No. 14-1728

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES DILLON,
Plaintiff-Appellee,

v.

BMO HARRIS BANK, N.A., *et al.*,
Defendants-Appellants,

and

FOUR OAKS BANK & TRUST,
Defendant.

Appeal from Order of the United States District Court for the
Middle District of North Carolina, No. 1:13-cv-00897-CCE (Eagles, J.)

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INTRODUCTION

Plaintiff James Dillon opposes arbitration. But tellingly, he does not deny that he entered into the arbitration agreements that Defendants have invoked. Nor does he assert—as he did below—that Defendants cannot enforce those agreements. As he concedes (Ans. Br. 12), every other district court to rule in the dozen copycat putative class actions his counsel has filed has held that the plaintiffs' arbitration agreements are enforceable (Opening Br. 5 & n.4).

Dillon therefore avoids any mention of the merits of Defendants' requests for arbitration. Instead, he argues that those requests were procedurally improper. The district court had denied Defendants' initial requests based on Dillon's objection that Defendants had not submitted declarations from third parties authenticating his arbitration agreements, even though Dillon did not deny that those agreements were genuine. Defendants then obtained those declarations and renewed their motions to enforce Dillon's arbitration agreements. The district court denied the renewed motions as improper requests for reconsideration of its earlier order. But in doing so, the court disregarded the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, which requires that courts faced with a dispute over the existence of an arbitration agreement permit further factual development rather than foreclose arbitration altogether. Dillon has no explanation for why court after court has concluded that the merits of requests for arbitration must be considered

under these circumstances—without subjecting them to the high bar for motions for reconsideration, as the court below did here.

Moreover, even if Defendants' renewed motions were subject to a heightened reconsideration standard, the district court's denial of those motions was an abuse of discretion. The court considered only one factor—the interest in finality of interlocutory orders. But the court disregarded the much stronger countervailing equities, including the strength of the motions, the public interest in enforcing arbitration agreements, and the prejudice to Defendants. Dillon similarly ignores these factors. Nor does he explain why the third-party authenticating declaration that defendant BMO Harris Bank, N.A. ("BMO Harris") had submitted was not newly available evidence warranting reconsideration. He suggests that BMO Harris might have been able to persuade the third-party lender to provide the declaration in connection with the initial motion to compel arbitration. But he ignores the district court's finding that the lender had refused BMO Harris's request, as well as the fact that the lender could have invoked tribal immunity to resist any subpoena.

In sum, the order below should be reversed. The dozen copycat cases filed by Dillon's counsel have all been sent to arbitration or voluntarily dismissed. The same result should occur here.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION.

Dillon's challenge to this Court's jurisdiction cannot be squared with the plain language of the FAA as well as Supreme Court precedent that Dillon fails to acknowledge, much less refute.

As Defendants explained in opposing Dillon's motion to dismiss this appeal (Dkt. No. 20-1), Section 16(a) of the FAA grants this Court jurisdiction to review the district court's order. Section 16(a) states that "[a]n appeal may be taken from . . . an order . . . refusing" to enforce an arbitration agreement. 9 U.S.C. § 16(a). In other words, "Section 16(a) provides that an appeal *may be taken from any order* favoring litigation over arbitration." *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 135 (4th Cir. 1997) (emphasis by Court). Thus, because Defendants' renewed motions sought arbitration (*e.g.*, DE123, at 2) and the order below denied arbitration (JA437), Section 16(a) provides this Court with appellate jurisdiction.

Dillon nonetheless asserts that the order below is not appealable under Section 16(a) because the district court treated Defendants' renewed motions as "motions for reconsideration." Ans. Br. 2-3. But Dillon is assuming that a district court's *grounds* for denying arbitration are relevant to jurisdiction under Section 16(a). The Supreme Court rejected that assumption in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). In that case, the Supreme Court held that the "clear

and unambiguous terms" of Section 16(a) confirm that "any litigant who asks for a stay [of the action while arbitration is compelled] under § 3 [of the FAA] is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay." *Id.* at 627. Any argument to the contrary, the Court explained, would "conflat[e] the jurisdictional question with the merits of the appeal." *Id.* at 628. But Section 16(a), the Court declared, "unambiguously makes the underlying merits irrelevant, for even utter frivolousness of the underlying request" to enforce an arbitration agreement "cannot turn a denial into something other than 'an order . . . refusing'" such a request. *Id.* at 628-29 (quoting 9 U.S.C. § 16(a)).

