No. 21-____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK DONELSON,

Petitioner,

v.

AMERIPRISE FINANCIAL SERVICES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 12(f) authorizes a federal court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." A court may do so on its own, or based on a motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

In the decision below the Eighth Circuit used Rule 12(f) to strike Plaintiff's allegations supporting his claim that the case should proceed as a class action.

The questions presented are:

1. May allegations made in support of the claim that a case should proceed as a class action be struck from a pleading pursuant to Federal Rule of Civil Procedure 12(f), which permits striking any "redundant, immaterial, impertinent, or scandalous matter"?

2. If so, what standards govern whether to strike such allegations?

PARTIES TO THE PROCEEDING

Petitioner is Mark Donelson, the plaintiff below.

Respondents are Ameriprise Financial Services, Inc., Mark J. Sachse, James Cracchiolo, Kelli Hunter Petruzillo, Neal Maglaque and Patrick Hugh O'Connell, the defendants below.

RELATED PROCEEDINGS

- *Donelson v. Ameriprise Financial Svs. Inc., et al.*, No. 18-cv-01023, U.S. District Court for the Western District of Missouri. Judgment entered on Dec. 3, 2019.
- *Donelson v. Ameriprise Financial Svs. Inc., et al.*, No. 19-3691, U.S. Court of Appeals for the Eighth Circuit. Judgment entered June 3, 2021.
- *Donelson v. Ameriprise Financial Svs. Inc., et al.*, No. 19-3693, U.S. Court of Appeals for the Eighth Circuit. Judgment entered June 3, 2021.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eighth Circuit's opinion is dated June 3, 2021. Pet. App. 2a. Petitioner timely filed a petition for rehearing en banc, which the Eighth Circuit denied on July 13, 2021. Pet. App. 47a. On July 19, 2021, the Chief Justice entered an order, applicable here, extending the time to file a petition for certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing if the relevant judgment or order was issued prior to July 19, 2021.

RULE & STATUTORY PROVISION INVOLVED

Federal Rule of Civil Procedure 12(f) provides in relevant part:

> (f) The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
>
> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

The Rules Enabling Act, 28 U.S.C. § 2074, provides in relevant part:

> (a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

INTRODUCTION

This case presents an important, recurring issue concerning class action litigation.

Federal Rule of Civil Procedure 12(f) authorizes a federal court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." A court may do so on its own, or based on a motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

In the decision below, the Eighth Circuit used Rule 12(f) to strike Petitioner's allegations supporting his claim that the case should proceed as a class action—effectively foreclosing class certification at the pleading stage. But the Eighth Circuit's holding—that Rule 12(f) may be, and here should have been, used to strike class allegations—is foreclosed by the plain text of Rule 12(f), and lacks support from the history of the Rule.

Unfortunately, misuse of Rule 12(f) to strike allegations supporting class certification is a tactic increasingly pursued by defendants, and accepted by lower courts. The Eighth Circuit's embrace of that

misuse warrants this Court's immediate attention for several reasons.

First, this misuse of Rule 12(f) is directly contrary to numerous decisions of this Court, which make clear that courts may not expand a Rule "by disregarding plainly expressed limitations," *Schlagenhauf v. Holder*, 379 U.S. 104, 121 (1964), and "have no power to rewrite the Rules by judicial interpretations." *Harris v. Nelson*, 394 U.S. 286, 298 (1969). "The text of a rule . . . limits judicial inventiveness," and courts "are not free to amend a rule outside the process Congress ordered . . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Second, the judicial invention of using Rule 12(f) to strike allegations supporting class certification creates an acute separation of powers problem. Like today, when Rule 12(f) was enacted, Congress partially delegated rulemaking authority to the federal courts, but reserved for itself a role in that process. *See* 28 U.S.C. § 2074(a). The Eighth Circuit's misuse of Rule 12(f) effectively amends it while bypassing Congress's prescribed role in the rulemaking process. But the propriety of Congress's delegation of authority to promulgate rules for the federal courts depends on the judicial branch "confin[ing] itself to its proper role." *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). That delicate delegation arrangement is disturbed if the federal courts interpret or apply a Rule in disregard of its plain terms, thereby utilizing it in a way that Congress did not consider or approve.

Third, this misuse of Rule 12(f) gives rise to other problems in class action litigation, and more broadly.

For example, it raises difficult and avoidable questions about the standards which should govern Rule 12(f) motions to strike class allegations, and generates uncertainly about when tolling of limitations periods end in putative class actions subject to such motions, and about the availability of interlocutory appeals from such motions under Federal Rule of Civil Procedure 23(f).

This case is an ideal vehicle to address the important and recurring questions presented. The Petition should be granted. *See* SUP. CT. R. 10(c).

STATEMENT OF THE CASE

As set out in his Amended Complaint, Petitioner, Mark Donelson, filed a lawsuit against his former investment advisor, Mark Sachse, and Ameriprise, his former investment advising firm, where Sachse worked, as well as against several officers of Ameriprise.

