No. 20-

IN THE

Supreme Court of the United States

MAURICE MCGINNIS, BY HIS CONSERVATOR DERRICK K. JONES,

Petitioner,

v.

SONNY PERDUE, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether strict application of procedural deadlines by an Arbitrator under the guidelines of the Consent Order in *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) to an obviously incompetent Claimant resulted in a fundamental miscarriage of justice and required an exercise of the district court's equitable jurisdiction where no provision was made in the Consent Order authorizing an arbitrator to appoint a guardian *ad litem* or allowing an enforcement action to the District Court prior to a final arbitration award?

PARTIES TO THE PROCEEDING

Maurice McGinnis, by his conservator, Derrick K. Jones is the Petitioner. Respondent is Sonny Perdue, in his official capacity as Secretary of the United States Department of Agriculture.

RELATED PROCEEDINGS IN FEDERAL AND APPELLATE COURTS

Pigford, et al. v. Perdue, et al., No. 19-5023, United States Court of Appeals for the District of Columbia Circuit. Judgment entered February 21, 2020.

Pigford, et al. v. Perdue, et al., No. 97-1978, United States District Court for the District of Columbia. Judgment entered January 2, 2019.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the United States District Court for the District of Columbia was not reported in Fed.App'x. It is reprinted in the appendix at Appx. A. The Order of the United States District Court for the District of Columbia was not reported in F. Supp. 3d. The District Court's Order is reprinted in the appendix at Appx. B.

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered as an unpublished opinion on February 21, 2020. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

This deadline for the filing of this Petition was extended by the March 19, 2020 Supreme Court Order, 589 U.S, and is thus timely.

CONSTITUTIONAL PROVISION INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law." United States Constitution, Amendment V.

INTRODUCTION AND STATEMENT OF THE CASE

Maurice McGinnis' adversarial relationship with the compensation process under the Consent Order in *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (the "Consent Order") began decades ago. The D.C. Circuit's decision to sustain the District Court's denial of McGinnis' Petition for Monitor Review of the Arbitrator's summary dismissal of his claim is the latest episode in this painful saga. See Appendices A and B.

It started twenty years ago with confusion and misdirection by the Government, which initially treated his Track B arbitration claim as a Track A proceeding. The Government

vigorously opposed McGinnis' request to recognize and treat his claim under the rules established in the Consent Decree for a Track B arbitration. Ultimately, it required a final decision from the D.C. Circuit in 2015 to establish that McGinnis was indeed entitled to a Track B arbitration. *Pigford v. Vilsack*, 777 F.3d 509 (D.C. Cir. 2015).

Following years of frustration caused by the Government's mistakes, compounded by an adamant refusal to rectify its errors without lengthy judicial proceedings, McGinnis was left confused and exhausted. Eventually, he lost perspective and his ability to make rational decisions in regard to his claim suffered greatly.

In the course of the Track B arbitration it became known to the Government and the Arbitrator that "McGinnis seriously misunderstood the nature of what he was required to do to comply with the Track B process." McGinnis made a series of irrational decisions not to engage in or comply with the requirements of the procedural orders issued by the Arbitrator. McGinnis refused to allow his attorney to exchange his expert's report and direct testimony until June 30, 2016, and then testimony only in the form of a request that the Arbitrator adopt the prior rulings of the Monitor on Review.

The government and Arbitrator were made aware on numerous occasions by McGinnis' counsel that the task of making McGinnis understand his obligations in the Track B arbitration was becoming increasingly difficult. The proceedings devolved from McGinnis refusing to engage in settlement negotiations to demanding the Arbitrator to rule on the basis of an earlier decision of the Monitor. The government and Arbitrator were updated regularly on the developing impasse with McGinnis. At one stage the Arbitrator proposed to McGinnis' counsel that he speak to McGinnis directly, outside the presence of counsel, to encourage his co-

operation and explain his responsibilities to the arbitration. Unfortunately, McGinnis refused the invitation.

The forceful intervention of his family ultimately convinced McGinnis to permit submission of an expert report and testimony (the latter albeit in the form of prior factual rulings by the Monitor). The Arbitrator granted as many extensions of time to meet deadlines as was possible but ultimately was bound by the strict procedural time-frame for Track B hearings set forth in the Consent Decree. The government's mistakes, misdirection and delay caused McGinnis to lose his reason, and yet it is the government that benefits from the ruling to dismiss his claim for failure to meet procedural deadlines. Deadlines imposed in compliance with the Consent Decree without regard to a claimant's mental capacity to participate in the process.

The fact that McGinnis suffered a diminished capacity to make rational decisions in this case was evident to all involved in the process, and is reflected in the Arbitrator's discussion of McGinnis' behavior. McGinnis could not be convinced that he had not already prevailed in the Track B proceeding. As he wrote in his narrative-form, direct testimony (which he insisted counsel file in lieu of the required submissions): "RE: 35 years of Damage, Pain & Suffering, Penalties and Fines . . . Discrimination 1981-2016: The YEARS keep getting longer. You have treated me worse than anyone in this lawsuit. 35 years ago I was 30; and now I am 65 years old. What kind of JUSTICE is this?"

McGinnis' mistaken belief about the status of his case could not be shaken. McGinnis continues, "[y]ou were instructed to pay me in January 2011, and to date (5 years later) you have not awarded me the money due to me from the Black Farmers Settlement…On August 8, 2013, the court handed down their first decision. On February 6, 2015, the court handed down their

second decision. The date of my deposition was March 3, 2016. Page 19 of the Consent Decree says you have 30-60 days after this date to pay me."

Obviously, McGinnis had no grasp on the process and a misapprehension that his prior victories in the case convinced that he was entitled to an award without further proofs. On April 4, 2017, Derrick K. Jones (McGinnis' nephew) was appointed Conservator for the person and estate of McGinnis by the Chancery Court of Humphrey's County, MS.

