BROOKLYN AND QUEENS, CARE AT HOME, THE FIRST CHINESE PRESBYTERIAN COMMUNITY AFFAIRS HOME ATTENDANT CORP., AZOR HOME CARE, BUSHWICK STUYVESANT HEIGHTS HOME ATTENDANT, INC., CABS HOMECARE, RIVERSPRING LICENSED HOMECARE SERVICES AGENCY, INC, ST. NICHOLAS HUMAN SUPPORTS CORP., WARTBURG, ALLIANCE FOR HEALTH, INC., REGION CARE, INC., SPECIAL TOUCH HOME CARE SERVICE, INC., RAIN, INC., PRESTIGE HOME CARE, INC., PRESTIGE HOME ATTENDANT, INC., DBA All Season Home Attendant, PERSONAL TOUCH HOME CARE OF N.Y., INC., PRIORITY HOME SERVICES, PREMIER HOME HEALTH CARE, INC., BRONX JEWISH COMMUNITY COUNCIL HOME ATTENDANT SERVICES, CIDNY INDEPENDENT LIVING SERVICES, HOME CARE SERVICES FOR INDEPENDENT LIVING, NEW YORK FOUNDATION FOR SENIOR CITIZENS HOME ATTENDANT SERVICES, INC., COOPERATIVE HOME CARE ASSOCIATES, RISEBORO HOME CARE, INC., FEGS HOME ATTENDANT SERVICES, HOME HEALTH MANAGEMENT SERVICES, INC., SCHOOL SETTLEMENT HOME ATTENDANT CORP., ROCKAWAY HOME ATTENDANT, BRONXWOOD HOME FOR THE AGED, INC., ACCENTCARE OF NY, INC., ISABELLA VISITING CARE, INC., SOCIAL CONCERN COMMUNITY DEVELOPMENT CORP., ABC HEALTH SERVICES REGISTRY, ALLIANCE HOME SERVICES, INC., collectively identified by the Arbitrator as Home Health Care Agencies,

Respondents,

RAMONA DE LA CRUZ, DULCE HERRERA PALMA,

Intervenors.

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JURISDICTIONAL STATEMENT

On March 1, 2022, Petitioner-Appellee 1199SEIU United Healthcare Workers East ("1199" or "the Union") petitioned the United States District Court for the Southern District of New York (Koeltl, J.) to confirm the February 25, 2022 Arbitration Award ("Second Award") of Arbitrator Martin F. Scheinman, A68, 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, which resolved the Union's wage and hour grievance concerning more than 100,000 bargaining unit members and forty-two Respondent Employers and resulted in the creation of a $40 million Special Wage Fund. By Opinion and Order dated June 24, 2022, the district court confirmed the Second Award, and, on June 28, 2022, the district court entered final judgment. A776. No party to the district court proceeding filed a Notice of Appeal.

On July 22, 2022, Eugenia Barahona Alvarado, Mei Kum Chu, Sau King Chung, Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Gail Yan, Qun Xiang Ling, Rafaela Cruceta, Virtudes Duran, Wai Kam Lou, Yue Ming Wu, and Cui Ying Mai ("Appellants") filed a Notice of Appeal purporting to challenge the denial of their motions to intervene and partially vacate the Award, and the district court's confirmation of the Second Award. A777-A778. This Court has jurisdiction over Appellants' appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly determine that Appellants could not challenge the Second Award because the Union was their exclusive bargaining representative and they did not claim a breach of the duty of fair representation and because they were not parties to the arbitration in which said Award was made?

2. Did the district court correctly determine that Appellants lacked Article III standing to challenge the Award because they did not suffer an actual or imminent injury in fact?

3. Did the district court correctly deny Appellants' motion to intervene because they lacked a sufficient interest in the litigation?

4. Did the district court correctly determine that it had subject matter jurisdiction over the petition to confirm the Second Award?

5. Did the district court correctly confirm the Second Award?

STATEMENT OF THE CASE

I. THE COLLECTIVE BARGAINING AGREEMENTS

1199 is the exclusive representative of the Respondent Employers' home health aide employees for purposes of collective bargaining over the terms and conditions of their employment and for enforcement of their rights under applicable collective bargaining agreements. A53 ¶9. 1199 is a party to a collective bargaining agreement with each of the Respondents (collectively, "Agreements" or

"CBAs"). Id. ¶10. All of the Respondents are parties to substantially similar agreements, including the provisions quoted herein. Id.

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.
>
> ****

A53 ¶11 (Ex. B at 28-29).

In or about 2014, the Union and the relevant Employers 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." A54 ¶12. 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.

A54 ¶12 (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.

A54-55 ¶13 (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. A55 ¶14. Following completion of the mandatory mediation process, the dispute could

proceed to arbitration before Mr. Scheinman. A55 ¶14. 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. . . .

A55-56 ¶14 (Ex. D at 9-10).

II. THE GRIEVANCE AND MEDIATION

On January 2, 2019, 1199SEIU filed a 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 against all the employers employing members of those bargaining units. A56 ¶15. As detailed below, the Union and many of those Employers participated in a mediation of the grievance for approximately one year in accordance with the procedures set forth in the CBAs. A56 ¶16. 1199 and the participating Employers reached an impasse at mediation, at which time the Arbitration commenced. A57 ¶17.

III. THE ARBITRATION

The sole parties to the arbitration were the Union, as grievant, and the Employers with whom 1199 had the relevant CBAs, as respondents. None of the would-be appellants here, nor any other alleged members of any of the collective bargaining units represented by 1199, was a party to the arbitration. A622-623. Initially, the parties to the arbitration submitted bifurcated issues pertaining to arbitrability and jurisdiction to the Arbitrator and on April 17, 2020, the Arbitrator issued an award ("First Award") holding, in pertinent part, that:

> 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. I 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 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.

A57 ¶18 (Ex. A at 8, 12). The Arbitrator excluded the following individuals from the First Award in light of rulings in various state courts holding that their wage and hour claims are not subject to arbitration: Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Boris Pustilnik, Maral Agarunova, Epifania Hichez, Carmen Carrasco, Seferina Acosta, and Eugenia Barahona Alvarado. A57 ¶18 n.3.