The 61-page Amended Complaint asserts violations of federal securities law and breaches of fiduciary duties, based on a series of alleged misconduct by Sachse and Ameriprise, including the failure to disclose that Sachse was a former attorney disbarred for professional misconduct, misrepresenting the account value, improper trading on the account, and misrepresenting reparation for problems with the account. *See* Pet. App. 27a, 30a-31a. The Amended Complaint also pleaded the case as a putative class action, seeking to represent other clients of Ameriprise who experienced substantially the same alleged misconduct, and who "may number less than fifty (50)," but "are so numerous and

dispersed that joinder of all members is impracticable."

Defendants moved to strike the Amended Complaint's class allegations, and to have the dispute sent to arbitration. The district court denied the motion to strike, observing "the extensive briefing of the defendants is more appropriate on a motion for class certification," Pet. App. 41a, as well as the motion to compel arbitration.

Defendants sought an interlocutory appeal based on 9 U.S.C. § 16(a)(1)(B). Concluding that provision created appellate jurisdiction, the Eighth Circuit proceeded to review the district court's order. With respect to the lower court's denial of the motion to strike, the Eighth Circuit noted that "Federal courts are split about whether class-action allegations may be stricken under Rule 12(f) prior to the filing of a motion for class-action certification," but held that Rule 12(f) may be employed for that purpose, and that the district court abused its discretion by denying Defendants' motion to strike the class allegations in Petitioner's complaint "because not only was it apparent from the pleadings that Donelson could not certify a class but also the class allegations were all that stood in the way of compelling arbitration." Pet. App. 20a. The court of appeals remanded the case to the district court for entry of an order striking the class allegations and compelling arbitration. Pet. App. 25a.

Mr. Donelson filed a timely petition for panel rehearing or rehearing en banc, which was denied. Pet. App. 46a.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Holding Conflicts With the Text and History of Rule 12(f)

The Eighth Circuit's holding—that Rule 12(f) may be, and here should have been, used to strike class allegations—is clearly foreclosed by the plain text of Rule 12(f), and lacks support from the history of the Rule.[1]

A. Class Allegations Are Not Among the "Redundant, Immaterial, Impertinent, or Scandalous" Matters Which Rule 12(f) Permits a Court to Strike

A Federal Rule is "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *see also Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019) (citing *Bank of Nova Scotia*); *Peguero v. United States*, 526 U.S. 23, 29 (1999) (citing *Bank of Nova Scotia*). Courts are "bound to follow" a Federal Rule as understood "upon its adoption" and "are not free to

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[1] Numerous district courts have used Rule 12(f) to strike class allegations. *See*, *e.g.*, *Naiman v. Alle Processing Corp.,* 2020 WL 6869412 (D. Ariz. Nov. 23, 2020); *City of Dorchester, S.C. v. AT & T Corp.*, 407 F. Supp. 3d 561 (D.S.C. 2019); *Wolfkiel v. Intersections Ins. Servs.*, 303 F.R.D. 287 (N.D. Ill. 2014); *Bearden v. Honeywell Int'l, Inc.*, 2010 WL 1223936 (M.D. Tenn. Mar. 24, 2010); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, (N.D. Cal. 2009); *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 194 (M.D. Pa. 2008). The Sixth Circuit is sometimes described as endorsing the use Rule 12(f) motions to strike class allegations, although that court's seminal decision does not expressly reference Rule 12(f). *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011) (affirming district court's judgment striking class allegations).

alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 861 (1999).

Rule 12(f) authorizes a federal court to strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter."[2] This list of four categories is specific, and limited. They are not mere examples, which may be supplemented at the discretion of a court. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93-94 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it . . . . The absent provision cannot be supplied by the courts"); *see also Nichols v. United States*, 578 U.S. 104, 110 (2016) (rejecting proffered reading of statute as "'not a construction" but "in effect, an enlargement of it by the court").

The four terms comprising the list of matters which may be struck from a pleading are, however, undefined. An undefined term is typically given its "ordinary meaning," *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012), and the Court routinely relies on recognized dictionaries in use at the time of enactment to ascertain that meaning. *See also Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning."): *Bus. Guides, Inc. v. Chromatic Commc'n Enters., Inc.*, 498 U.S. 533, 540, 543 (1991)

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[2] Rule 12(f) is currently, in relevant part, identical to the version enacted in 1938. A 1946 amendment permitting the striking "any insufficient defense" has no bearing on the issues raised in this Petition.

(citing *Pavelic & LeFlore*) (rejecting reading inconsistent with the language of Rule); *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 716 n.5 (2019) (rejecting invitation to interpret Rule "flexibly" given the "clear text" of the Rule).

Dictionaries in use in 1938, when Rule 12(f) was enacted, demonstrate that allegations supporting class certification fall far outside the scope of the Rule.

Redundant. BLACK'S LAW DICTIONARY 1512 (3d ed. 1933) (Redundancy: "introducing superfluous matter into a legal instrument; particularly the insertion in a pleading of matters foreign, extraneous, and irrelevant to that which it is intended to answer."); BOUVIER'S LAW DICTIONARY 2853 (8th ed. Vol. III 1914) (Redundancy: "Matter introduced in an answer or other pleading which is foreign to the bill or article."); OXFORD ENGLISH DICTIONARY 318 (Vol. VIII: Pt. I 1914) (Redundancy: **"**The state or quality of being redundant; superabundance, superfluity.").