McGinnis' inability to assist and co-operate in prosecuting his claim was raised repeatedly and discussed at length between the parties and with the Arbitrator. The issue became not whether McGinnis was competent, clearly his actions were irrational, but rather what could be done about the situation given the limitations of the arbitration proceeding. At the same time, perhaps naturally for an independent farmer, McGinnis was intransigent in the face of family pressure to submit to a psychological examination and conservatorship. Given the Arbitrator's lack of authority to appoint a guardian *ad litem*, an enforcement action prior to Monitor review before the District Court alleging "violation of any provision of [the] Consent Decree," under Section 13 of the Consent Order, was untenable in advance of a final award. The Arbitrator's dismissal of his claim finally convinced McGinnis to submit to a conservatorship. The State court process to appoint Mr. Jones to that role was not an after-thought. It was urged on McGinnis by his family for many months prior to becoming an actuality.

On April 12, 2017, McGinnis submitted a petition for monitor review requesting that the monitor review the Track B arbitration award due to a clear and manifest error that resulted in a fundamental miscarriage of justice, and direct the Arbitrator to reexamine his decision granting the government's motion for judgment as a matter of law. The district court declined to reappoint the Monitor to review the case and granted the Government's motion to dismiss on May 31, 2018

The district court granted McGinnis' motion to substitute party on October 4, 2018. McGinnis filed a renewed motion for reconsideration on October 31, 2018. The District Court denied the renewed motion on January 2, 2019.

In the course of proceedings below, it was acknowledged by both the Arbitrator and the district court that an arbitrator appointed under the Consent Decree lacks authority to appoint a guardian *ad litem*. Indeed, the Arbitrator lacked authority to even stay proceedings in recognition of McGinnis' incapacity to assist counsel in prosecuting his claim.

REASONS FOR GRANTING CERTIORARI

1. Competency Standards are Vital to the Fair Administration of Justice.

The Arbitrator himself emphasized that McGinnis was "confused" by his obligation to participate: "McGinnis seriously misunderstood the nature of what he was required to do in the Track B process." McGinnis made a series of irrational decisions not to comply with the requirements of the Consent Decree and the Revised Hearing Notice by not permitting an exchange of his expert report on damages, and other direct testimony, until June 30, 2016.

Previously, in November 2015, the "Arbitrator was informed that efforts to settle were foundering as a result of Claimant's decision not to release to Defendant the economic damages analysis prepared by his expert. Despite the efforts of Claimant's counsel, the Arbitrator, and, the cooperation of defense counsel, Claimant refused to permit release of the report . . ." Ultimately, the Arbitrator ruled that McGinnis' late-filed export report and testimony could not be used to prove his case in chief because they were not timely filed. Since McGinnis lacked evidence to prove his case in chief, the Arbitrator granted Defendant's Motion for Judgment as a Matter of Law. The strict application of procedural deadlines to a Claimant so obviously incompetent resulted in a fundamental miscarriage of justice.

Due to his diminished mental capacity, a condition largely attributable to the more than twenty-year ordeal McGinnis faced in these proceedings, McGinnis "lost his perspective . . . because of his theories of various different conspiracies." It became apparent in the course of proceedings that McGinnis lacked the mental capacity to participate and instruct counsel in the Track B arbitration proceeding. Fundamental justice required that a remedy be fashioned that allowed the Arbitrator to re-set the proceedings under management of the conservator.

It cannot be denied that McGinnis' interests were not placed in conservatorship prior to the Arbitrator's grant of judgment as a matter of law. But the District Court's observation that it could have been sought at an earlier stage failed to recognize the practical difficulties faced by McGinnis' family and counsel in first determining that guardianship was needed and then convincing McGinnis to surrender his independence. Determining mental capacity is a complicated and emotional process that requires professional assistance. Without the ability to seek a guardian *ad litem*, McGinnis' cooperation was absolutely necessary. It cannot be argued that the Consent Decree does not authorize the Arbitrator to appoint a Guardian *ad litem* when confronted with an incompetent claimant. Further, under Section 13 of the Consent Order, it is not possible to seek an enforcement action in the District Court prior to a final award of the Arbitrator.

The Consent Decree's procedures for Track B claimants assume, apparently, the mental capacity of claimants to conduct their own affairs throughout the length of the proceeding. This was an oversight. Competency plays an important role in the adjudication of any case, criminal or civil. *See, generally, Drope v. Missouri*, 420 U.S. 162 (1975); Rule 17 of the Federal Rules of Civil Procedure. Arbitration is no exception. Indeed, the case for a competency standard in arbitration is even more pressing given the binding nature and limited review of an arbitration

award. Dismissing the case of an incompetent party for failure to meet procedural deadlines is fundamentally unfair and runs counter to the central values of the American judicial process, which is designed to protect vulnerable parties and ensure a just outcome.

2. Standards of Competency Lacking in Arbitrations under the Consent Order.

The field of arbitration has yet to set standards relating to a party's competency, it is simply assumed from the outset that parties to an arbitration proceeding are indeed competent. Certainly, that is an assumption underlying the design of Track B arbitration proceedings in the Consent Decree. The Consent Decree ignores entirely the concept of mental competency. The Arbitrator lacked power to adjudicate the competency of McGinnis and appoint a guardian *ad litem*. The Consent Decree did not permit immediate submission to the District Court because its jurisdiction is limited to violations of "any provision" of the Consent Decree. Though McGinnis' competency was questioned, the Arbitrator was constrained by the procedural deadlines of the Consent Decree.

Proceeding with an arbitration when a party to the process lacks fundamental mental capacities, as was eventually revealed in the conservatorship process, is unfair to the party and runs counter to central values of the American judicial process, which is designed to protect parties and achieve a just outcome. As the Supreme Court has noted in the criminal context, the bar against trying a incompetent defendant is certainly "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

The Monitor's review of an Arbitration award is limited to the record of the Track B arbitration. McGinnis' diminished capacity required an exercise of the District Court's equitable jurisdiction to right what is otherwise an unjust result. This Court has repeatedly emphasized that courts are vested with extensive equitable powers to fashion appropriate remedies. For example,

in *Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1 (1971), the Court stated, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

The essence of equity jurisdiction has been the "power of the [court] to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowley*, 321 U.S. 321, 329-330 (1944).