Following issuance of the First Award on the bifurcated issues pertaining to arbitrability and jurisdiction, the Union petitioned the district court for confirmation of the First Award. A57 ¶19. On February 18, 2021, the District Court confirmed the First Award ("First Confirmation Order"):

> Because the CBA and the 2015 MOA evince a clear consent to arbitrate and delegate questions of arbitrability to the Arbitrator, and because the Arbitrator's Award is sufficient to survive the highly deferential review appropriate for confirmation of LMRA arbitration awards, the [First] Award is confirmed.

A58 (520 F.Supp.3d 588, 608 (S.D.N.Y. 2021).

Following the First Award, the Employers produced extensive discovery pursuant to orders of the Arbitrator dated July 7, 2020 and September 23, 2020 granting the Union's motions to compel discovery, including financial records submitted to the Arbitrator. A58 ¶¶20-22. The Union had requested financial information because some Employers had argued that their potential liability should be limited due to financial constraints. See A92-93. On or about March 26, 2021, the Arbitrator accepted from the parties a joint stipulation of undisputed facts common to all of the forty-two Employers, facts disputed by the parties, and a statement of affirmative and other defenses asserted by the Employers with legal argument and the Union's responses thereto. A59 ¶23. Thereafter, approximately two dozen Employers supplemented these submissions with addenda of additional undisputed and disputed facts, and/or defenses unique to a particular employer and providing individualized undisputed facts as to such Employer's practices, including whether and to what extent their practices and facts differ from the statement of undisputed facts, including submission of documentary evidence. Id. The Union additionally submitted further evidence in support of its grievance, including multiple affidavits from affected employees. Id.

As authorized by the parties, the Arbitrator formulated the issues to be decided as follows:

> 1. Have the Employers violated the Collective Bargaining Agreement by failing to pay employees as required by the New York State Home Care Worker Parity Law ("WPL"), the Fair Labor Standards Act, the New York Labor Law and other applicable federal, state or local wage and hour laws or regulations, by failing to pay a) minimum rates of total compensation required by the WPL, b) overtime pay, c) spread of hours pay, d) pay for interruptions of sleep and meal time on twenty four (24) hour cases, e) travel time pay, and by f) failing to provide requisite statutory wage notices and statements?
>
> 2. If so, what shall be the remedy?

A60 ¶27 (Ex. A at 26-27). On February 25, 2022, the Arbitrator issued the Second Award deciding the merits of the Union's grievance A59 ¶24. As summarized by the Arbitrator:

> Six (6) categories of claims were presented in the arbitration: 1) Claims for minimum pay rates on Medicaid funded assignments pursuant to the New York Home Care Worker Wage Parity Law, 2) Claims for spread of hours premiums under the New York Minimum Wage Order for Miscellaneous Industries and Occupations, 12 N.Y.C.R.R. Part 142) (hereinafter, the "New York Minimum Wage Order), 3) Claims for overtime compensation under the FLSA, 4) Claims for pay for interruptions of sleep and meal periods occurring during 24 hour shifts, pursuant to New York's Minimum Wage Order as interpreted by the New York State Department of Labor, 5) Claims for travel time and pay, and 6) Claims for wage notice violations under New York's Wage Theft Prevention Act, New York Labor Law §§195(1), 195(3).

A59-60 ¶26. As to the first issue, the Arbitrator ruled that:

> [R]equired wages were underpaid to these employees, in varying amounts, during the coverage periods at issue. I recognize not all of the Employers violated the coverage statutes to the same degree or for the same periods of time, and a few of the Employers had no liability at all for claims made under certain of the covered statutes. Nevertheless, I conclude, in general, violations were committed by all of the Employers during their coverage periods, resulting in underpayment of required wages to the affected home health aides.

A60 ¶28 (Ex. A at 28).

The Arbitrator based this conclusion on the Parties' 2015 MOA containing the ADR Provision which had "the goal of ensuring compliance with the wage and hour provisions of the covered statutes." A61 ¶29 (Ex. A at 45). The Arbitrator found that, "required wages were underpaid to these employees . . . during the coverage periods at issue." Id. (Ex. A at 46). The Arbitrator arrived at this conclusion based on "the parties' submissions, including their joint stipulation of facts, addenda to the joint stipulation of facts, evidence of the Employers' pay practices, and assertions made during conference and hearings held during the course of this proceeding." Id.

As to the second issue, the Arbitrator awarded a per capita contribution remedy to provide a mechanism for prompt funding and payment of proven wage claims. A61 ¶ 30 (Ex. A at 48-49). The Arbitrator concluded that "[s]uch a remedy is fair to the individual employees, who will benefit by creation of a fund for prompt recovery of claims" and that payment of a uniform contribution rate was

appropriate "in the interests of arbitral economy, efficiency and stability of the home care industry." Id. at 49.

The Arbitrator explained that he had arrived at the per capita contribution after "considering fully the parties' submissions including employee affidavits submitted by the Union, relevant Employer financial records submitted by virtually all Employers, the level of funding needed to assure fair compensation to the employees, and the financial stability of the industry." A61 ¶31 (Ex. A at 54). The Arbitrator rejected the arguments made by certain of the Employers that their exposure to damages was lower than others due to a higher degree of compliance. A64 ¶34 (Ex. A at 49). The Arbitrator was "convinced their argument [was] outweighed by the overarching interest of the Union and all Employers as a whole in maintaining the viability of the industry and its workforce." Id. The Arbitrator also noted that "neither side would benefit from the added costs and delays inherent in having to conduct thousands of individual hearings at a time when the agencies are facing increased financial pressure from the effects of the pandemic." A116. Balancing a number of factors, including the need to avoid serious disruption of the delivery of essential services, the Arbitrator came "to the inevitable conclusion a per capita contribution greater than two hundred fifty ($250) dollars is not sustainable and will, inevitably, lead to deserving employees failing to recover upon their meritorious claims." A61 ¶31 (Ex. A at 55).