Immaterial. BLACK'S LAW DICTIONARY 918 (3d ed. 1933) (Immaterial: "Not material, essential, or necessary; not important or pertinent; not decisive."); *id.* at 919 (Immaterial Issue: "In pleading. An issue taken on an immaterial point; that is, a point not proper to decide the action."); BOUVIER'S LAW DICTIONARY 1493 (8th ed. Vol. III 1914) (Immaterial: "Unnecessary or non-essential; impertinent (*q. v.*); indecisive."); *id.* (Immaterial Issue: "An issue taken upon some collateral matter, the decision of which will not settle the question in dispute between the parties in action."); OXFORD ENGLISH DICTIONARY 61 (Vol. V: Pt. II 1901) (Immaterial: "Not pertinent to the matter

in hand"; "Of no essential consequence; unimportant.").

Impertinent. BLACK'S LAW DICTIONARY 923 (3d ed. 1933) (Impertinence: "Irrelevancy; the fault of not properly pertaining to the issue or proceeding. The introduction of any matters into a bill, answer, or other pleading or proceeding in a suit, which are not properly before the court for decision, at any particular state of the suit."); BOUVIER'S LAW DICTIONARY 1509 (8th ed. Vol. II 1914) (Impertinent: "A term applied to matters introduced into a bill, answer, or other proceeding in a suit which are not properly before the court for decision at that particular state of the suit."); OXFORD ENGLISH DICTIONARY 88 (Vol. V: Pt. II 1901) (Impertinence: "The fact or character of not pertaining to the matter in hand; want of pertinence; irrelevance.").

Scandalous. BLACK'S LAW DICTIONARY 1583 (3d ed. 1933) (Scandal: "In Pleading – "Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added, that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous."); BOUVIER'S LAW DICTIONARY 3009 (8th ed. Vol. III 1914) (Scandalous Matter: "In Equity Pleading. Unnecessary matter criminatory of the defendant or any other person, alleged in the bill, answer, or other pleading, or in the interrogatories to or answers by witnesses."); *id.* ("Matter which is relevant can never be scandalous"); OXFORD ENGLISH DICTIONARY 174 (Vol. XIII, Pt. II 1914) (Scandal: "An

irrelevancy or indecency introduced into a pleading to the derogation of the dignity of the court."); *id.* at 175 (Scandalous: "Not pertinent to the case, irrelevant.").

No one could credibly claim that ordinary class allegations, like those in Petitioner's complaint, are "redundant, immaterial, impertinent, or scandalous," as those terms were understood in 1938—or are understood today.[3] *See* BLACK'S LAW DICTIONARY (11th ed. 2019).

The Federal Rules of Civil Procedure "should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf*, 379 U.S. 104 at 122 (considering the "plain language of Rule 35"). Courts "have no power to rewrite the Rules by judicial interpretations." *Harris*, 394 U.S. at 298.

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[3] In theory, a specific class allegation, in a particular case, could—for reasons separate from its purported support for class certification—*actually be* "redundant, immaterial, impertinent, or scandalous." But neither this case, nor the other cases endorsing the use of Rule 12(f) to strike class allegations, have involved such allegations.

The use of Rule 12(f) to strike class allegations ignores this Court's clear directions on these points. *See also* Timothy A. Daniels, *Challenging Class Certification at the Pleading Stage: What Rule Should Govern and What Standard Should Apply?*, 56 S. TEX. L. REV. 241, 263 (2014) ("The terms of 12(f) . . . do not encompass a challenge to the propriety of class certification."); *id.* at 264 ("Even courts that recognize Rule 12(f) as a basis to challenge class allegations do not rely on the text of the rule . . . ."); STEVEN S. GENSLER & LUMEN N. MULLIGAN, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY RULE 23 CLASS ACTIONS, Westlaw (database updated February 2021) ("Some courts have also entertained motions to strike the class allegations under Rule 12(f). The use of Rule 12(f) is problematic, however, because of the limited scope of Rule 12(f) . . . .").[4]

It is of "overriding importance" that courts "be mindful" the Federal Rules "set[] the requirements they are bound to enforce." *Windsor*, 521 U.S. at 620. When a federal court of appeals fundamentally misapprehends a Rule, this Court should intervene to ensure it is properly construed and faithfully applied. *See, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405 (2006) (reversing lower court, explaining "[t]he text of Rule 50(b)" left the district court "without the power" to grant a new trial, even if inclined to do so); *Temple v. Synthes Corp.*, 498 U.S. 5, 7-8 (1990) (reversing lower court due to misapplication of Rule 19(b)); *Windsor*, 521 U.S. at 622 (federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted" and must employ "criteria the rulemakers