Arthur Andersen compels rejection of Dillon's jurisdictional challenge. Whether the court below correctly denied Defendants' renewed motions to enforce Dillon's arbitration agreements under the standard for motions for reconsideration is "irrelevant" to this Court's jurisdiction. *Id.* at 628. All that matters is whether those motions requested arbitration. Dillon does not and cannot deny that they did. Indeed, Dillon's failure to address *Arthur Andersen*—despite Defendants' repeated invocations of it (Opening Br. 3; Dkt. No. 20-1, at 2, 10-11)—is telling.[1]

[1] *Arthur Andersen* also refutes Dillon's concern about serial appeals of successive arbitration motions. Ans. Br. 4-6, 8. In *Arthur Andersen*, the Supreme Court rejected the assertion that its interpretation of Section 16(a) "will produce a long parade of horribles . . . [and] permit[] frivolous interlocutory appeals." 556 U.S. at 629. "Even if these objections could surmount the plain language of the

Nor can Dillon distinguish *Oblix, Inc. v. Winiecki*, 374 F.3d 488 (7th Cir. 2004), which rejected Dillon's jurisdictional argument even before *Arthur Andersen*. In *Oblix*, the defendant appealed the denial of its motion for reconsideration of an order denying its motion to compel arbitration. *Id.* at 490. The plaintiff asserted—as Dillon does here (Ans. Br. 2)—that "the appeal was too late" because the defendant did not appeal the initial order denying the motion to compel arbitration. 374 F.3d at 490. The Seventh Circuit rejected that argument as based on the false assumption that "the appeal must come from the first appealable decision." *Id.* Instead, "each order meeting the conditions for interlocutory appeal may be appealed separately." *Id.* And, because the district court's order "reiterating its refusal to send the matter to arbitration" was an order denying a request for arbitration, the Seventh Circuit explained, the order denying reconsideration was "no less appealable under § 16(a)" of the FAA than the order denying the initial motion to compel arbitration. *Id.*

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statute," the Court explained, it "would not be persuaded." *Id.* That is because jurisdictional rules are supposed to be simple, and "[d]etermin[ing] . . . whether" a party has requested arbitration "is immeasurably more simple and less fact-bound than" alternative approaches, such as Dillon's proposal that this Court also examine whether a renewed motion to compel arbitration meets the different standard for a motion for reconsideration. *Id.* Moreover, the Court made clear that there is no need to distort the FAA's requirements to deter the kinds of hypothetical abuses that Dillon raises here, because lower courts already have numerous "ways of minimizing the impact of abusive appeals." *Id.*; *see also* Opening Br. 30-32.

Dillon tries to distinguish *Oblix* by noting that the district court in that case had invited the defendant to submit a motion for reconsideration. Ans. Br. 7 (citing *Oblix*, 374 F.3d at 490). But the Seventh Circuit's holding was simply that an "order reiterating [the] refusal to send [a] matter to arbitration" is still a denial of a request for arbitration, and thus is "no less appealable" under Section 16(a) of the FAA than the denial of the initial motion. 374 F.3d at 490. Whether the request for reconsideration was invited therefore is immaterial.[2]

Finally, the only case that Dillon cites—*Cozza v. Network Associates*, 362 F.3d 12 (1st Cir. 2004) (cited by Ans. Br. 4-6)—in fact contradicts his jurisdictional challenge. As Dillon himself concedes (Ans. Br. 5), in *Cozza*, the First Circuit exercised jurisdiction over the appeal—even though the defendant in that case was appealing the denial of a successive motion to compel arbitration. 362 F.3d at 14. Indeed, the First Circuit warned that "[r]efusing to allow an appeal [from the denial] of a second motion to compel arbitration"—which is Dillon's position here—has the potential to lead to "wasteful" proceedings, such as "a full trial

[2] Dillon fares no better in attempting to distinguish *Behrens v. Pelletier*, 516 U.S. 299 (1996)—one of the cases cited in *Oblix*—by pointing to factual differences between that case and this one. Ans. Br. 7 n.4. That is because, as the Supreme Court stated in *Behrens* itself, appellate jurisdiction "cannot depend on the facts of a particular case," but "must be determined by focusing upon the *category* of order appealed from." 516 U.S. at 311 (emphasis added; quotation marks omitted). Here, the "category of order" is the denial of a request for arbitration. Section 16(a) of the FAA unequivocally permits an appeal from such orders.

followed by a determination [on appeal from a final judgment] that the matter must be arbitrated." *Id.* at 15 n.1 (quotation marks omitted).

In sum, Section 16(a) of the FAA authorizes this Court to hear this appeal.

II. THE COURT BELOW ERRED BY SUBJECTING DEFENDANTS' RENEWED MOTIONS TO ENFORCE DILLON'S ARBITRATION AGREEMENTS TO THE STANDARD FOR RECONSIDERATION MOTIONS.

A. The District Court's Decision To Apply A Reconsideration Standard To Defendants' Motions Is Reviewed *De Novo*.

Dillon argues that the district court's order should be reviewed only for an abuse of discretion, which is the standard applicable to denials of motions for reconsideration. Ans. Br. 19-20. But Dillon has overlooked the threshold question of whether the renewed motions should have been resolved under that standard in the first place.