The Arbitrator designed the remedy awarded to address a number of issues he identified. Specifically, the Arbitrator found that, while all the Employers had failed to pay required wages, calculating exact amounts owed to specific employees would be "impractical, if not impossible" and would "require the expenditure of substantially more legal time and expense, while causing employees to miss work to attend hearings." A62 ¶32 (Ex. A at 47). While severity of violation varied, the Arbitrator found that all Employers had liability. A62 ¶32 (Ex. A at 48). While "the amount being required of all Employers is less than what they would face even if their alleged uniqueness was calculated" Ex. A at 50, "such a remedy is fair to the individual employees, who will benefit by creation of a fund for prompt recovery of claims." Id. at 49. The Arbitrator concluded that "[c]ommon sense and the interests of arbitral economy favor a remedy which fairly compensated employees for their losses, while avoiding depletion of resources through years of costly, individual hearings." Id. at 48. The Arbitrator grounded this remedy in the intent of the Parties to adopt a "fair and expeditious process for resolving their disputes." Id. By doing so, the Arbitrator reasoned, the Parties had also "empowered [the Arbitrator] to fashion a remedy which takes into account conditions in the industry and existing realities affecting the Employers and employees alike." Id.

Specifically, the Arbitrator awarded as follows:

1. A Special Wage Fund (hereinafter, the "Fund") shall be created by contributions from the forty-two (42) Employers in this proceeding . . . .

2. The coverage periods for the Employers are as follows:

   Alliance for Health: June 8, 2012 – October 31, 2021

   Chinese-American Planning Council Home Attendant Program, Inc.: April 1, 2008 – October 31, 2021

   First Chinese Presbyterian Community Affairs Home Attendant Corp.: September 2, 2010 – October 31, 2021

   New Partners Inc. d/b/a Partners in Care: July 14, 2011 – October 31, 2021

   PSC Community Services, Inc: July 12, 2012 – October 31, 2021

   United Jewish Council of the East Side Home Attendant Service Corp.: June 14, 2011 – October 31, 2021

   All other Employers: January 2, 2013 – October 31, 2021

3. Within thirty (30) calendar days from issuance of this [Second] Award, each of the Employers shall provide to the Claims Administrator ("Administrator") . . . [specified] information for each home aide in its employ during its coverage period [and through October 31, 2021] . . . .[1]

4. Within sixty (60) calendar days after the issuance of this [Second] Award, each Employer listed in paragraph 1, above, shall contribute the sum of two hundred fifty ($250) dollars for each

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[1] The Arbitrator specifically excluded the following individuals: Alvaro Ramirez Guzman, Elida Agustina Mejia Herrera, Leticia Panama Rivas, Boris Pustilnik, Maral Agarunova, Epifania Hichez, Carmen Carrasco, Seferina Acosta, and Eugenia Barahona Alvarado. A62-63 ¶ 33 n.5 (Ex. A at 52-53, 67).

home aide in its employ during all or part of its coverage period. If an employee worked for more than one (1) employer, each Employer shall be bound to separately contribute two hundred fifty ($250) dollars for that employee. All contributions shall be paid to the Claims Administrator named below. . . .

5. The Fund shall be allocated sixty (60%) percent to 24-hour shift claims and forty (40%) percent to total hours inclusive of 24-hour shifts. A fifteen (15%) percent enhancement shall be added to the 24-hour shifts and total hours for the coverage period ending December 31, 2015, in calculating the amounts to be paid to the employees. . . .

6. [addressing how disbursements will be structured as it related to wages and payroll taxes] . . . .

7. [directing Employers and Claims Administrator to exchange information] . . . .

8. [providing for costs and fees to be calculated and deducted from the Fund] . . . .

9. [giving attorneys 30 days to submit applications for attorneys' fees and expenses to be determined by the arbitrator though noting that the Union has advised they will be returning to the Fund any attorneys' fees awarded to the Union, for disbursement to employees] . . . .

10. In the event there are funds remaining on hand after distribution to employees has been made, those funds shall be deposited to the jointly administered 1199SEIU Home Care Industry Education Fund, which is a benefit fund to which all Employers contribute and which operated for the benefit of educating and training home care employees.

11. Each aide who timely provides a claim form shall receive a minimum of ten ($10) dollars . . . .

12. Employees of Employer who fails to provide data or funding directed by my Award shall not receive payment for the portion of time they worked for such employer, unless or until the data and

> funding is received. The Union may seek provisional remedies before me in order to ensure my Award is not ineffectual, by requesting attachment, undertaking, an increased *pro rata* distribution, or such other relief as may be proper to achieve compliance with my Award by such Employer.
>
> 13. [identifying notice and claim form as Exhibit A] . . . .
>
> 14. [directing methods of notice by Claims Administrator, cut off times for claims to be submitted, and payment method and timeline] . . . .
>
> 15. [appointing Arden Claims Services, LLC, as Claims Administrator] . . . .

A62-64 ¶33 (Ex. A at 50-64).

As individualized hearings for each Employer's specific circumstances would require enormous time and expense, the Arbitrator concluded that it made "no sense to issue an award requiring employees wait several more years before their claims are determined and collection of damages can be attempted." As a result, the Arbitrator concluded that, "in these particular circumstances, a per capita contribution remedy is the only reasonable course." Id. ¶34

As described above, the Union petitioned to confirm the Second Award. The district court granted that petition and confirmed the Second Award and would-be Appellants now to seek to challenge that confirmation. None of the parties to the arbitration proceeding seek to challenge the district court's judgment. Rather, before this Court is an appeal filed by individuals who were neither parties to the

arbitration proceeding nor to the proceeding in the district court to confirm the Second Award.

SUMMARY OF THE ARGUMENT

As a matter of law, none of the Appellants could challenge the Second Award, as each of them (i) lacked a cause of action under the National Labor Relations Act or the Federal Arbitration Act because none of them was a party to the arbitration nor alleged, must less demonstrated, a breach of the duty of fair representation; (ii) did not suffer any injury in fact; (iii) was correctly denied leave to intervene; (iv) was expressly excluded from the Second Award; (v) had continued working beyond 2015 and thus, did not fall in the pre-2015 MOA category as alleged; and/or (v) possessed no wage and hour claims impacted by the Second Award.

The district court correctly denied Appellants' motion to intervene. Individual employees who are represented by a Union do not have a basis to intervene under the National Labor Relations Act, absent an allegation and showing of the breach of the duty of fair representation. With respect to Article III standing, none of them demonstrated an injury sufficient to confer such standing. Lacking an individual entitlement to challenge the Second Award, each Appellant necessarily could not challenge the Award on behalf of anyone else, particularly given that no class was certified either below or in any of the cases in which any of

them are named plaintiffs. Appellants failed to meet the requirements of Federal Rule of Civil Procedure 24, because they lacked sufficient interest for purposes of intervention. Federal Rule of Civil Procedure 71 does not apply because there is no order in this proceeding granting relief to a non-party.