[4] Several district courts have cited the text of Rule 12(f) in declining to use it as the basis for striking class allegations. *See*, *e.g.*, *Barrett v. Vivint, Inc.*, 2020 WL 2558231, at *7 (D. Utah May 20, 2020) ("The court does not engage in a Rule 12(f) analysis because Defendants do not tether their argument to the language of the rule."); *Boddie v. Signature Flight Support Corp.*, 2019 WL 3554383, at *3 (N.D. Cal. Aug. 5, 2019) ("Rule 12(f) permits a court to strike from a pleading only 'an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter'. . . . Defendants do not explain how the class allegations in the FAC satisfy this standard."); *Vision Power, LLC v. Midnight Express Power Boats, Inc.*, 2019 WL 5291042, at *8 (S.D. Fla. July 26, 2019) ("Midnight Express did not even attempt to argue that the class action allegations are redundant, immaterial, impertinent, or scandalous. Accordingly, Midnight Express' motion to strike the class allegations should be denied."); *Thompson v. Procter & Gamble Co.*, 2018 WL 5113052, at *5 (S.D. Fla. Oct. 19, 2018) ("While Plaintiffs' proposed class may ultimately fail on a motion for class certification, Defendant has certainly not established at this juncture that Plaintiffs' class allegations are 'redundant, immaterial, impertinent, or scandalous.'"); *Ortiz v. Amazon.com LLC*, 2017 WL 11093812, at *2 (N.D. Cal. Oct. 10, 2017) ("To the extent Defendants rely on Rule 12(f), the Court concludes the class allegations are not redundant, immaterial, impertinent, or scandalous."); *Claiborne v. Water of Life Cmty. Church*, 2017 WL 9565337, at *14 (C.D. Cal. Aug. 25, 2017) ("Defendant does not argue the allegations fall under any of the Rule 12(f) categories; instead, it argues only the class allegations are legally insufficient."); *Weigand v. Maxim Healthcare Servs., Inc.*, 2016 WL 127595, at *5 (W.D. Mo. Jan. 11, 2016) ("But Maxim identifies no redundant, immaterial, impertinent, or scandalous matter in Weigand's complaint."); *Roy v. Wells Fargo Bank, N.A.*, 2015 WL 1408919, at *2 (N.D. Cal. Mar. 27, 2015) ("Indeed, Wells Fargo does not claim that the class allegations fit any Rule 12(f) category; Wells Fargo argues only that the class allegations are legally insufficient."); *Bohlke v. Shearer's Foods, LLC*, 2015 WL 249418, at *2 (S.D. Fla. Jan. 20, 2015) ("As the Court finds nothing "redundant, immaterial, impertinent, or scandalous" in Plaintiff's class action allegations, the Motion to Strike Plaintiff's

set"); *Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958) (reversing lower court due to reliance on incorrect Rule).

B. The Enactment and Historical Use of Rule 12(f)

As with Rule 12(f)'s text, nothing about its enactment in 1938, as part of the original Federal Rules of Civil Procedure, remotely supports the propriety of its use to strike class allegations.

As for historical practice in the federal courts, it decidedly undermines the notion that Rule 12(f) should be used for such purposes. Although class actions have been formally contemplated by the Rules since their initial adoption in 1938, and been specifically addressed by Federal Rule of Civil Procedure 23 during all of this time, Petitioner has been unable to find a *single case* during the first eight decades Rule 12(f) was in effect in which it was used to strike class allegations. The earliest case cited by Respondents below is from 2010—and the Eighth Circuit's decision cites no such cases. *Cf. Rubin v.*

Nationwide Class–Action Allegations is denied."); *Galoski v. Stanley Black & Decker, Inc.*, 2014 WL 4064016, at *1 (N.D. Ohio Aug. 14, 2014) ("There is nothing redundant, immaterial, impertinent or scandalous contained in the Class Action Complaint or the class allegations."); *Meyer v. Nat'l Tenant Network, Inc.*, 10 F. Supp. 3d 1096, 1104 (N.D. Cal. 2014) ("Defendant has not explained what about those class allegations are 'redundant, immaterial, or impertinent and scandalous matter.'"); *Williams v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 2046097, at *2 (E.D. Ark. June 6, 2012) ("The class allegations in this case are not redundant, immaterial, impertinent, or scandalous. Therefore, the Court sees no reason to strike the allegations at this time.").

Islamic Republic of Iran, 138 S. Ct. 816, 825 (2018) (looking to "historical practice" as part of statutory interpretation); *see also Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'"); *Printz v. United States*, 521 U.S. 898, 905 (1997) (from Congress's failure to employ "this highly attractive power, we would have reason to believe that the power was thought not to exist"). Use of Rule 12(f) to strike class allegations is a relatively new judicial invention—like a "bad wine of recent vintage." *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring).

The dearth of Rule 12(f) motions directed to class allegations until recent years is unsurprising given that there has always been another Federal Rule of Civil Procedure dedicated to class actions. "Class certification is governed by Federal Rule of Civil Procedure 23." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (Rule 23 "governs class actions in federal court."). Defendants seeking to adjudicate

the propriety of class certification can—and should—file appropriate motions pursuant to that Rule.[5]

Numerous district courts have properly recognized as much, finding that Rule 12(f) is not appropriately used to strike class allegations. *See*, *e.g.*, *Delux Cab, LLC v. Uber Techs., Inc.*, 2017 WL 1354791, at *8 (S.D. Cal. Apr. 13, 2017) ("Rule 12(f) is not the proper procedural vehicle for challenging class claims"); *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 2014 WL 1048710, at *3 (N.D. Cal. Mar. 14, 2014) ("Rule 12(f) motions to strike are not the proper vehicle for seeking dismissal of class allegations" and the motion before the court was a "procedural misstep"); *Swift v. Zynga Game Network, Inc.*, 2010 WL 4569889, at *10 (N.D. Cal. Nov. 3, 2010) ("the Ninth Circuit has indicated that Rule 12(f) is not the proper vehicle for dismissing portions of a complaint when the Rule 12(f) challenge is really an attempt to have portions of the complaint dismissed; such a challenge is better suited for a Rule 12(b)(6) motion to