That question is a pure question of law that this Court reviews *de novo*. *See, e.g.*, *United States v. Han*, 74 F.3d 537, 540 (4th Cir. 1996). Indeed, the answer turns in substantial part on the district court's interpretations of the FAA and Rule 54, which are also reviewed *de novo*. *See, e.g.*, *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001) (holding that "an issue of statutory construction" is a "pure question of law" subject to *de novo* review). Finally, even if the standard of review were abuse of discretion, an error of law is by definition an abuse of discretion. *See, e.g.*, *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 393 (4th

Cir. 2012). Accordingly, this Court owes no deference to the district court's decision to subject Defendants' renewed arbitration motions to a heightened reconsideration standard.

B. The FAA And An Unbroken Line Of Case Law Required The District Court To Entertain Defendants' Renewed Motions.

In the district court's view, once an initial arbitration motion is denied, even because of an unresolved factual dispute regarding the authenticity of the arbitration agreement, any subsequent request for arbitration is procedurally barred unless the request satisfies a heightened reconsideration standard. That position—and Dillon's defense of it—are inconsistent with the FAA and the numerous decisions permitting renewed motions to compel arbitration under the same circumstances.

Dillon does not deny (Ans. Br. 22) that, when "the making of the arbitration agreement" is "in issue," the FAA contemplates further factual development, including, if necessary, "proceed[ing] . . . to . . . trial." 9 U.S.C. § 4. Instead, he argues that Defendants should have done more at the outset of the case to prove that his arbitration agreements are authentic. Ans. Br. 20-29, 38-47. But as Defendants have explained (Opening Br. 27-30), the FAA does not require the proponent of arbitration to thwart any potential challenge to the existence or authenticity of the arbitration provision in its first motion. Dillon's position simply cannot be squared with the provision in Section 4 of the FAA authorizing a trial if

necessary to resolve these factual issues. As the Tenth Circuit has explained, it would "invite . . . nonsense" if "the party moving for arbitration" must "prove[] the existence of an agreement to arbitrate" in its initial motion before "the FAA's trial guarantee . . . appl[ies]." *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 979-80 (10th Cir. 2014).[3] The FAA thus contradicts Dillon's position.

Dillon's approach of requiring all evidence to be submitted with the initial arbitration motion also contravenes the FAA's objective of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as *quickly and easily as possible*." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (emphasis added). Indeed, frontloading the evidentiary burden would subject Defendants to exactly the kind of "preliminary litigating hurdle" that the Supreme Court has admonished courts not to impose on parties requesting arbitration. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013). The district court's similar position that Defendants had effectively waived their

[3] Dillon tries to distinguish the Tenth Circuit's holding by claiming that there was no factual dispute for the district court to resolve in this case, because Defendants allegedly failed to "raise[] a genuine issue of material fact" in their initial requests for arbitration. Ans. Br. 43-44. But that is simply incorrect; Defendants tendered Dillon's loan agreements containing the arbitration provisions in support of their arbitration motions, and the factual dispute in this case was whether those agreements were genuine. The district court has never purported to resolve that dispute. Indeed, in denying Defendants' renewed arbitration motions, the district court acknowledged that the tendered loan agreements can still be used in the case and that it was "not prohibiting the defendants from relying on these loan agreements in connection with other issues." JA437.

right to arbitration unless they could show a "strongly convincing" reason why they should be permitted to renew their requests for arbitration (JA436) was also inconsistent with the FAA's strong presumption against default or waiver of the right to arbitrate. *See* Opening Br. 28-29 & n.14 (collecting cases).[4]

Nor does Dillon's approach find any support in the case law. He acknowledges that "courts have permitted 'renewed' motions" supported by additional evidence when an initial motion was denied because of a dispute over the existence or authenticity of the agreement to arbitrate. Ans. Br. 22; *see also* Opening Br. 18-22 (collecting cases). But he fails to appreciate that subjecting a

[4] Nor is Dillon's approach required by Rule 54(b), which merely states that a district court may revise its interlocutory orders "at any time" prior to final judgment. Dillon echoes the district court's view that Rule 54(b) allows renewed motions only in "unusual situations." Ans. Br. 34 (quoting JA430). But as Defendants have explained, the rule says nothing at all about the standards for revisiting a prior interlocutory determination, and it is in fact common for parties in this Circuit to be permitted to renew their motions after further development of the factual record. *See* Opening Br. 26 & n.13 (collecting cases). Moreover, the district court's analysis cannot be reconciled with this Court's holding that neither Rule 54(b) nor common-law "doctrines such as law of the case" "limit[] the power of a court to reconsider an earlier ruling." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). Indeed, this Court explained that when the issue at hand "call[s] into question the very legitimacy of a court's adjudicatory authority," the court's "ultimate responsibility . . . to reach the correct judgment under law" is "great[] and . . . unflagging," and should not be overly "tempered . . . by concerns of finality and judicial economy." *Id.* Dillon protests that *American Canoe* is distinguishable because it involved an issue of standing. Ans. Br. 33. But he does not—and cannot—deny that courts also lack "adjudicatory authority" over arbitrable claims. *See* Opening Br. 25 & n.12. Thus, just as in *American Canoe*, the district court's obligation to "reach the correct judgment under law" here was "great[] and . . . unflagging." 326 F.3d at 515.