Appellants raise a number of irrelevant arguments before this Court pertaining to the merits of the Second Award in an attempt to overturn the district court's judgment. First, they incorrectly argue that the district court should have applied a de novo standard in reviewing the Second Award, rather than the deferential standard applicable to review of an arbitration award which asks whether an award drew its essence from the applicable collective bargaining agreement. Second, Appellants incorrectly argue that the Arbitrator exceeded his authority by determining the question of arbitrability. Because the parties clearly and unmistakably delegated the question of arbitrability to the Arbitrator, the district court properly confirmed the Arbitrator's resolution of that issue. The state court decisions cited by Appellants have no bearing on the Arbitrator's determination that the Union's pre-2015 claims in its grievance were arbitrable, given that the Union was not a party to any of those cases and given that the present case involves review of an arbitration award issued by an arbitrator.

Appellants incorrectly argue that the district court lacked jurisdiction to decide the Union's petition to confirm the Second Award. The petition to confirm

the Second Award did not challenge in any way the First Award confirmed by the First Confirmation Order, which is the sole subject of the first appeal to this Court. Appellants mistakenly argue that collateral estoppel barred the Arbitrator from making arbitrability determinations. The Court should decline to consider that argument as it was never raised below, but is, in any event, without merit because no state court ever ruled on the questions that were pending before the Arbitrator and the Union was not a party to any state court proceeding.

In reviewing the merits of the Second Award, the district court applied the correct standard which is whether the Second Award drew its essence from the collective bargaining agreement. The district court properly concluded that it did and confirmed the Second Award, which orders the creation and distribution of a Special Wage Fund of close to $40 million to compensate 1199 bargaining unit members.

ARGUMENT

STANDARDS OF REVIEW

The district court's determination that Appellants could not challenge the Second Award because they were not parties to the arbitration and do not even allege that the Union breached its duty to fairly represent them is reviewable de novo, except to the extent that determination is based on a finding of fact, which is reviewable for clear error. Although questions of Article III standing are reviewed

de novo, see Am. Psychiatric Ass'n v. Anthem Health Plans, 821 F.3d 352, 357 (2d Cir. 2016), to the extent that the district court's conclusions with respect to standing were based on findings of fact, those are reviewed for clear error, see A&A Maint. Enter., Inc. v. Ramnarain, 982 F.3d 864, 868 (2d Cir. 2020).

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 factual conclusions regarding subject matter jurisdiction are reviewed for clear error and its legal conclusions as to subject matter jurisdiction de novo. Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2d Cir. 2003).

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.'" A&A Maint. Enter., Inc. v. Ramnarain, 982 F.3d 864, 868 (2d Cir. 2020) (internal citation omitted).

I. APPELLANTS LACKED STANDING TO CHALLENGE THE SECOND AWARD.

A. APPELLANTS LACKED A CAUSE OF ACTION UNDER THE NATIONAL LABOR RELATIONS ACT AND THE FEDERAL ARBITRATION ACT.

None of the Appellants possessed a cause of action to challenge the Second Award under any relevant federal statute and, therefore, lacked any basis to

challenge the Second Award. (While the cases discussed in this Section usually spoke of this issue as one of statutory standing, the Supreme Court and this Court have clarified that the issue is more appropriately described as whether a plaintiff has stated or demonstrated a cause of action under a particular statute. See Am. Psychiatric Ass'n v. Anthem Health Plans, 821 F.3d 352, 359 (2d Cir. 2016), discussing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014)). The National Labor Relations Act provides that the Union "shall be the exclusive representative[] of all the employees in [a certified unit] for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. §159. As the exclusive representative of the employees in the bargaining unit, the Union also had the exclusive authority to determine whether to take a grievance to arbitration or to challenge an arbitration award. See Acuff v. United Papermakers and Paperworkers, AFL-CIO, 404 F.2d 169, 171 (5th Cir. 1968) ("It 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 members immediately concerned."). As individual bargaining unit members, none of the Appellants possessed a cause of action under the National Labor Relations Act to challenge the Second Award, which is an arbitration award rendered in a

proceeding brought by their exclusive bargaining representative. Similarly, only a party to an arbitration proceeding could assert a claim to vacate the Award under the Federal Arbitration Act. See 9 U.S.C. §10(a). It is undisputed that none of the Appellants was a party to the arbitration proceeding.

In Katir v. Columbia Univ., 15 F.3d 23, 24 (2d Cir. 1994), Katir, a research assistant at Columbia University, was fired from employment for falsifying time sheets. Katir's union filed a demand for arbitration challenging her termination, but the arbitrator upheld her termination for just cause. Id. The union did not challenge the arbitration award, but Katir filed a motion to vacate in state court "on the grounds of partiality, corruption, fraud and misconduct on the part of the arbitrator." However, she did not allege the union breached its duty of fair representation. Id. Columbia removed the proceeding to federal court, pursuant to Section 301 of the Labor Management Relations Act, and moved for summary judgment on the grounds that Katir lacked standing to challenge the arbitration award. Id. This Court held that Katir lacked standing to challenge the arbitration award because she was not a party to the union's arbitration and did not claim a breach of the duty of fair representation. Id. at 24-25. Here, as the district court held, Katir "compel[led] the conclusion" that Appellants lacked standing to challenge the Second Award. SPA14. "[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."); Acuff v. United Papermakers and Paperworkers, AFL-CIO, 404 F.2d 169, 171 (5th Cir. 1968) (an individual union member has no right to compel arbitration). 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 Cont'l, 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.')).

Appellants' attempt to call into question this well-settled principle must fail, as they rely on a plainly distinguishable 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 that case, unlike the Appellants here, the Court found that the non-party union did have a substantial interest under Rule 24(a), and, therefore, could intervene as of right for the purpose of moving to vacate. However, in so holding that the non-party union had a right to intervene under Rule 24(a), this Court expressly distinguished cases in which individual union members, like the Appellants 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," a circumstance that did not arise there where the challenger to the award was not a bargaining unit member. Id.