The arbitration procedure designed in the Consent Decree ignores the concept of mental competency and lacks competency standards similar to this employed in the civil and criminal contexts. This oversight left McGinnis without protections afforded litigants elsewhere and resulted in a denial of fundamental justice.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 16, 2019 Decided February 21, 2020

No. 19-5023

TIMOTHY C. PIGFORD, ET AL.,
APPELLEE

v.

SONNY PERDUE, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,
APPELLEE

MAURICE MCGINNIS, BY HIS CONSERVATOR DERRICK K. JONES,
APPELLANT

Consolidated with 19-5027

Appeals from the United States District Court
for the District of Columbia
(No. 1:97-cv-01978)
(No. 1:98-cv-01693)

John M. Shoreman argued the cause and filed the briefs for appellant.

Casen B. Ross, Attorney, U.S. Department of Justice, argued the cause for appellee Sonny Perdue. With him on the brief were *Jessie K. Liu*, U.S. Attorney, and *Charles W. Scarborough*, Attorney. *Jennifer L. Utrecht*, Attorney, entered an appearance.

Before: WILKINS, *Circuit Judge*, and WILLIAMS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: Maurice G. McGinnis brought this action to claim damages under the Consent Decree created in the 1999 settlement between the Department of Agriculture and a class of African American farmers. The arbitrator responsible for adjudicating claims under the Consent Decree denied McGinnis's claim because he did not timely submit evidence of racial discrimination. McGinnis then petitioned the district court for "monitor review" of the arbitrator's decision. The district court denied that petition and McGinnis's two motions for reconsideration. Because we agree with the district court that such review would have been futile, we affirm the district court's holding. We also affirm the district court's decision declining to modify the Consent Decree under Federal Rule of Civil Procedure 60(b)(5).

I.

In 1997, three African American farmers, representing a putative class of 641 African American farmers, filed a class action lawsuit against the Department of Agriculture alleging racial discrimination in denying their applications for farm loans, credit and other benefit programs. *Pigford v. Glickman*, 185 F.R.D. 82, 86, 89 (D.D.C. 1999). The parties settled in

1999 and agreed to a Consent Decree that would "ensure that in the future all class members in their dealings with the USDA will 'receive full and fair treatment' that is 'the same as the treatment accorded to similarly situated white persons.'" *Id.* at 95 (quoting J.A. 292).

The Consent Decree established two tracks for class members to claim monetary damages: Track A and B. *Id.* On Track A, a class member must "demonstrate[] by substantial evidence that he was the victim of race discrimination." J.A. 303. The class member submits the required documentation and an adjudicator issues a decision. *Id.* at 303–06. If the adjudicator determines that the USDA discriminated against the class member, the adjudicator can "discharge all of the class member's outstanding debt to USDA" that was affected by discrimination and grant the class member a cash payment of $50,000. *Id.* at 304. Track A "provides those class members with little or no documentary evidence with a virtually automatic cash payment of $50,000, and forgiveness of debt owed to the USDA." *Pigford*, 185 F.R.D. at 95.

On Track B, class members have a higher evidentiary hurdle: they must demonstrate that they were discriminated against by a preponderance of the evidence. *Id.*; J.A. 308. Class members submit a "claim package" to an arbitrator who then schedules an evidentiary hearing. J.A. 306–07. The hearing can include witnesses and exhibits to prove discrimination. *Id.* at 307. Following the hearing, the arbitrator issues a decision and can award actual damages and discharge outstanding debt affected by discrimination. *Id.* at 308. Because the arbitrator can award actual damages, class members who pursue claims on Track B can receive much more than the $50,000 available on Track A, but the evidentiary standard required to show discrimination is higher.

The Consent Decree makes the adjudicator's decisions on Track A and the arbitrator's decisions on Track B "final." *Id.* at 306, 309. There is a narrow review provision that empowers a "monitor" to direct the arbitrator or adjudicator "to reexamine a claim where the Monitor determines that a clear and manifest error has occurred . . . and has resulted or is likely to result in a fundamental miscarriage of justice." *Id.* at 311. "Generally, the Monitor's review will be based only on the Petition for Monitor Review, any response thereto, the record that was before the Facilitator, Adjudicator or Arbitrator, and the decision that is the subject of the Petition for Monitor Review." *Id.* at 285. For Track B claims, "the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination." *Id.* at 286.

Maurice G. McGinnis is an African American farmer from Mississippi who sought but was denied farm credit from the Department of Agriculture. *Pigford v. Vilsack*, 777 F.3d 509, 510 (D.C. Cir. 2015). In 1999, he initiated a claim under the Consent Decree. *Id.* at 512. In an earlier phase of this litigation, "the persons responsible under the Consent Decree for processing his claim ignored or misinterpreted his clearly expressed wishes" to proceed under Track B. *Id.* at 510. There was extensive confusion between the claims facilitator, who processed class member claims, and McGinnis as to whether he was pursuing a claim under Track A or Track B. *Id.* at 512–13. The facts and circumstances of that phase of the litigation are more fully explained in *Pigford*, 777 F.3d at 512–13. McGinnis was represented by his privately retained attorney John M. Shoreman during part of that litigation. *Pigford v. Perdue*, 330 F. Supp. 3d 1, 4 (D.D.C. 2018). As relevant for this phase of the litigation, McGinnis was ultimately able to submit his claim under Track B, as he intended. *Pigford*, 777 F.3d at 510, 518.