renewed request for arbitration to a heightened reconsideration standard when the initial request was denied on the basis of an evidentiary dispute is inconsistent with this overwhelming weight of authority, as well as the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

Dillon—like the district court (JA431-32)—purports to distinguish these decisions by pointing out that in many of them the court had expressly denied the initial arbitration motion without prejudice or invited a subsequent arbitration motion after further evidentiary development. Ans. Br. 24-26. But as Defendants have explained (Opening Br. 23-24), the reason that those courts invited further proceedings on the request for arbitration is because that is the procedure that is required by the FAA and prior precedent. As the Third Circuit has explained, when the "arbitrability" of the plaintiff's claims is either not "apparent on the face of the complaint" or the plaintiff "has come forward with enough evidence in response to the motion to compel arbitration to place the question in issue," the "motion to compel arbitration must be denied pending further development of the factual record" and "a renewed motion to compel arbitration." *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 774, 776 (3d Cir. 2013). The district court's failure to allow further proceedings here—which became apparent only when the district court denied Defendants' *renewed* motions—is a further example of the

district court's misapplication of the FAA's procedures, not a basis for distinguishing the numerous decisions that have correctly applied those procedures.

Indeed, the district court's outlier approach is incompatible with the results reached by those other courts. For instance, if that approach were the correct one, then the court in *Bernal v. Southwestern & Pacific Specialty Finance, Inc.*, 2014 WL 1868787 (N.D. Cal. May 7, 2014), should not have compelled arbitration. In *Bernal* (unlike here), the defendant did not tender the applicable arbitration agreement with its initial arbitration request, even though (again unlike here) the agreement was contained in the defendant's own documents. *Id.* at *1 & n.1. Yet the court permitted the defendant to renew its request for arbitration supported by additional evidence, including a copy of the loan documents, and granted the renewed motion on the merits. *Id.* Nor should the court have compelled arbitration in *Goldberg v. C.B. Richard Ellis, Inc.*, 2012 WL 6522741 (D.S.C. Dec. 14, 2012), where the defendant initially submitted an unsigned loan agreement, but was permitted to renew its request for arbitration with a signed copy of the agreement retrieved from the defendant's warehouse. *Id.* at *2. Nor the court in *Stone v. Pennsylvania Merchant Group, Ltd.*, 949 F. Supp. 316 (E.D. Pa. 1996), where the defendant was permitted to renew its request for arbitration with additional materials even though the defendant's initial showing was deemed

"insufficient." *Id.* at 318-19. None of the defendants in those cases would satisfy the heightened reconsideration standard applied by the district court here and defended by Dillon.[5]

Moreover, Dillon still can identify no case—and the district court cited none (JA431-37)—that has departed from the consensus to permit renewed requests for arbitration supported by additional evidence of the existence or formation of the arbitration agreement after an earlier motion was denied because of a dispute over that issue. Dillon purports to identify one such case: the First Circuit's decision in *Cozza*. Ans. Br. 26-28. But the circumstances in *Cozza* are nothing like those in this case or the cases that Defendants have cited. In *Cozza*, the district court had denied the defendant's initial motion to compel arbitration on the merits, holding

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[5] Dillon tries (Ans. Br. 25-26) to distinguish these and the other cases cited by Defendants by claiming that in "many" of them the renewed motion was permitted only after "the moving party requested limited discovery" on the existence of the arbitration agreement. Yet Dillon cites only one case where that occurred, *Stringfield v. GGNSC Tifton, LLC*, 2012 WL 1320165 (M.D. Ga. Apr. 17, 2012). And Defendants have not found any other case that supports Dillon's claim. In fact, in several of the cases, it was the *plaintiff* opposing arbitration who requested discovery in order to substantiate an objection to the tendered arbitration agreement—something Dillon never attempted to do in this case. *See, e.g.*, *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, 2013 WL 5539563, at *1 (N.D. Cal. Oct. 8, 2013) ("Plaintiff opposes the motion [to compel arbitration] and has filed a motion for leave to conduct discovery."); *Griffin v. Yellow Transp., Inc.*, 2007 WL 593632, at *1 (D. Kan. Feb. 21, 2007) ("Plaintiff contends that he cannot fully respond to defendants' motions to compel arbitration without limited discovery on the issue of whether the parties formed a valid and binding contract to arbitrate plaintiff's claims.").

that the claims were outside of the scope of the arbitration provision. 362 F.3d at 13-14. Thus, the *Cozza* defendant's request for reconsideration of that substantive ruling was subject to the standard for motions for reconsideration. *Id.* By contrast, in this and the other cases that Defendants have cited, the district court denied the initial request for arbitration because of an unresolved factual dispute over the existence or formation of the arbitration agreement, and thus never reached the merits of whether the underlying claims were subject to arbitration.