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[5] Since 1966, Rule 23 has provided that a court may require amendment of the pleadings to eliminate allegations as to representation of absent persons. *See* Fed. R. Civ. P. 23(d)(1)(D) (Rule 23(d)(4), prior to the 2007 Amendments). This is a procedural mechanism for amending pleadings after the propriety of class certification is decided—not means for an end-run around proper adjudication of the issue. *See* CHARLES A. WRIGHT ET AL., 7B FED. PRAC. & PROC. CIV. § 1795 (3D ED.) ("After a determination has been made that a class action is not proper under Rule 23(c)(1), courts typically issue an order requiring that the pleadings be amended to reflect that decision, although this often is done without reference to Rule 23(d)(4)."); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 184 n.6 (1974) (noting the provision might apply were the case "remitted to an individual action").

dismiss or a Rule 56 motion for summary judgment.") (citing *Whittlestone, Inc. v. Handi-Craft Co.,* 618 F.3d 970, 974 (9th Cir. 2010)). As one commentator has explained: "Rule 12(f) is not an appropriate mechanism to challenge class allegations"; it was not intended to address, nor do its "terms" address, "the propriety of class certification." Daniels, *supra*, at 11; *see also id*. at 263; *id*. at 265 ("its use in the future should be discontinued by both courts and litigants").[6]

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[6] The Eighth Circuit's precedential decision is binding on ten district courts, across seven states. That alone is sufficient to warrant this Court's review. However, the decision below is likely to usher in a wave of motions to strike across the country. Soon after the decision was issued, law firms which routinely defend clients in class actions sent out alerts touting the result and suggesting consideration of such motions. *See*, *e.g.*, Kilpatrick Townsend & Stockton, *Motions to strike: Eighth Circuit reverses district court refusal to strike class allegations* 2 (July 29, 2021) ("a Rule 12(f) motion to strike serves as an additional means for deciding whether to allow a class action to proceed . . . a motion to strike remains a viable option for many class action defendants"); Skadden, *The Class Action Chronicle* 2 (July 2021) ("*Donelson* provides important support for the motion to strike class allegations at the pleading stage"); Cadwalader, *Clients & Friends Memo* 3-4 (June 11, 2021) (calling the Eighth Circuit's decision "an endorsement" for striking class allegations "on the pleadings under Federal Rule of Civil Procedure 12(f), prior to class discovery and a motion for class certification" which "could prove influential in broadening acceptance of the mechanism").

II. The Eighth Circuit's Inventive Use of Rule 12(f) Creates a Separation of Powers Problem

The recent judicial invention of using Rule 12(f) to strike allegations supporting class certification creates an acute separation of powers problem.

"Congress has undoubted power to regulate the practice and procedure of federal courts," which it may exercise by delegating that authority "to make rules not inconsistent with the statutes or Constitution of the United States." *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941); *see also Mistretta v. United States*, 488 U.S. 361, 387 (1989) ("Congress, in some circumstances, may confer rulemaking authority on the Judicial Branch.").

Like today, when Rule 12(f) was enacted, Congress partially delegated rulemaking authority to the federal courts, but expressly reserved for itself a role in that process. *See* 28 U.S.C. § 2074(a). As the Court has observed, Congress partakes in an "extensive deliberative process" before Federal Rules take effect, *Windsor*, 521 U.S. at 620, and as part of that process retains "plenary power to override the Federal Rules," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 402 n.4 (2010). *See also I.N.S. v. Chadha*, 462 U.S. 919, 935 n.9 (1983) (explaining the statute authorizing creation of the Federal Rules of Civil Procedure gave "Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable"); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150

U. PA. L. REV. 1099, 1115 (2002) (discussing the "report-and-wait requirement" of the rulemaking process).

"The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered . . . ." *Windsor*, 521 U.S. at 620; *see also* Struve, *supra*, at 17 ("Congress's delegation of rulemaking authority should constrain, rather than liberate, court's interpretation of the Rules."); *id.* at 1120 ("The structure of the Enabling Act delegation and the reality of the rulemaking process together suggest that courts should have, if anything, less latitude to interpret the Rules than they do to interpret statutes.").

The Eighth Circuit's misuse of Rule 12(f) effectively amends it while bypassing Congress's prescribed role in the rulemaking process. This, however, poses a separation of powers problem: courts may not expand a Rule "by disregarding plainly expressed limitations," *Schlagenhauf*, 379 U.S. at 121, and "have no power to rewrite the Rules by judicial interpretations," *Harris*, 394 U.S. at 298. *See also Windsor*, 521 U.S. at 622 (federal courts "lack authority to substitute for Rule 23's certification criteria a standard never adopted" and must employ "criteria the rulemakers set").