On May 29, 2015, the arbitrator issued a formal hearing notice for McGinnis's Track B claim. *Pigford*, 330 F. Supp. 3d at 4. McGinnis was again represented by Shoreman. *Id.* Before the scheduled hearing, the parties jointly requested several stays of the proceeding while they discussed settlement. *Id.* at 5. The settlement negotiations stalled because McGinnis did not give Shoreman permission to disclose the expert report supporting his claim of racial discrimination. *Id.* Several times during December 2015, the parties and the arbitrator discussed McGinnis's reticence to disclose the expert report and Shoreman's efforts to convince his client to allow its release. *Id.* The arbitrator even offered to speak with McGinnis *ex parte* about releasing the report, and the government did not object, but it is not clear if that conversation ever took place. *Id.* Finally, on December 23, 2015, the arbitrator informed Shoreman and the government that he would give McGinnis until December 28, 2015, to release the report or he would restart the schedule for a Track B arbitration. *Id.* at 5–6. When the report was not released, the government proposed a schedule for the proceeding including deadlines for filing expert reports, direct testimony and legal memoranda, and for completing discovery and depositions. *Id.* at 6. The government also requested that, if McGinnis failed to meet the deadlines, "he would be 'precluded from offering any expert report, testimony, or other expert evidence in this case.'" *Id.*

On January 21, 2016, the arbitrator issued a formal hearing notice adopting the schedule proposed by the government and set the hearing for July 20, 2016. *Id.* "The arbitrator's formal revised hearing notice made clear: 'Should [McGinnis] fail to provide an expert report [on or before February 11, 2016,] he shall be precluded from offering any expert report, testimony, or other expert evidence related to economic damages.'" *Id.* (second alteration in original). McGinnis did not disclose his

expert's report or submit direct testimony, and neither he nor his counsel sought to depose the government expert or take discovery on the government's expert report. *Id.* On June 30, 2016, Shoreman filed an "unsigned economic damages report," "a package of miscellaneous documents that included a three-page letter from Mr. McGinnis himself," and other documents with handwritten annotations. *Id.* at 7. On July 5, 2016, the arbitrator excluded the damages report because it was not timely. *Id.* He determined, based on the rest of the documents filed at the same time, he would not hold a hearing. *Id.* On December 13, 2016, the arbitrator released his decision denying McGinnis damages because he "introduced no evidence in support of his claim" of discrimination. J.A. 277–78.

Approximately four months after the arbitrator's decision, in a state court proceeding, Derrick K. Jones was appointed as conservator on behalf of McGinnis. J.A. 262 n.1; *Pigford*, 330 F. Supp. 3d at 7. Jones is McGinnis's "nephew and long-time personal attorney." *Pigford*, 330 F. Supp. 3d at 14. Shortly after Jones was appointed, Shoreman filed a petition for monitor review of the arbitrator's decision, "purportedly on behalf of Derrick K. Jones." *Id.* at 7–8. The petition asserts that the arbitrator made a "clear and manifest error resulting in a fundamental miscarriage of justice" when it denied McGinnis's claim. *Id.* Specifically, the petition asserts that McGinnis's failure to meet deadlines for the arbitration process was attributable to his mental health conditions, which the petition asserted from the record were obvious to the participants in the process. *Id.* at 7–9.

The district court dismissed the petition for monitor review. *Id.* at 14. It first explained that monitor review would be futile because the monitor can direct a reexamination of the decision only when there is a clear error based on the evidence

in the record before the arbitrator. *Id.* at 11–12. Crucially, the new evidence introduced as part of McGinnis's competency proceeding was not before the arbitrator and, therefore, could not be considered during a reexamination. *Id.* Next, *sua sponte*, the district court considered, but ultimately rejected, modifying the Consent Decree under Federal Rule of Civil Procedure 60(b)(5). *Id.* at 12–14. In reaching that conclusion, the district court relied on Supreme Court precedent that a party is bound by the conduct of voluntarily chosen counsel. *Id.* at 13 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 396–97 (1993); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633–34 (1962)). The district court explained, "Because Mr. McGinnis has been represented by Mr. Shoreman in this matter since at least 2012, he is not entitled to a Rule 60(b)(5) modification for any failures or mistakes made by his retained counsel. Rather, he is bound by his agent's acts and omissions." *Id.* (internal citation omitted).

McGinnis filed a motion for reconsideration on June 28, 2018, but the district court denied the motion without prejudice on August 6, 2018, because Shoreman had not properly added Jones, the conservator, as a party to the case. J.A. 234. After the court granted Shoreman's motion to substitute Jones as a party, Shoreman filed a renewed motion for reconsideration on October 31, 2018. *Id.* at 234–35. The motion did not assert that there had been an intervening change in the law; instead, "using language almost identical to that found in the original petition," the petition argued that the court should reconsider its decision because it represented a "fundamental and manifest injustice." *Id.* at 236–37. The district court denied the renewed motion for reconsideration on January 2, 2019, because the motion merely retread the grounds in the original petition for monitor review. *Id.* at 237–40. McGinnis filed a timely notice of appeal on February 8, 2019, for both the dismissal of the

petition for monitor review and the denial of the renewed motion for reconsideration. *See* 28 U.S.C. § 1291.

II.

The district court's decision to dismiss the petition for monitor review represents an assessment that McGinnis's arguments failed to demonstrate a colorable claim that the arbitrator committed a clear and manifest error. *See Pigford*, 330 F. Supp. 3d at 11–12. The district court undertakes a similar analysis in the context of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim: determining whether "[a] claim has facial plausibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As the district court was considering whether McGinnis had a claim under the Consent Decree and not interpreting said decree, we will review the district court's dismissal of McGinnis's petition for monitor review *de novo*, as we do for 12(b)(6) motions to dismiss. *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 788 (D.C. Cir. 2019).