Contrary to Dillon's protest that "this is a distinction without a difference" (Ans. Br. 27), the distinction goes to the heart of this case. When a district court denies a request for arbitration without ruling on whether the claims are arbitrable because the parties dispute the existence of the arbitration agreement, the FAA's procedures and the strong federal policy favoring arbitration permit the party seeking arbitration to renew its request with additional evidence—and even to have a trial to resolve any remaining factual disputes—as numerous courts have confirmed. By contrast, when a court decides the merits of the request for arbitration by ruling that a party's claims are not arbitrable, *Cozza* stands for the unremarkable proposition that the party seeking to revisit that merits ruling must satisfy the traditional standard for reconsideration motions, such as by presenting "newly discovered evidence." 362 F.3d at 16.

Finally, Dillon's attacks on Defendants' conduct distort what actually occurred in this case. Contrary to Dillon's repeated assertions that Defendants strategically chose not to submit additional evidence that Dillon had agreed to arbitrate (*e.g.*, Ans. Br. 22-23, 34, 42-43), Defendants had a good-faith basis for believing that the loan agreements they tendered with their initial motions to compel arbitration were properly submitted. Because Dillon's claims against Defendants all are predicated on and refer to the terms of his loan agreements (JA54-59), Defendants relied on the settled rule that documents incorporated by reference in the complaint are part of the pleadings by operation of Federal Rule of Civil Procedure 10(c). Defendants also relied on the many rulings by courts that, consistent with this rule, have not insisted upon authenticating declarations for such documents.[6] Indeed, several of the district courts in the copycat actions filed by Dillon's counsel have accepted similar loan agreements attached directly to the defendants' arbitration motions without requiring declarations.[7]

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[6] *See, e.g.*, *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 195 n.5 (4th Cir. 2002); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1164 (4th Cir. 1994); *In re Wade*, 969 F.2d 241, 249 & n.12 (7th Cir. 1992); *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991); *Norfolk Fed'n of Bus. Dists. v. Dep't of Hous. & Urban Dev.*, 932 F. Supp. 730, 736 (E.D. Va. 1996).

[7] *See Gunson v. BMO Harris Bank, N.A.*, --- F. Supp. 3d ----, 2014 WL 4472725, at *1 (S.D. Fla. Sept. 10, 2014) ("Defendants have attached the relevant Loan Agreements to their Motions."); *Riley v. BMO Harris Bank, N.A.*, --- F. Supp. 2d ----, 2014 WL 3725341, at *2 (D.D.C. July 29, 2014) ("Although Plaintiff did

To be sure, the incorporation-by-reference rule does not necessarily apply when there is a valid dispute over the authenticity of the attached document. But Defendants had a good-faith basis for arguing that Dillon had not legitimately disputed the authenticity of those agreements. Dillon is the only participant in the action who was a signatory to the loan agreements, and thus was in the best position to know whether the agreements were genuine. Yet he did not deny entering into the loan agreements or submit any evidence or testimony suggesting that the agreements were not genuine. *See, e.g.*, JA168. Indeed, it would have been difficult for Dillon to repudiate the existence of his loan agreements, because he is suing Defendants over the interest terms in those agreements. Instead, Dillon strategically objected to the agreements' admissibility by claiming solely that they were "hearsay" in the absence of authenticating declarations. *E.g.*, *id*. But because

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not attach the loan agreements to her Complaint, they are referenced throughout the Complaint. Moreover, Defendants attached the loan agreements *as exhibits to their motions to compel arbitration* and Plaintiff cites to these exhibits throughout her Opposition to Defendants' motions. Accordingly, it is proper for the Court to consider these agreements in evaluating these motions.") (emphasis added; citations omitted); *Graham v. BMO Harris Bank, N.A.*, 2014 WL 4090548, at *1 (D. Conn. July 16, 2014) (the loan agreements attached to the defendants' motions to compel arbitration were "proper for consideration" because they "are integral to the complaint"). And although it is not mentioned in the court's opinion compelling arbitration, the defendants in the *Elder* copycat action also attached the loan agreements directly to their motions to compel arbitration without any supporting declaration. *E.g.*, Dkt. No. 52-2, *Elder v. BMO Harris Bank, N.A.*, No. 8:13-cv-03043 (D. Md. Dec. 23, 2013), *appeal voluntarily dismissed*, No. 14-1638 (4th Cir. Jan. 14, 2015).