The propriety of Congress's delegation of authority to promulgate rules for the federal courts depends on the judicial branch "confin[ing] itself to its proper role." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). That delicate delegation arrangement is disturbed if the federal courts

interpret or apply a Rule in disregard of its plain terms, thereby utilizing it in a way that Congress did not consider or approve.

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 870 (1991). "[P]olicing the 'enduring structure' of constitutional government" is "one of the most vital functions of this Court." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring).

III. The Inventive Use of Rule 12(f) Creates Other Potential Problems

In addition to the threshold clashes with the text and history of the Rule, the misuse of Rule 12(f) to strike class allegations presents other problems in class action litigation, and more generally.

A. Other Problems in Class Action Litigation

1. Uncertain Standards Governing Motions to Strike Class Allegations

"Class certification is governed by Federal Rule of Civil Procedure 23." *Dukes*, 564 U.S. at 345. The standards governing class certification under Rule 23 are well-developed and substantially settled. Not so, however, with respect to Rule 12(f) motions directed to class allegations. *See* Daniels, *supra*, at 11 (noting "there is significant variability in the approach taken in deciding such challenges, both among the circuits and in some instances within the circuits").

For example, it is clear that a plaintiff moving for class certification has the burden of demonstrating

the requirements of Rule 23 are satisfied. 3 NEWBERG ON CLASS ACTIONS § 7:39 (5th ed.) ("When a party—typically the plaintiff—moves for class certification, it bears the burden."). There is also a growing consensus that a preponderance of the evidence standard applies. *Id.* at § 7:21 ("The trend in recent cases has been a move from lighter or loosely defined burdens towards adoption of a preponderance of the evidence standard."). Yet neither the burden, nor the appropriate standard, are settled with respect to a Rule 12(f) motion applied to allegations in support of class certification. *See e.g., Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1092 (8th Cir. 2021) (whether "it is 'apparent from the pleadings that the class cannot be certified'"); *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013) (whether "it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis"); *City of Dorchester*, 407 F. Supp. at 565–66 ("'A court may grant a motion to strike class allegations where the pleading makes clear that the purported class cannot be certified and no amount of discovery would change that determination.'"); *Wolfkiel*, 303 F.R.D. at 292–93 ("whether the class allegations in the Complaint are facially and inherently defective to establish a class action."). *See e.g.*, *Fishon v. Mars Petcare US, Inc.*, 501 F. Supp. 3d 555, 575 (M.D. Tenn. 2020) ("A motion to strike class allegations under Rule 12(f) may be treated as a motion to deny class certification under Rule 23 . . . The moving party has the burden of demonstrating from the face of the . . . complaint that it will be impossible to certify the class as alleged, regardless of the facts plaintiffs may be able to prove."); *Dieter v. Aldi, Inc.*, 2018 WL 6191586, at *3

(W.D. Pa. Nov. 28, 2018) ("Regardless whether a defendant files a motion to strike class allegations pursuant to Rule 12(f) based upon insufficient class allegations in a complaint, or a plaintiff files a motion to certify a class pursuant to Rule 23 based upon a more fully developed record, the plaintiff has the burden to prove that the requirements set forth in Rule 23 are met, and the court must accordingly apply Rule 23."); *Walters v. Vitamin Shoppe Indus., Inc.*, 2018 WL 2424132, at *3 (D. Or. May 8, 2018) (on a Rule 12(f) motion to strike class allegations, "the defendant 'must bear the burden of proving that the class is not certifiable'"), *report and recommendation adopted*, 2018 WL 2418544 (D. Or. May 29, 2018).

The Court should not have to address these questions at all because Rule 12(f) is not appropriately deployed to strike class allegations. However, if the Court elects to sanction that use of Rule 12(f), then the Court's guidance on these issues is both needed and welcome.

2. Uncertainty Concerning Tolling in Putative Class Actions

Another area of uncertainty created by the misuse of Rule 12(f) to strike class allegations concerns tolling of applicable statutes of limitations based on the filing of a putative class action.

Under this Court's well-settled precedents, absent class members expect the filing of a class action to suspend the running of the applicable statute of limitations. *See American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). However, these cases were decided based on discussion and consideration of

Federal Rule of Civil Procedure 23—without any mention of Rule 12(f). Thus, *Crown* provides that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown*, 462 U.S. at 354. But an order granting a motion to strike class allegations pursuant to Rule 12(f) is not obviously a denial of class certification, as that phrase is used in the tolling cases.

Permitting courts to use Rule 12(f) to decide issues more properly addressed under Rule 23 will sow confusion—and generate unnecessary litigation—about whether and when tolling has ended in putative class actions where a Rule 12(f) motion has been granted.

3. Uncertainty Concerning Rule 23(f) Appeals in Putative Class Actions

An additional area of uncertainty created by the misuse of Rule 12(f) to strike class allegations concerns the availability of an interlocutory appeal.

Rule 23(f) provides "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . ." An order granting a motion to strike class allegations pursuant to Rule 12(f) is, by definition, not "an order granting or denying class-action certification *under [Rule 23]*." (emphasis added). Yet disputes have already arisen about whether Rule 23(f) may provide

a basis for appellate jurisdiction in cases where Rule 12(f) motions to strike have been granted.[7]

Permitting courts to use Rule 12(f) to resolve class certification decisions more properly addressed under Rule 23 will generate avoidable uncertainty and litigation about the availability of interlocutory appeals under Rule 23(f).