Next, we turn to McGinnis's Federal Rule of Civil Procedure 59(e) motion for renewed reconsideration. "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004). We therefore review denials of motions for reconsideration for abuse of discretion, *id.*, unless, in considering the motion, the district court also reached the merits of a new argument or legal theory, *Dyson v. District of Columbia*, 710 F.3d 415, 420 (D.C. Cir. 2013). Because the district court did not address any new arguments, J.A 236–40, we review the district court's denial of the

renewed motion for reconsideration for abuse of discretion, *Ciralsky*, 355 F.3d at 671.

We also review the district court's denial of relief under Federal Rule of Civil Procedure 60(b)(5) for abuse of discretion. *Am. Council of the Blind v. Mnuchin*, 878 F.3d 360, 366 (D.C. Cir. 2017).

A.

We agree with the district court that monitor review would be futile because there was no evidence of McGinnis's incompetency in the record before the arbitrator. The record contained evidence of McGinnis's potential frustration and confusion with the process, including: McGinnis's refusal to allow his attorney to release the expert report, *Pigford*, 330 F. Supp. 3d at 5; the arbitrator's offer to speak to McGinnis to resolve his reluctance to release the report, *id.*; McGinnis's May 10, 2016 letter submitted to the arbitrator lamenting his treatment during the proceeding, J.A. 265–66; McGinnis's failure to comply with the deadlines established by the arbitrator, *Pigford*, 330 F. Supp. 3d at 6–7; and, finally, a reference in the arbitrator's decision that "McGinnis seriously misunderstood the nature of what he was required to do in the Track B process," J.A. 275. But, as the district court explained, these examples could indicate McGinnis's frustration or confusion with the process but do not raise an inference of mental incompetence. *Pigford*, 330 F. Supp. 3d at 12.

There is also no evidence that Shoreman raised the issue of McGinnis's potential incompetence before the arbitrator either by alerting the arbitrator or by moving to stay the case pending conservatorship proceedings in state court. Nor does Shoreman's briefing explain why he failed to take action to

protect his client's interests if he believed that competency was an issue.

The lack of evidence is crucial because the Consent Decree permits only a limited review. The monitor may instruct the arbitrator to reexamine the claim when there is a clear error in the record, but the evaluation of error is limited to what was in the record before the arbitrator. J.A. 285–86. These limitations mean that the monitor cannot consider the new evidence from medical evaluations of McGinnis and the competency proceeding. Instead, the monitor could rely only on the evidence of McGinnis's conduct during the proceeding, like the instances cited above. We agree with the arbitrator and the district court that McGinnis's actions could be interpreted as a product of irrationality or confusion or frustration but do not support an inference of incompetence. Thus, a monitor review would be futile.

B.

The district court did not abuse its discretion when it refused to modify the Consent Decree. *See Pigford*, 330 F. Supp. 3d at 12–14. As the district court explained, Rule 60(b)(5) permits relief from a "final judgment, order, or proceeding" if "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). "Modification [of a consent decree] is also appropriate when a decree proves to be unworkable because of unforeseen obstacles." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992). One such unforeseen obstacle could be an attorney's failure to meet deadlines. This court has recognized the vital importance of competent representation for eligible farmers seeking damages pursuant to the Consent Decree. *Pigford v. Veneman*, 292 F.3d 918, 925–27 (D.C. Cir. 2002). In fact, we modified the deadlines in the Consent Decree when the class counsel failed

to meet them. *Id.* at 925–26. But, importantly, in that decision, the presumption that clients are bound by the mistakes of their "voluntarily chose[n]" attorney, *Link*, 370 U.S. at 633, was rebutted because the class counsel was appointed by the district court, *Veneman*, 292 F.3d at 926. Because McGinnis voluntarily chose his attorney, the presumption is not rebutted on that ground. He is therefore bound by his attorney's failure to submit documents and memoranda by the arbitrator-imposed deadlines. As a result, the district court did not abuse its discretion when it declined to modify the Consent Decree because Shoreman did not meet the arbitration deadlines.

McGinnis's failure or inability to cooperate with his attorney may be another unforeseen obstacle. But the district court did not abuse its discretion in declining to modify the Consent Decree because McGinnis's alleged incompetence made it impossible for him to cooperate with or supervise his attorney. The district court reasonably explained that modification was not warranted for two reasons. First, Shoreman never raised the issue of competency in the record. *Pigford*, 330 F. Supp. 3d at 13–14. Second, modifying the Consent Decree would lead to "a mini-trial on a matter ancillary to the merits of this case"—namely Shoreman's "options for advancing [McGinnis's] interests independent of [his] relative competence." *Id.* at 14. The district court further noted that "any grievance Mr. McGinnis may have with his counsel would be more properly resolved in a separate malpractice action." *Id.* In sum, the district court provided a reasoned and reasonable explanation for its decision not to modify the consent decree.

III.

For the foregoing reasons, we affirm the district court's denial of the petition for monitor review and the denial of the motion for reconsideration.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY PIGFORD et al., Plaintiffs, v. SONNY PERDUE, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 97-1978 (PLF)
CECIL BREWINGTON et al., Plaintiffs, v. SONNY PERDUE, Secretary, United States Department of Agriculture, Defendant.	Civil Action No. 98-1693 (PLF)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the renewed motion for reconsideration [Dkt. No. 2077] filed by Derrick K. Jones as Conservator of the person and estate of Maurice McGinnis.[1] The Conservator's motion seeks reconsideration of the Court's opinion and order of

[1] The Conservator's renewed motion for reconsideration was originally filed on October 31, 2018 as Dkt. No. 2077. The Conservator filed an errata on November 5, 2018, in which he re-filed the same motion – dated October 31, 2018 – with an amended exhibit as Dkt. No. 2078. Based on the Conservator's representation that the only difference between the original motion and the errata is the amended exhibit, the Court shall issue its ruling based on the motion filed as Dkt. No. 2077.