Dillon's technical evidentiary objection was not backed by an actual denial that the agreements were genuine, Defendants reasonably believed that authenticating declarations were unnecessary. *E.g.*, JA172; *see also Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001) ("To establish a genuine issue," the party opposing arbitration must make "an unequivocal denial that the agreement to arbitrate had been made" and produce "some evidence" to "substantiate the denial.") (alterations and quotation marks omitted).[8]

It is even more clear in hindsight that Dillon has never had a genuine objection to the arbitration agreements that Defendants tendered with their initial

[8] Dillon purports to distinguish *Drews Distributing* because its requirement that the party opposing arbitration unequivocally deny having agreed to arbitrate should apply only when the proponent of arbitration has made a prima facie showing that there has been an agreement to arbitrate. Ans. Br. 42. But as noted above, Defendants made that showing by tendering the loan agreements that were incorporated by reference in Dillon's complaint. Other courts confronted with similar coy refusals by plaintiffs to admit or deny having agreed to arbitrate have not insisted that the defendants also provide authenticating declarations. For example, in *Umbenhower v. Copart, Inc.*, 2004 WL 2660649 (D. Kan. Nov. 19, 2004), the court held that the defendants "were not required to authenticate the copy of the arbitration agreement that they submitted" because the plaintiff had referred to the agreement in her complaint and only "vaguely suggest[ed] that she did not sign the agreement" without "aver[ing] that the signature on the documents submitted by defendants is not her signature." *Id.* at *6. The court in *Brisco v. Schreiber*, 2010 WL 997379 (D.V.I. Mar. 16, 2010), similarly rejected the plaintiffs' argument "that a written arbitration agreement is insufficient proof of an agreement to arbitrate merely because it is unaccompanied by a sworn statement." *Id.* at *2. The court explained that "[d]espite Plaintiffs' protests about the lack of a sworn statement, nowhere in Plaintiffs' opposition do the Plaintiffs deny the existence of the agreement to arbitrate." *Id.*

arbitration motions. When Defendants submitted the exact same agreements with their renewed motions, Dillon again did not deny having entered into those agreements and again submitted no evidence or testimony challenging their authenticity. *See* JA330-43, 419-23. Nor does Dillon deny in his appellate brief that the agreements are in fact genuine. In short, Dillon to this day does not deny that Defendants submitted the correct agreements the first time around.

Nonetheless, Dillon claims that he had "good cause" to justify his evidentiary challenge because some payday lenders—not the banks who are defendants here—have allegedly engaged in "abusive and illegal practices." Ans. Br. 38-39. Specifically, he notes that some payday lenders had been buying consumers' "personal and financial information" from "data brokers" so that they can steal money from those consumers' bank accounts under the pretext that the consumers were repaying fictitious loans. *Id.* at 38. This excuse is a complete red herring. Dillon's arguments about alleged misconduct in the payday-lending industry *in general* have nothing to do with the facts and circumstances *in this case*. Here, Dillon knows full well that his loans are not fictitious and that his loan agreements are not "bogus documents." *Id.* at 39. He himself relied on the existence and terms of those documents as the basis for his complaint. And he has never denied that the agreements that Defendants submitted are genuine. Dillon is simply trying to use the parts of the loan agreements that he likes to try to state

claims against Defendants while trying to bar Defendants from invoking the terms of those agreements that he would prefer to ignore.

III. EVEN IF THE RECONSIDERATION STANDARD WERE APPLICABLE, DEFENDANTS' RENEWED MOTIONS SATISFIED THAT STANDARD.

A. Refusing To Consider Defendants' Renewed Motions Would Result In Manifest Injustice.

Dillon concedes that one of the grounds for reconsideration even under the strictest standard would be if denial of reconsideration would result in a "manifest injustice." Ans. Br. 36. And he does not deny that a district court abuses its discretion if it fails to consider the relevant factors to its decision. *Id.* at 36-37. But Dillon has no explanation for why the district court was entitled to overlook key determinants of whether denial of arbitration here would result in a "manifest injustice."

In assessing whether manifest injustice would result, a district court must engage in a balancing test, weighing the equities in favor of granting the request against the potential reasons not to grant the request, such as "concerns of finality and judicial economy." *Am. Canoe*, 326 F.3d at 515. There is no simple definition of "manifest injustice."[9] But the term necessarily requires a balancing of equities

[9] *See, e.g.*, *In re Cusano*, 431 B.R. 726, 734 (B.A.P. 6th Cir. 2010) ("Manifest injustice . . . is an amorphous concept with no hardline definition.") (quotation marks omitted); *Bender Square Partners v. Factory Mut. Ins. Co.*, 2012 WL 1952265, at *4 (S.D. Tex. May 30, 2012) ("There is no general definition of

to determine whether denial of the request "would lead to a result that is both inequitable and not in line with applicable policy." *In re Bunting Bearings Corp.*, 321 B.R. 420, 423 (Bankr. N.D. Ohio 2004).