B. Abandoning The Clear Textual Limits of Rule 12(f) Invites Other Misuses of the Federal Rules

Abandoning the clear textual limits of Rule 12(f) invites other misuses of that Rule beyond class certification.

If an unavailing class allegation is permissibly reimagined as "redundant, immaterial, impertinent, or scandalous," then what's next? What is the limiting principle?

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[7] In *Microsoft v. Baker*, 137 S. Ct. 1702, 1711 n. 7 (2017), the Court observed that "[a]n order striking class allegations is 'functional[ly] equivalent' to an order denying class certification and therefore appealable under Rule 23(f)." The footnote also cited *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)—a decision which predated Rule 23(f). Neither *Microsoft* nor *McDonald* appear to have involved a Rule 12(f) motion. Moreover, the observation in *Microsoft* did not engage with the language of Rule 23 "permit[ting] an appeal from an order granting or denying class-action certification *under this rule*." (emphasis added). The Court occasionally renders "unrefined dispositions," sometimes described as "drive-by" rulings, reached without the benefit of full briefing on a subsidiary issue in a case. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). Observations made in such dispositions "should be accorded 'no precedential effect' . . . ." *Id*. It appears unresolved by this Court whether an order under Rule 12(f) striking all class allegations from a complaint is appealable under Rule 23(f).

The Ninth Circuit has already rejected an effort to strike allegations concerning damages, appropriately reversing a district court's use of Rule 12(f) to strike the portion of a complaint which "sought the recovery of lost profits and consequential damages." In contrast with the Eighth Circuit, the Ninth Circuit looked to the "plain meaning" of the Rule, concluding "it is quite clear that none of the [] categories covers the allegations in the pleading sought to be stricken." *See Whittlestone*, 618 F.3d 970 at 973-74.

But if the Eighth Circuit's version of Rule 12(f) prevails, *Whittlestone* will be called into doubt, and countless new inventive uses of Rule 12(f) will be conjured up and deployed by litigants.

"The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (reversing lower court where "the requirements of Rule 15 were not met"). "The text of a rule . . . limits judicial inventiveness." *Windsor*, 521 U.S. at 620. If textual limits are not enforced, due process and the rule of law are undermined.

IV. This Case Is an Ideal Vehicle to Resolve Important and Recurring Issues Governing Class Action Litigation, and a Separation of Powers Problem

The Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1. Given their importance, the Court has granted numerous petitions for certiorari to consider their meaning or

application. *See*, *e.g.*, *Unitherm*, 546 U.S. 394 (Rule 50(b), reversing lower court); *Temple*, 498 U.S. 5 (1990) (Rule 19(b), reversing lower court); *Pavelic & LeFlore*, 493 U.S. 120 (Rule 11, reversing lower court); *White v, New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445 (1982) (Rule 59(e), reversing lower court); *Schlagenhauf*, 379 U.S. 104 (Rule 35, vacating the judgment and remanding the case to the lower court, and rejecting "the conclusion that the Rule does not mean what it most naturally seems to say"); *Rogers*, 357 U.S. at 203 (certiorari granted because the decision below "raised important questions as to the proper application of the Federal Rules of Civil Procedure," and reversing because the lower court relied on an incorrect Rule); *see also Chen v. Mayor and City Council of Baltimore*, 574 U.S. 988 (2014) (Rule 4(m); petition subsequently dismissed).

The application of the Rules to class actions is of particular importance given the prevalence of class actions and their impact on large numbers of parties and absent putative class members. *See Snyder v. Harris*, 394 U.S. 332, 341 (1969) ("the class action device serves a useful function across the entire range of legal questions"); *Bernard*, 452 U.S. at 99 ("Class actions serve an important function in our system of civil justice."); *Windsor*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); CHARLES A. WRIGHT ET AL., 7A FED. PRAC. & PROC. CIV. § 1751 (4th ed.) ("It now is apparent that the increasing complexity and urbanization of modern American

society has magnified tremendously the importance of the class action as a procedural device for resolving disputes affecting numerous people."); BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 2 (2019) (a class action lawsuit "is the most effective means private citizens have to enforce the law").

While the questions presented are significant to class action litigation, the Court's attention is even more essential because of the separation of powers concerns arising from misuse of Rule 12(f). The Court's role safeguarding separation of powers principles is so vital that it has numerous times agreed to review cases raising serious questions, but ultimately concluded no violation occurred. *See*, *e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); *Miller v. French*, 530 U.S. 327 (2000); *Loving v. United States*, 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992); *Freytag*, 501 U.S. 868; *Mistretta*, 488 U.S. 361; *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).[8]

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[8] Recognizing the importance of maintaining the separation of powers, the Court has granted review in numerous cases without the presence of conflicting lower court decisions. *See*, *e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897 (2018); *Peterson*, 136 S. Ct. 1310; *Stern v. Marshall*, 564 U.S. 462 (2011); *Loving*, 517 U.S. 748; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Robertson*, 503 U.S. 429; *Freytag*, 501 U.S. 868; *Morrison*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Chadha*, 462 U.S. 919; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Nixon*, 433 U.S. 425; *United States v. Klein*, 13 Wall. 128 (1871).