Finally, Appellants argue that they need not allege or show that the Union breached a duty of fair representation in order to challenge the Second Award

because, they argue, the Union had no authority to represent them. ECF 196 at 41. The district court found this argument to be without merit holding that, as the Union "is 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." SPA 17. The district court concluded that, "because the Union had the authority to enter the 2015 MOA and prosecute the arbitration on behalf of the Pre-2015 MOA Employees, under Katir, the [Appellants'] failure to allege a breach of the Union's duty of fair representation in connection with these activities is dispositive on the issue" of the proposed intervenors' ability to challenge the Second Award. Id.

In support of their argument regarding the Union's duty of fair representation, Appellants cite a number of irrelevant cases addressing claims that were based on circumstances occurring after an employee was no longer a member of the bargaining unit. See Williams v. Teamsters Local Union No. 727, No. 03-cv-2122, 2003 WL 22424726, at *2 (N.D. Ill. Oct. 22, 2003) (no duty of fair representation owed when the plaintiff had already become an owner when his union membership was terminated and, therefore, was no longer a member of the bargaining unit); Freeman v. Local Union No. 135, 746 F.2d 1316, 1320 (7th Cir. 1984) (no further duty owed to former bargaining unit member whose termination had been upheld by a final arbitrator's award); Int'l Union v. Vought Aircraft

Indus., No. 09-11210, 2010 U.S. App. Lexis 24398, at *6 (5th Cir. Nov. 29, 2010) (the union would need an employee's consent where his claim arose after he had left the bargaining unit and had become a supervisor, and thus, the union was no longer his exclusive bargaining representative); Zakulski v. Bethlehem Steel Corp., No. CIV–87–173E, 1989 WL 118743, at *5 (W.D.N.Y. Oct. 4, 1989) (no duty of fair representation where the former employee had voluntarily elected to terminate his employment and accept a severance payment thereby relinquishing his rights under the CBA and ceasing to be a bargaining unit member). None of these cases stand for the proposition that the Union cannot represent or pursue the claims of former bargaining unit members whose claims arose while they were members of the bargaining unit. None of these cases prohibit the Union from pursuing the claims of its bargaining unit members, whether they subsequently continued to be in the bargaining unit or not. Furthermore, whether the Union had a duty of fair representation to Appellants is an entirely separate question from whether the Arbitrator had jurisdiction over the Union's claims that the Employers violated the CBA and wage and hour laws during the period of Appellants' employment or that such claims were arbitrable. The Union has an absolute right to pursue the claims of the workers it is federally certified to represent, when, as here, the claims arose during their employment.

B. APPELLANTS LACKED STANDING BECAUSE THEY WERE NOT PARTIES TO ANY CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III AS THE DISTRICT COURT PROPERLY DENIED THEIR MOTION TO INTERVENE.

Appellants cannot establish that the district court abused its discretion in finding that they failed to demonstrate that they satisfy the requirements of Federal Rule of Civil Procedure 24, because the Second Award's "potential impact on their ability to seek class certification in other actions . . . is speculative, remote, and contingent." SPA 24-25.

1. Appellants failed to meet the requirements of Fed. R. Civ. P. 24.

Having already found that Appellants could not challenge the Second Award, the district court also concluded, for "largely the same reasons," that Appellants lacked sufficient interest under Federal Rule of Civil Procedure 24 to intervene in the proceeding before it. SPA 24. To the extent Appellants claimed an interest based on the Second Award's potential impact on their ability to seek class certification in other actions, the district court concluded that "any such interest is speculative, remote, and contingent." SPA 25 (citing Eddystone Rail Co. v. Jamex Transfer Servs., 289 F. Supp. 3d 582, 592-93 (S.D.N.Y. 2018). To the extent Appellants claimed an interest because they asserted that the Second Award resolved their claims for an unsatisfactory amount, the district court correctly concluded that they did not "have a cognizable interest in this action

absent a showing that the Union breached its duties" to them. SPA 25. Obviously, if mere dissatisfaction with the result of an arbitration entitled a bargaining unit member to challenge an award, a union's statutory status as the exclusive bargaining representative of that unit member would be rendered meaningless.

Appellants' argument that their interests are not adequately represented is without merit and their citation of cases in which courts considered the question of a conflict between class members with competing interests is totally inapplicable. ECF 196 at 45-46. Whether Appellants were adequately represented by the Union on the petition to confirm turns on whether the Union beached its duty of representation in the arbitration proceeding. Here, there is no dispute that the Union, the federally certified bargaining agent, properly represents the bargaining units at each of the Employers. Acuff v. United Papermakers and Paperworkers, AFL-CIO, 404 F.2d 169, 171 (5th Cir. 1968) (in reviewing a denial of a motion to intervene in a § 301 action by individual employees, acknowledging the inapplicability of Rule 24 when considering adequate representation, because the union was the exclusive bargaining agent and the right to arbitration was incident to the collective bargaining, not the employment relationship). And no bargaining unit members even allegedly possessed interests adverse to those of Appellants. Thus, Appellants failed to show that the Union did not or could not adequately represent their interests. Appellants' reliance on In re Payment Card Interchange

Fee & Merchant Discount Antitrust Litig., 827 F. 3d 223, 236 (2d Cir. 2016) is totally misplaced. In that case, the Second Circuit rejected a class settlement that unfairly discriminated between two sub-classes, awarding one sub-class upwards of $7.25 billion and the other sub-class only forward-looking injunctive relief from which they were prohibited from opting-out. Id. at 229. As noted above, this proceeding does not involve a certified class. Even if it did, the Second Award does not distinguish between so-called pre-2015 MOA Employees and other bargaining unit members. Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972) concerns whether the court properly permitted intervention of union members in a suit brought by the U.S. Secretary of Labor against a union to set aside a union election under the Labor Management Reporting and Disclosure Act ("LMRDA"). It has absolutely nothing to do with whether the union adequately represented its bargaining unit members. The Second Award does not distinguish between current and former bargaining unit members, so no such alleged intra-class conflict could exist. The Union is not asserting interests of any bargaining unit members that are in competition with any interests of Appellants. Neither of the other cases cited by Appellants are analogous in that neither involved employees qua employees nor union members qua union members. Sierra Club v. Glickman, 82 F.3d 106 (5th Cir. 1996) (case concerning environmental group suing the federal government and the intervention of an industry group); Cohen v.