Here, the district court looked at only one side of the scale—the finality interests which it deemed paramount (JA435-37). The court failed to consider at all the equitable considerations that favored entertaining Defendants' renewed requests for arbitration—including the strength of Defendants' requests, the potential prejudice to Defendants of depriving them of their arbitration defense, or the public interest in favor of arbitration. (In his brief, Dillon similarly focuses solely on the reasons the district court offered for denying relief. Ans. Br. 36-38.)

The district court's refusal to consider both sides of the equation was an abuse of discretion. To begin with, the district court failed to consider the strength of Defendants' motions. Dillon does not deny entering into the tendered loan agreements. And he acknowledges that every other court to have ruled on the merits of the similar arbitration requests in the copycat actions his counsel have filed has compelled arbitration. Ans. Br. 12. It is telling that Dillon does not seek affirmance of the district court's order on alternative grounds, such as by reiterating the substantive objections to arbitration that he raised below (objections

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manifest injustice; rather, courts evaluate whether there has been a manifest injustice on a case-by-case basis.").

that have now been rejected by numerous courts). Indeed, he does not so much as hint in his brief that his claims are not arbitrable. Given the strength of Defendants' right to arbitration, there is no reason why Dillon's case—and only Dillon's case—should be excused from arbitration when there is no meaningful difference between Dillon and any of the other plaintiffs in the copycat actions filed by Dillon's counsel.

The district court also failed to consider the prejudice to Defendants of being deprived of their arbitration defense. Unlike other affirmative defenses, which may be raised at trial if they cannot be resolved on the pleadings or on summary judgment, an arbitration defense would be rendered meaningless if not entertained near the outset of the case. That is because—as this Court has made clear—"'the advantages of arbitration—speed and economy—are lost forever'" if the party seeking arbitration "'must undergo the expense and delay of trial.'" *Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988) (quoting *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984)). Thus, as Defendants have explained, when an arbitration motion is denied because of an evidentiary dispute, the only way to raise that defense is in a renewed motion. *See* Opening Br. 14.

Another relevant factor that the district court overlooked—and Dillon ignores—is the public interest, which strongly favors enforcing arbitration

agreements. Not only does the FAA embody a strong federal policy in favor of arbitration, but enforcing arbitration agreements also benefits the public by reducing docket congestion, which was one of Congress' principal reasons for enacting the FAA. *See* Opening Br. 35 & n.19.[10]

Moreover, as Defendants have explained (Opening Br. 34-36), the district court failed to give adequate weight to the strong federal policies favoring arbitration and disfavoring waiver of the right to invoke arbitration. The court below paid lip service to the federal policies in favor of arbitration, saying that they "are relevant and have been considered." JA436. But its reasoning contradicts that assertion. The court improperly minimized the importance of Defendants' requests for arbitration merely because they are nonsignatories to the arbitration agreements, saying that "whether there is a potential arbitration is, as to the defendants, just a matter of chance and not a bargained-for right." JA435. The district court thus was mistaken as a matter of federal law: The Supreme Court has

[10] Although Dillon purports to represent a class of consumers, his putative class allegations cannot justify keeping his action in court. The Supreme Court has held that "there is no . . . entitlement" to "class proceedings" that could "invalidat[e] private arbitration agreements." *Am. Express*, 133 S. Ct. at 2309-10. And it is obvious that Dillon's putative class could not be certified. To name only one defect with the putative class, the proceedings below confirm that whether absent class members entered into enforceable arbitration agreements would be an individualized issue precluding class certification. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007) (affirming district court's denial of class certification because "predominance was defeated" by difficulty of analyzing enforceability of class members' arbitration agreements).

made clear that the FAA mandates enforcement of an arbitration agreement not "only for disputes between [the] parties" to that agreement, but also when the arbitration provision is enforceable by (or against) "a third party under state contract law." *Arthur Andersen*, 556 U.S. at 631.

Dillon offers no defense of the district court's reasoning, instead baldly asserting that "Defendants' 'status as nonsignatories' was not the basis for the district court's ruling." Ans. Br. 37. That assertion is belied by the language of the district court's order. Indeed, rather than confront the district court's error, Dillon perpetuates it throughout his brief, quoting the district court's analysis on this point and claiming repeatedly that the fact that Defendants are not parties to the loan agreements supports the district court's decision. *See*, *e.g.*, *id.* at 23, 31, 39, 44, 46.