May 31, 2018, granting the government's motion to dismiss the petition for monitor review of Mr. McGinnis's Track B arbitration claim. See Pigford v. Perdue, 330 F. Supp. 3d 1 (D.D.C. 2018). The government has filed a memorandum in opposition to the Conservator's renewed motion for reconsideration, see Gov't Opp., and the Conservator filed a reply. See Reply. Having considered the parties' arguments, the relevant legal authorities, and the entire record in this case, the Court will deny the Conservator's renewed motion for reconsideration.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

The Court's prior opinions summarize the factual and procedural history of this case, beginning with Mr. McGinnis's Track A award and continuing through his Track B arbitration proceeding. See, e.g., Pigford v. Vilsack, 961 F. Supp. 2d 82, 83-87 (D.D.C. 2013), aff'd, 777 F.3d 509 (D.C. Cir. 2015); Pigford v. Perdue, 330 F. Supp. 3d at 3-9. The Court therefore limits its discussion here to those facts relevant to the instant motion, which pertains to Mr. McGinnis's Track B arbitration proceeding.

Throughout the course of his Track B arbitration proceeding, Mr. McGinnis was represented by John M. Shoreman. See Pigford v. Perdue, 330 F. Supp. 3d at 4-8. According to the Conservator, notwithstanding his representation by counsel, "[Mr.] McGinnis made a series of irrational decisions not to comply with the requirements of the Consent Decree and the

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[2] The Court has reviewed the following filings in resolving the pending motion: Conservator's Renewed Motion for Reconsideration ("Ren. Mot. Recon.") [Dkt. No. 2077]; Government's Opposition to the Conservator's Renewed Motion for Reconsideration ("Gov't Opp.") [Dkt. No. 2079]; Conservator's Reply ("Reply") [Dkt. No. 2080]; Government's Motion to Dismiss Mr. McGinnis's Petition for Monitor Review ("Mot. to Dismiss") [Dkt. No. 2057]; August 6, 2018 Memorandum Opinion & Order ("Mem. Op. & Order") [Dkt. No. 2069]; Consent Decree [Dkt. No. 167]; November 2, 2015 Stipulation and Order ("Stip. & Order") [Dkt. No. 2008]; Petition for Monitor Review, Mot. to Dismiss Ex. 43 ("Pet. Mon. Review") [Dkt. No. 2059 at 202]; Government's Motion for Judgment as a Matter of Law, Mot. to Dismiss Ex. 36 ("Mot. J. Law") [Dkt. No. 2059 at 88]; and Arbitrator's Track B Decision, Mot. to Dismiss Ex. 37 ("Arb. Decision") [Dkt. No. 2059 at 105].

Revised Hearing Notice." See Ren. Mot. Recon. at 4. He and his counsel failed to meet deadlines – even after they were rescheduled – and failed to provide a timely expert report or any written testimony. See Pigford v. Perdue, 330 F. Supp. 3d at 4-7. After a series of extensions of time granted by the Arbitrator, the government moved for judgment as a matter of law, arguing that Mr. McGinnis had not introduced any evidence and had not "articulate[d] the bases for his discrimination claims or the source and nature of any alleged economic damages." See Mot. J. Law at 89. On December 13, 2016, the Arbitrator granted the government's motion for judgment as a matter of law and denied Mr. McGinnis's Track B claim, reasoning that "[Mr. McGinnis] ha[d] neither demonstrated by a preponderance of the evidence that [the] USDA discriminated against him, nor ha[d] he established any damages." See Arb. Decision at 111; see also Pigford v. Perdue, 330 F. Supp. 3d at 7.

On April 12, 2017, Mr. Shoreman submitted a petition for monitor review of the Arbitrator's decision purportedly on behalf of Derrick K. Jones, the alleged conservator of Mr. McGinnis's person and estate. See Pet. Mon. Review at 202; see also Pigford v. Perdue, 330 F. Supp. 3d at 7-8. The initial petition for monitor review "[did] not dispute that Mr. McGinnis repeatedly failed to meet deadlines and, as a result, did not submit sufficient evidence to prove his claim by a preponderance of the evidence. Rather, the petition assert[ed] that these failures resulted from Mr. McGinnis's diminished mental capacity and deteriorating ability to assist his counsel, issues which assertedly arose due to the stressful and long-running nature of the case." See Pigford v. Perdue, 330 F. Supp. 3d at 8. The petition concluded that because "[t]he strict application of procedural deadlines to a Claimant so obviously incompetent resulted in a fundamental miscarriage of justice," the Monitor should direct the Arbitrator to re-examine his decision to grant the government's motion for judgment and to re-set procedural deadlines so

that Mr. McGinnis's Track B arbitration claim could proceed under the direction of Mr. McGinnis's conservator. See Pet. Mon. Review at 207-08.

The government moved to dismiss the petition for monitor review of Mr. McGinnis's Track B arbitration claim. The matter was fully briefed and the Court granted the government's motion on May 31, 2018. See Pigford v. Perdue, 330 F. Supp. 3d at 12.[3] In so deciding, the Court declined to reappoint the Monitor – who had been released from her duties under the Consent Decree in March 2012 – and to direct her to review the petition because "there [was] simply insufficient evidence in the relevant record [before the Arbitrator] of Mr. McGinnis's alleged mental incapacity to support a finding by the monitor that 'clear and manifest error' ha[d] resulted or [was] likely to result in 'a fundamental miscarriage of justice.'" See id. at 12; see also Stip. & Order at ¶ 1(a)(5).[4]

Mr. Shoreman subsequently filed a motion for reconsideration [Dkt. No. 2067] of the Court's opinion and order by and through Derrick K. Jones, the alleged conservator of the person and estate of Mr. McGinnis. The Court denied that motion without prejudice on August 6, 2018, because Mr. Jones had not been substituted as a party in this case pursuant to Rule 25(b)

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[3] The Court noted then and reiterates now that this matter may be more properly resolved in a separate malpractice action against Mr. Shoreman. See Pigford v. Perdue, 330 F. Supp. 3d at 14; Mem. Op. & Order at 2.