Brown Univ., 16 F.4th 935 (1st Cir. 2021) (involving divergent interests between college athletes from different teams and time periods).

2. Fed. R. Civ. P. 71 has no application to this case.

Federal Rule of Civil Procedure 71 is not applicable in this case. Rule 71 concerns the enforcement procedure for an order granting relief to a non-party. Specifically, Rule 71 provides, "When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party." Appellants mistakenly argue that Rule 71 somehow enables them to seek enforcement in the court below of orders made in other cases by other courts. Rule 71 does no such thing. None of the cases cited suggest otherwise. In Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977), former plaintiff inmates, who no longer had standing to sue, sought to enforce a prior order of the court on behalf of current inmates. Similarly, in Berger v. Heckler, 771 F.2d 1556, 1565 (2d Cir. 1985), the court considered the applicability of a prior consent decree to future applicants for government benefits. Each of the cases cited in support of this argument concern a court enforcing an order of its own (in all cases consent decrees) in favor of non-parties who benefited from those consent decrees, not, as here, orders of other courts which were not binding on the district court. See, e.g., Calderon v. Wambua, No. 74-cv-4868, 2012 WL 1075840, at *7 (S.D.N.Y. Mar. 28, 2012). Accordingly, the district court properly denied intervention under Rule 71.

C. VARIOUS APPELLANTS CANNOT CHALLENGE THE SECOND AWARD FOR ADDITIONAL REASONS

1. Four Appellants were expressly excluded from the Second Award and thus are not effected by that Award.

Of the thirteen would-be Appellants, four of them (Guzman, Herrera, Rivas, and Alvarado) were expressly excluded from the Second Award ("Excluded Employees"). A62-63 ¶33 n.5 (Ex. A at 52-53, 67). Because the Excluded Employees are excluded from the Second Award, they cannot challenge the district court's confirmation of that Award. See Bloom v. FDIC, 738 F.3d 58, 62 (2d Cir. 2013).

2. Wai Kam Lou continued to be a bargaining unit member through 2016 and is not a pre-MOA employee.

Appellant Wai Kam Lou, continued to work well into 2016 and thus did not fall into the "pre-2015 MOA" category alleged by Appellants. See A639 (Aff. of Bobby Hocson, dated May 1, 2022, ¶3).

3. Virtudes Duran has no claims covered by the Second Award.

Virtudes Duran did not work after August 2010 and, thus, any claims she might have would not be covered by the Second Award, which covers claims arising between September 2, 2010 and October 31, 2020 for her Employer. Therefore, the Second Award had no impact on Duran's potential claims. A639 (Hocson Aff.) ¶4.

4. Yue Ming Wu and Cui Ming Yai appear to have abandoned their appeal.

It appears that Appellants Yue Ming Wu and Cui Ming Yai may have abandoned their appeal as they do not appear to have filed a brief in support of the appeal. See Dkt. 196 at 15 (listing Appellants).

D. APPELLANTS DO NOT REPRESENT OTHER MEMBERS OF THE BARGAINING UNIT AND, THEREFORE, MAY NOT CHALLENGE THE SECOND AWARD ON THEIR BEHALF.

Appellants argue that they have standing to seek relief on behalf of putative class members, but they do not represent any other members of the Union's bargaining unit. ECF 196 at 51. As noted by the district court, no class was certified in any of the pending actions in which any Appellants were named plaintiffs. See SPA 20; see also A643 (Decl. of Kenneth Kirschner ¶12). To the extent Appellants seek a remedy on behalf of a putative class, they have no standing to do so as they do not represent anyone beyond themselves. 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). Lacking both a claim under an applicable federal statute and Article III standing as argued above, they cannot possibly have standing on behalf of a proposed class which they do not yet represent.

None of the cases cited by Appellants suggest otherwise and are not applicable here. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) concerned the question of whether payment and entry of judgment in favor of a named plaintiff mooted the case and terminated the named plaintiff's right to appeal the denial of class certification. Likewise, U.S Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980), decided the same day as Roper, held that an action brought on behalf of a putative class does not become moot upon expiration of the named plaintiff's substantive claim even though class certification has been denied. There is neither a question of mootness nor of class certification raised here. The district court's denial of intervention had no bearing on whether certain of the Appellants can move for class certification in state court (which they have never done). This case concerns an arbitration proceeding brought by the Union, which asserted claims against Respondent Employers that arose during bargaining unit members' employment. Whether or not the Union's arbitration proceeding may have some remote or contingent impact on Appellants' ability to move for class certification, it does not create an interest "relating to the property or transaction which is the subject matter of the action," which is an arbitration on behalf of the Union's bargaining unit members. Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984) (internal citations

omitted). Accordingly, none of the individuals before this Court could challenge the district court's judgment on behalf of themselves or anyone else.

II. THE DISTRICT COURT PROPERLY CONFIRMED THE SECOND AWARD.

A. THE DISTRICT COURT PROPERLY CONFIRMED THE SECOND AWARD INSOFAR AS IT WAS BASED ON THE ARBITRATOR'S PRIOR DETERMINATION OF ARBITRABILITY.

Appellants argue that the Arbitrator exceeded his authority by determining the question of arbitrability. ECF 196 at 26. In the First Confirmation Order, the district court had already concluded that the Arbitrator properly determined the question of arbitrability in the First Award.

The CBA required that grievances be arbitrated and delegated to the Arbitrator the question of arbitrability. 1199SEIU United Healthcare Workers East v. PSC Community Services, Inc., et al., 520 F.Supp.3d 588, 606 (S.D.N.Y. 2021). As the district court noted in the First Confirmation Order, the Appellants:

> Confuse[d] the question of consent to arbitration (namely, did parties consent to arbitrate) with the question of arbitrability (namely, whether the dispute at issue is within the scope of the arbitration agreement). The searching review that the Proposed Intervenor encourages this Court to undertake is not appropriate, because the parties to the CBA–namely the Union and the Respondents–plainly agreed to arbitrate grievances and to delegate such questions of arbitrability to the Arbitrator.