Finally, Dillon's argument that Defendants "ignore[d] unambiguous rules of evidence" (Ans. Br. 37-38) by not submitting authenticating declarations with their initial arbitration motions misses the mark. As noted above, numerous courts have not insisted on such declarations when, as here, the tendered document is integral to the complaint. *See* page 15, *supra*. And Defendants had a good faith basis for taking the position that Dillon's convenient silence on the authenticity of the tendered loan agreements was insufficient to place their authenticity at issue. *See* pages 16-17, *supra*.

B. BMO Harris Demonstrated That Its New Evidence Of Dillon's Arbitration Agreement Was Previously Unavailable.

As BMO Harris explained to the district court, Dillon's lender refused to provide BMO Harris with a declaration prior to the court's denial of Defendants' initial arbitration motions. *See* JA298-302, 351-54, 358-61. It is Dillon, not Defendants, who "impermissibly attempts to re-argue the facts here" by asserting that BMO Harris could have obtained the declaration at the outset of the case. Ans. Br. 49-50. As the record shows (JA359-60), and as the district court acknowledged, BMO Harris "could not obtain that evidence voluntarily" (JA434). Rather, the district court's position—which Dillon parrots in his brief (at 48)—was that, in order to comport with the "due diligence" standard for whether evidence is newly available, BMO Harris was required to halt the proceedings and seek the court's assistance in compelling the lender to provide that evidence. JA434-35.

That position was mistaken. As BMO Harris has explained (Opening Br. 38-39; JA352), it would have been futile to subpoena Dillon's lender because the lender could invoke tribal immunity and refuse to respond to a subpoena. Dillon does not contest Defendants' explanation of tribal sovereign immunity. *See* Ans. Br. 50. Nor does Dillon dispute Defendants' position that "due diligence does not encompass requiring a party to undertake futile gestures." Opening Br. 39. Instead, Dillon simply asserts that Defendants' position is "incredible" (Ans. Br. 50) and argues that the fact that the lender changed its mind and agreed to provide

a declaration *after* the initial arbitration motions were denied shows that the lender would have been willing to provide the declaration at an earlier time. But again, the record evidence is to the contrary, as the district court acknowledged. *See* JA359-60, 434.

Dillon also argues that BMO Harris failed to act with due diligence because it did not "'mention the lender's lack of cooperation'" to the court prior to the denial of its initial motion to compel arbitration. Ans. Br. 48 (quoting JA434-35). But Dillon fails to explain how bringing up the lender's intransigence would have altered any of the proceedings. When the lender refused to provide a declaration, BMO Harris sought in good faith to secure a ruling as a matter of law based on Dillon's incorporation of the tendered loan agreement in his complaint. Even had BMO Harris mentioned the lender's lack of cooperation and the district court told BMO Harris to subpoena the lender, the end result would have been unchanged—the lender would have invoked tribal sovereign immunity and the district court still would have denied BMO Harris's motion for lack of an authenticating declaration.

Dillon further fails to even acknowledge the needless burdens and inefficiencies that would result from his approach. *See* Opening Br. 39-40. BMO Harris would have been required to move to stay the further briefing of its arbitration motion, subpoena the lender, and pursue collateral litigation in a likely futile attempt to enforce that subpoena. It was far more efficient to submit the loan

agreement without an authenticating declaration from the lender, especially given that Dillon never denied the validity of the agreement or submitted any evidence or testimony to the contrary. Dillon's approach would have led to substantial delay and consumed party and judicial resources for no good reason. And it cannot be reconciled with the FAA's purpose of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22.

Finally, Dillon argues that, because "the NACHA Rules . . . expressly provide that Originators . . . are required to retain and provide to ODFIs records relating to entries they initiate at the ODFI's request," there is "no plausible explanation as to why potential authentication evidence was not available from [Dillon's lender]." Ans. Br. 50-51. But Dillon's lender *did* provide BMO Harris with records—a copy of Dillon's loan agreement that Dillon now concedes is genuine—which BMO Harris submitted with its initial arbitration motion. *See* JA359. Nothing in the NACHA rules specifies that Dillon's lender also must provide an employee to testify in connection with court proceedings. *See* DE 115-1, at 2 (2014 NACHA Operating Rules § 2.3.2.5). And in any event, BMO Harris did request that testimony—and was unable to obtain it for use in connection with its initial motion to compel arbitration. JA359.

CONCLUSION

The Court should vacate the district court's order denying Defendants' renewed motions to enforce Dillon's arbitration agreements and remand the case for further proceedings, so that arbitration may be compelled pursuant to those agreements.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1728 Caption: James Dillon v. BMO Harris Bank, N.A., et al.

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Dated: January 14, 2015

CERTIFICATE OF SERVICE

I certify that on this 14th day of January, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Kevin Ranlett*
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