[4] According to the Court's wind-down stipulation and order issued on November 2, 2015, the Monitor was released from her duties under the Consent Decree on March 31, 2012. See Stip. & Order at ¶ 1(a)(5); Pigford v. Vilsack, 330 F. Supp. 3d at 11. The wind-down stipulation and order explicitly provided for her potential reappointment with respect to Mr. McGinnis's claim: "In the event that a Track B hearing is ever conducted in the matter of Maurice McGinnis, the Court may request that the Monitor resume her duties in the future for the limited purpose of reviewing any Petition for Monitor Review of the Arbitrator's decision in that matter." See Stip. & Order at ¶1(a)(5).

of the Federal Rules of Civil Procedure. See Mem. Op. & Order.[5] The Court has since granted [Dkt. No. 2075] Mr. Jones's motion for substitution of party [Dkt. No. 2070], and Mr. Jones has been properly substituted for plaintiff Maurice McGinnis as a party to this action.

Pursuant to the Court's order, Mr. Jones, as Conservator, filed a renewed motion for reconsideration on October 31, 2018 on behalf of the estate of Mr. McGinnis. See Ren. Mot. Recon. The Conservator's renewed motion for reconsideration – now before the Court – asks the Court to reconsider under Rule 59(e) of the Federal Rules of Civil Procedure its order and opinion of May 31, 2018. See Ren. Mot. Recon. at 7. He requests that the Court deny the government's motion to dismiss the petition for monitor review. See Ren. Mot. Recon. Proposed Order [Dkt. No. 2077-3].

II. LEGAL STANDARD

The Conservator has styled the instant motion as a motion for reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. See Ren. Mot. Recon. at 5. Although the Federal Rules of Civil Procedure have no rule specifically addressing motions to reconsider, "[t]he D.C. Circuit has stated that motions to reconsider are routinely construed as motions to clarify or alter or amend judgment under Rule 59(e)." See Piper v. U.S. Dep't of Justice, 312 F. Supp. 2d 17, 20 (D.D.C. 2004). After entry of judgment, a timely motion for reconsideration under Rule 59(e) may be filed to "alter or amend [the] judgment." See FED. R. CIV. PRO. 59(e).

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[5] In denying without prejudice Mr. McGinnis's first motion for reconsideration, the Court also admonished Mr. Shoreman for purportedly filing a motion on behalf of Mr. Jones as Conservator while simultaneously attaching a document as an exhibit to that motion in which Mr. Jones purports to be proceeding pro se. See Mem. Op. & Order at 3. The Court cautioned Mr. Shoreman that such a contradiction not only violated the Federal Rules of Civil Procedure, but also may have constituted violations of Mr. Shoreman's professional and ethical obligations. See id.

The Supreme Court has explained that Rule 59(e) was enacted to allow a district court "to rectify its own mistakes in the period immediately following the entry of judgment." See White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 450 (1982). But Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." See Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008); see also Piper v. U.S. Dep't of Justice, 312 F. Supp. 2d at 21 ("Rule 59(e) motions are not granted if the court suspects the losing party is using the motion as an instrumentality of arguing the same theory or asserting new arguments that could have been raised prior to final judgment."). A Rule 59(e) motion, therefore, "is discretionary and need not be granted unless the district court finds that there is [1] an intervening change of controlling law, [2] the availability of new evidence, or [3] the need to correct a clear error or prevent manifest injustice." See Dyson v. District of Columbia, 710 F.3d 415, 420 (D.C. Cir. 2013) (quoting Ciralsky v. Cent. Intelligence Agency, 355 F.3d 661, 671 (D.C. Cir. 2004)); see also Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

III. DISCUSSION

As noted, the Court may grant the Conservator's motion to reconsider its prior decision to dismiss the petition for monitor review of Mr. McGinnis's Track B claim if it "finds that there is [1] an intervening change of controlling law, [2] the availability of new evidence, or [3] the need to correct a clear error or prevent manifest injustice." See Dyson v. District of Columbia, 710 F.3d at 420 (quoting Ciralsky v. Cent. Intelligence Agency, 355 F.3d at 671). In his motion, the Conservator does not suggest that there has been an intervening change of controlling law or that new evidence has become available since the Court's May 31, 2018 decision. Instead, using language almost identical to that found in the original petition, the

Conservator argues that the Court should reconsider its decision because "under the circumstances of this case[,] the Arbitrator's strict application of procedural deadlines to a Claimant so obviously incompetent resulted in a fundamental and manifest injustice." See Ren. Mot. Recon. at 5. The only question before the Court now, therefore, is whether it must reverse its prior decision in order to prevent this alleged manifest injustice.

A Rule 59(e) motion to reconsider – even one based on asserted manifest injustice – is not simply an opportunity to reargue facts and theories upon which a court has already ruled. See State of N.Y. v. United States, 880 F. Supp. 37, 38 (D.D.C. 1995) (per curiam); see also Pearson v. Thompson, 141 F. Supp. 2d 105, 107 (D.D.C. 2001) ("A motion for reconsideration will not be granted if a party is simply attempting to renew factual or legal arguments that it asserted in its original briefs and that were already rejected by the Court."); O.R. v. Hunter, 576 F. App'x 106, 110 (3d Cir. 2014) ("[Rule 59(e) cannot be employed to re-relitigate . . . already-denied motions."). Nor is it a "vehicle for presenting theories or arguments that could have been advanced earlier." See Klayman v. Judicial Watch, Inc., 296 F. Supp. 2d 208, 213-14 (D.D.C. 2018) (quoting Estate of Gaither ex rel. Gaither v. District of Columbia, 771 F. Supp. 2d 5, 10 & n.4 (D.D.C. 2011)). The Court must deny the Conservator's motion because that is precisely what the Conservator attempts to do here.