Id. Moreover, the Appellants' focus on consent "misconceive[d] the relationship between a Union and its bargaining unit members and oversimplifies the CBA at

issue." The Union, "[a]s the 'exclusive bargaining' agent for home care employees of the Respondents, . . . had authority to enter into CBAs and subsequent agreements, on behalf of its bargaining unit members." Id. at 607. Having already decided this question in the First Confirmation Order, the district court found this duplicative argument "irreconcilable with the First Confirmation Order and the first jurisdictional award, in which the arbitrator determined that the claims of Pre-2015 MOA Employees were arbitrable." SPA17.

Appellants' repeated invocation of Agarunova v. Stella Orton Home Care Agency, Inc., 794 F.App'x 138 (2d Cir. Feb. 24, 2020) does not call into question the district court's prior conclusions. As the Union has argued previously before this Court, see Dkt. 102 at 22-23, 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. Agarunova, 794 F.App'x at 140. 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.

Appellants argue that the question of arbitrability was for a court, not the Arbitrator, to decide, but the district court, in the First Confirmation Order, found otherwise because the parties "clearly and unmistakably" provided that it was a question for the arbitrator. The CBA clearly and unmistakably provided that "arbitrations occur pursuant to AAA Rules, including AAA Rule 3(a), which delegates questions of jurisdiction and 'arbitrability' to the Arbitrator." 1199SEIU United Healthcare Workers East v. PSC Community Services, Inc., et al., 520 F.Supp.3d 588, 606 (S.D.N.Y. 2021). "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.'" Id. at 607 (quoting Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005).

Appellants are correct that they were not parties to the Arbitration, but that fact does not lead to a conclusion that the Arbitrator exceeded his authority. None of the cases cited by Appellants in support of that argument suggest otherwise. See, e.g., Streamlined Consultants, Inc. v. Forward Financing, LLC, No. 21-cv-10838 (NSR), 2022 WL 766233 (S.D.N.Y. Mar. 14, 2022) (considering a motion by plaintiff to enjoin arbitration proceedings to which they argued they did not consent). The parties to the Arbitration were the parties to the applicable collective

bargaining agreements, the federally certified collective bargaining agent (i.e. the Union) and the Employers. Appellants and their claims were represented by the Union in the arbitration proceeding. The question of their consent to arbitration is neither relevant nor before this Court. Rather the relevant questions concerned the Arbitrator's authority to determine arbitrability (resolved in the First Confirmation Order) and decide the merits of the Union's grievance (which included claims on behalf of Appellants).

B. STATE COURT DECISIONS HAVE NO BEARING ON THE ARBITRATOR'S DETERMINATION THAT THE UNION'S PRE-2015 CLAIMS IN ITS GRIEVANCE WERE ARBITRABLE.

The state court decisions invoked by Appellants have no bearing on the instant case and Appellants wrongly argue that the district court should have applied state law. First, to the extent the state court cases cited by Appellants determined questions of the Arbitrator's jurisdiction, they improperly did so. None of the state courts purporting to determine an issue 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 II(A) supra. Moreover, contrary to Appellants' suggestion, New York state law is consistent with federal law on this very point. Life Receivables Tr. v. Goshawk Syndicate 102 at Lloyd's, 66 A.D. 3d 495, 496 (1st Dep't 2009) ("Although the question of arbitrability is generally an

issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules . . . and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators'") aff'd 14 N.Y. 3d 850, 851 (2010) ("Appellate Division properly concluded that the scope and validity of the parties' arbitration agreement, including issues of arbitrability, are for the arbitration tribunal to determine.").

Thus, as to the question posed by Appellants as to what the New York Court of Appeals would do in the circumstances presented here, that question has already been answered by the Court of Appeals in Life Receivables Tr., 66 A.D. 3d at 496.

Appellants assert that various state court decisions held that Appellants and other bargaining unit members who left employment prior to the 2015 MOA are not bound to arbitrate their claims, but that question was not before the Arbitrator in rendering either the First or Second Award nor before the district court when asked to confirm those Awards. The Arbitrator was empowered by the CBA to determine the question of the arbitrability of the Union's grievance which asserted claims which arose during the employment of more than 100,000 bargaining unit members. The Arbitrator, empowered to determine arbitrability, ruled that the grievance was arbitrable and the district court confirmed that ruling in the First Confirmation Order. Thereafter, the Arbitrator ruled on the merits of the Union's grievance on behalf of these more than 100,000 bargaining unit members. The

question of whether any of the Appellants were required to arbitrate their individual wage claims was not before the Arbitrator or the district court and is not before this Court.

Appellants rely on Donohue v. Cuomo, 980 F.3d 53 (2d Cir. 2020), in support of their argument that state law governs CBAs, but that case involved public-sector employees whose collective bargaining agreements are not governed by the National Labor Relations Act, but rather state law, so that case is totally inapplicable here, where the Employees at issue are governed by private-sector collective bargaining agreements. As the court in Donohue v. Cuomo explained, it applied New York law because the workers at issue in that case were public sector employees with contracts governed by New York State law. Specifically, the court explained:

> the protections of the NLRA are available to private-sector workers, not to state employees. See 29 U.S.C. § 152(2). New York State employees' right to bargain collectively is provided for solely by New York law. See N.Y. Civ. Serv. Law § 203. The CBAs between CSEA and the State are therefore contracts created under and governed by New York law.

Id. at 65. Moreover, the Appellants mistakenly cite Badgerow v. Walters, et al., 141 S. Ct. 2620, 596 U. S. ____ (2022), which held that Sections 9 and 10 of the Federal Arbitration Act do not by themselves create federal jurisdiction. Rather, a federal court must have an independent jurisdictional basis in order to resolve a

petition to confirm or vacate an arbitration award. See id. Here, the Labor Management Relations Act created an independent jurisdictional basis for the Union's petition to confirm the Second Award. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 577 (1960) ("a grievance arbitration provision in a collective agreement [can] be enforced by reason of s 301(a) of the Labor Management Relations Act"); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (acknowledging federal jurisdiction over a petition to confirm a labor arbitration award). "[T]he substantive law to apply in suits under s 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . Federal interpretation of the federal law will govern, not state law." Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, 390 U.S. 557, 559 (1968).

C. THE ARBITRATOR PROPERLY DETERMINED THE MERITS OF THE UNION'S GRIEVANCE WITH RESPECT TO ALL BARGAINING UNIT MEMBERS.

Appellants argue that the Arbitrator exceeded his power by determining the rights of individuals not bound by an arbitration agreement, but the Arbitrator properly determined the rights of the parties to the CBA, namely the right of the Union to bring claims on behalf of its bargaining unit members which arose during their employment. Appellants rely on Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 300 (2d Cir. 1963) in support of their

argument, but that case involved vacatur of an arbitrator's ruling holding a non-party corporation liable for a party's contractual obligations. Id. The Arbitrator in this proceeding did not make any rulings holding a non-party liable for any employer's violation of a collective bargaining agreement. Rather, the Arbitrator ruled that the Union could bring claims on behalf of its bargaining unit members which arose during the period of their employment and decided the merits of the Union's claims against the employers that were parties to the relevant collective bargaining agreements.

The Arbitrator did not exceed his power by deciding the merits of the Union's grievance. As discussed above, the Arbitrator had already determined, and the district court had confirmed in the First Confirmation Order, that he had jurisdiction over the grievance with respect to pre- and post-2015 MOA employees. "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." Nicosia v. Amazon.com, 834 F.3d 220, 229 (2d Cir. 2016) (emphasis added). The parties did so here, namely clearly and unmistakably delegated authority to the Arbitrator to determine arbitrability. The Appellants focus on a number of state court cases, but none of these apply, given the clear and unmistakable delegation of authority to the Arbitrator to determine arbitrability.

D. THE DISTRICT COURT PROPERLY ASSERTED ITS JURISDICTION OVER THE UNION'S PETITION TO CONFIRM THE SECOND AWARD.

Appellants argue that the district court lacked jurisdiction to decide the Union's Petition to Confirm the Second Award because the appeal of the First Confirmation Order remained pending ("First Appeal"), but such argument is entirely without merit. Jurisdiction transfers to the Court of Appeals only with respect to "matters involved in the appeal." See Leonhard v. U.S., 633 F.2d 599, 609 (2d Cir. 1980). A notice of appeal "terminates the district court's consideration and control over those aspects of the case that are on appeal." New York State Nat. Org. for Women v. Terry, 886 F.2d 1339, 1349 (2d Cir. 1989) (emphasis added).

The Union's petition to confirm the Second Award did not challenge in any way the district court's First Confirmation Order (nor did the district court's second confirmation order, which is the subject of the instant appeal, modify, or in any way challenge, the First Confirmation Order). Even if there is overlap in the legal issues dealt with in the First and Second Awards, that did not deprive the district court of jurisdiction. In reviewing the Second Award, the district court did not alter its prior confirmation of the Arbitrator's ruling on arbitrability. Therefore, the appeal from the First Confirmation Order did not deprive the district court of jurisdiction over the petition to confirm the Second Award, even if an appellant here could be said to be a party to the First Appeal.

New York v. U.S. Dep't of Homeland Sec., 974 F. 3d 210, 215 (2d Cir. 2020), cited by Appellants is plainly distinguishable. New York concerned the question of a district court's jurisdiction over a second preliminary injunction motion, when a prior, virtually identical, preliminary injunction granted by the district court was on appeal and had been stayed by the Supreme Court. The district court in New York "undertook to reconsider the very preliminary injunction that was under review in this Court, and simply provided new reasons to justify the preliminary relief itself." Id. at 215. In essence, the district court in New York effectively modified an injunction, the appropriateness of which was already pending before this Court. Here, the district court did not modify the First Confirmation Order in confirming the Second Award, and, thus, New York is not applicable.

E. THE NON-PARTIES INCORRECTLY ARGUE THAT THE DISTRICT COURT SHOULD HAVE APPLIED A DE NOVO STANDARD OF REVIEW.

Appellants incorrectly argue that the district court should have applied a de novo standard in reviewing the Second Award. ECF 196 at 36-37. Appellants have suggested no reason to depart from the highly deferential standard of review for an arbitration award, which provides that a labor arbitration award must be confirmed unless it does not draw its "essence" from the parties' collective bargaining agreement. United Steelworkers of Am. v. Enterprise Wheel & Car

Corp., 363 U.S. 593, 597 (1960). The Arbitrator's ruling on arbitrability, like his ruling on the merits of the Union's grievance, involved interpretation of the CBA. Consequently, the Arbitrator's arbitrability determination was likewise reviewable only for whether it drew its essence from the CBA.

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

Appellants have not presented any reason to question the district court's determination that the Second Award, in its entirety, drew its essence from the collective bargaining agreement. The district court concluded that the Second Award was "thorough, rational, and well-founded," SPA 29, and that "the arbitrator carefully balanced [various] considerations when he fashioned a remedy that resulted in a Fund of more than $30 million for over 100,000 current and former Union members." SPA 30. The district court noted that the Arbitrator determined that the Covered Statutes had been violated and "ordered a per capita contribution remedy to compensate the respondents' current and former employees for these violations. SPA 29. The arbitrator arrived at this remedy "after considering several submissions, including employee affidavits and the respondents' financial records, along with other factors including the financial stability of the home care industry." Id. 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.

Given that the proper standard is whether the Second Award drew its essence from the CBA, the district court's proper application of that standard, and the failure of Appellants to provide any reason to question the application of that standard, the district court's confirmation of the Second Award should be affirmed.

III. COLLATERAL ESTOPPEL DOES NOT APPLY.

Appellants also argue that collateral estoppel barred the Arbitrator from making arbitrability determinations that were already made by a state court. The Court should decline to consider that argument, as it was not raised below. ECF 196 at 37. In any event, as argued above, no state court has ruled on the questions that were pending before the arbitrator, namely (i) whether the Union could arbitrate its grievance concerning 100,000 current and former bargaining unit

members (decided in the First Award); and (ii) the merits of the Union's grievance (decided in the Second Award). Moreover, no state court has ruled on the issue presented here, to wit, whether the Second Award should be confirmed. Finally, collateral estoppel could not possibly apply where the Union was not a party in any of the state court cases.

CONCLUSION

Petitioner-Appellee 1199 respectfully request that this Court affirm the judgment of the district court in its entirety.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the foregoing brief is in 14-point Times New Roman proportional font, and as calculated my word processing software (Microsoft Word), contains 11,178 words, excluding the portions exempted by Fed. R. App. P. 32(f).

Dated: February 7, 2023

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