The Conservator relies upon the same reasoning that was put forth in the original petition for monitor review. He has not addressed and does not dispute the reasons that the Court gave for granting the government's motion to dismiss in the first instance. See Ren. Mot. Recon; see also Gov't Opp. at 4-7. The only difference between the original petition for monitor review and the Conservator's motion for reconsideration is that Mr. Jones now has been properly substituted as a party to the case. As in the original petition, the Conservator argues that "[i]t is

manifestly unjust, under these circumstances, not to permit the Track B arbitration to re-convene under the direction of the Conservator to allow McGinnis to finally recover his just compensation for years of past discrimination by the government." See Ren. Mot. Recon. at 6; Pet. Mon. Review at 207. It can be inferred from the Conservator's motion that he believes that the Arbitrator would reach a different conclusion if he reinitiated review of Mr. McGinnis's Track B claim now that Mr. Jones has been substituted for Mr. McGinnis as a party to this case. Without more, the Court declines to award the Conservator a second bite at the apple.

The Court has already ruled on the arguments made by the Conservator. And the problem for the Conservator – and ultimately for Mr. McGinnis – remains the same: The Consent Decree dictates the outcome here. As the Court has explained repeatedly, it has no authority to "grant vacatur of the arbitrator's decisions and resurrection of the claimants' Track B claims." See Pigford v. Vilsack, 78 F. Supp. 3d 247, 250 (D.D.C. 2015) (quoting Abrams v. Vilsack, 655 F. Supp. 2d 48, 52 & nn. 4-5 (D.D.C. 2009)). The sole exception to this robust finality was provided in Paragraph 12(b)(iii) of the Consent Decree, under which the Monitor was given the limited power, on petition of a party, to review an arbitrator's decision and to direct the arbitrator to reexamine a claim where the Monitor determines that a clear and manifest error has occurred in the arbitration and has resulted or is likely to result in a fundamental miscarriage of justice. See Pigford v. Vilsack, 78 F. Supp. 3d at 251; Consent Decree ¶ 12(b)(iii). Accordingly, the Court's role in responding to Mr. McGinnis's challenge to the Arbitrator's decision is very limited. It has the authority to decide only whether there is reason to reappoint the Monitor to consider the petition for review. The Court decided previously that there is no such reason because reappointing the Monitor for this purpose would be in vain. See Pigford v. Perdue, 330 F. Supp. 3d at 11-12. Nothing has changed.

The Consent Decree dictates that the Monitor – in determining whether to order the Arbitrator to reexamine a Track B claim – is permitted to consider only the record that was before the Arbitrator at the time of the Arbitrator's initial Track B determination. See Pigford v. Perdue, 330 F. Supp. 3d at 11; see also Court Order of Reference ¶ 8(e)(ii) [Dkt. No. 279] ("[I]n Track B claims, the Monitor will not be permitted to consider additional materials on review or to supplement the record for review upon reexamination."). Once again, this limitation would render monitor review futile. The Monitor would not be able to consider any evidence of Mr. McGinnis's diminished capacity that was not before the Arbitrator when it denied Mr. McGinnis's claim. And just as the Court reasoned when it granted the government's motion to dismiss, so too here there is "simply insufficient evidence" in the record developed before the Arbitrator of Mr. McGinnis's alleged mental incapacity to support a finding by the Monitor that "'clear and manifest error' has resulted or is likely to result in 'a fundamental miscarriage of justice.'" See Pigford v. Perdue, 330 F. Supp. 3d at 12.[6] The fact that the Conservator has replaced Mr. McGinnis would not result in the different outcome that the Conservator seeks.

Even if the Monitor could consider the additional evidence and arguments presented in the Conservator's motion to prove Mr. McGinnis's incapacity, the Court agrees with the government that the Conservator still has not "demonstrated (or even suggested) any

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[6] The parties dispute whether Mr. McGinnis's diminished mental capacity was raised and preserved for the record during the course of the arbitration proceeding. See Reply at 1; Gov't Opp. at 4, 6. The Court has already decided this issue. It concluded that there was "some evidence which was before the arbitrator . . . that would have indicated to the arbitrator that Mr. McGinnis was both frustrated with the handling of his claim and possibly confused about its status. But this would not necessarily lead one to infer that Mr. McGinnis was mentally incompetent. More importantly, it does not explain why his counsel did not raise the issue of competence with [the Arbitrator] at any point during the arbitration process." See Pigford v. Perdue, 330 F. Supp. 3d at 11-12, 9 n.5.

connection between Mr. McGinnis's supposed 'incompetence' and [Mr. Shoreman's] failure to meaningfully prosecute Mr. McGinnis's claims." See Gov. Opp. at 4.[7]

Ordering the Monitor to reexamine the Arbitrator's decision could not prevent or correct the alleged injustice that has befallen Mr. McGinnis. No evidence was before the Arbitrator of Mr. McGinnis's supposed mental incapacity and no such explanation was provided to the Arbitrator for his or his counsel's failure to comply with the terms of the Consent Decree and the deadlines imposed (and generously extended) by the Arbitrator. While it is possible that Mr. McGinnis's alleged incapacity may have played a role in his Tack B arbitration process, the Court must enforce the terms of the Consent Decree. The Conservator has failed to make any new arguments, and the Court will not allow him to re-litigate the already-dismissed petition.

For the foregoing reasons, it is hereby

ORDERED that the Conservator's Renewed Motion for Reconsideration [Dkt. No. 2077] is DENIED.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 1/2/19

[7] Instead, the Conservator "submits it is unfair to hold counsel responsible for the Consent Decree's failure to make provision for mental incapacity affecting a claim in the middle of arbitration proceedings." See Ren. Mot. Recon. at 4. Even if the Court were to agree, the Conservator has not provided any explanation for Mr. Shoreman's failure to preserve Mr. McGinnis' incompetence for the record or to abide by the deadlines imposed by the Arbitrator during the Track B proceedings, even after they were amended. See Pigford v. Perdue, 330 F. Supp. 3d at 9 n.5.