This case is an ideal vehicle for resolving the purely legal issues, squarely presented by the Eighth Circuit's precedential decision, which the full court of appeals refused to address en banc. Pet. App. 46a. The Court should not wait for another opportunity to address the misuse of Rule 12(f) embraced by the Eighth Circuit and other courts.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DECEMBER 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-3691

MARK DONELSON,
individually and on behalf of all others similarly situated,
Appellee,
v.

AMERIPRISE FINANCIAL SERVICES, INC.
Appellant,

MARK J. SACHSE,

JAMES CRACCHIOLO;
KELLI HUNTER PETRUZILLO;
NEAL MAGLAQUE;
PATRICK HUGH O'CONNELL,
Appellants.

No. 19-3693

MARK DONELSON,
individually and on behalf of all others similarly situated,
Appellee,
v.

AMERIPRISE FINANCIAL SERVICES, INC.

MARK J. SACHSE,
Appellant,

JAMES CRACCHIOLO; KELLI HUNTER PETRUZILLO;
NEAL MAGLAQUE;
PATRICK HUGH O'CONNELL.

Submitted: January 13, 2021
Filed: June 3, 2021

Before GRUENDER, BENTON, and STRAS, *Circuit Judges*.

GRUENDER, Circuit Judge.

Plaintiff Mark Donelson filed suit against Defendants Mark Sachse, Ameriprise Financial Services, Inc., and individual Ameriprise officers (collectively "Defendants"), alleging violations of federal securities law. He also sought to represent other Sachse and Ameriprise clients in a class action. Defendants moved to strike Donelson's class-action

allegations and to compel arbitration. The district court denied these motions. Defendants appeal. We reverse and remand for entry of an order striking Donelson's class-action allegations and compelling arbitration.

I.

According to his first amended complaint,[1] Donelson is a high school graduate with no training in trading securities. Donelson had an investment account with Robert W. Baird & Co. in 2008. In 2008, Sachse, who worked for Baird, contacted Donelson and told him that Sachse had heard that Donelson was adept at trading options. Sachse told Donelson that he was a former attorney who had stopped practicing law because he no longer enjoyed it. Unbeknownst to Donelson, Sachse had been disbarred by the Kansas Supreme Court in 2007 after multiple former clients filed ethics complaints.

In 2010, Sachse stopped working at Baird and became a broker and investment advisor at Ameriprise. At Sachse's invitation, Donelson then moved his investment account from Baird to Ameriprise. In the process of doing so, Donelson and Sachse met at a restaurant so that Donelson could sign the papers needed to open his new Ameriprise account. At the restaurant, Sachse had a copy of the Account Application, which he filled out himself, checking each box that, according to him, required

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[1] For the purposes of this opinion, we accept Donelson's allegations as true.

checking. Donelson instructed Sachse that under no circumstances was he to trade on margin any securities in or for the account. Nevertheless, Sachse checked a box in the Account Application that authorized margin borrowing. Sachse told Donelson he checked the box as a formality and assured Donelson that he would not trade any securities on margin. Donelson signed the Account Application as Sachse instructed, without reading it.

The Account Application included a recitation that stated:

> You acknowledge that you have received and read the Agreement and agree to abide by the terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in the Agreement. This account is governed by a predispute arbitration clause which is found in Section 26, Page 3 of the Agreement. You acknowledge receipt of the predispute arbitration clause.

The Account Application defined "Agreement" as "the Ameriprise Brokerage Client Agreement for Non-Qualified Accounts" ("Client Agreement"), which included an arbitration clause. That arbitration clause provided for arbitration of "ALL CONTROVERSIES THAT MAY ARISE BETWEEN US . . . , WHETHER ARISING BEFORE, ON OR AFTER THE DATE THIS ACCOUNT IS OPENED,"

except for "PUTATIVE OR CERTIFIED CLASS ACTION[S]."

After Donelson signed the Account Application, Sachse badly mishandled Donelson's investment account by, among other things, misrepresenting the account value, trading on margin when expressly instructed not to, and misrepresenting reparations Ameriprise would make for problems with Donelson's account. In response, Donelson filed suit against Defendants, bringing three counts against them. In Count I, Donelson asserted violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and related Securities and Exchange Commission Rules 10b-5(a) and (c), *see* 17 C.F.R. § 240.10b-5. In Count II, he asserted violations of § 20(a) of the Securities Exchange Act. *See* 15 U.S.C. § 78t(a). And in Count III, he asserted breach of fiduciary duty under § 206 of the Investment Advisors Act. *See* 15 U.S.C. § 80b-6. Alleging that other Sachse clients experienced similar improprieties, Donelson sought to represent them in a class action.

Defendants moved to strike Donelson's class-action allegations and to compel arbitration. The district court denied these motions. Defendants appeal, challenging the district court's denials. In Section II, we consider whether we have jurisdiction. In Section III, we determine whether Defendants waived their right to arbitrate. In Section IV, we address whether the district court or the arbitrator should have decided arbitrability. And in Section V, we address whether a valid arbitration clause exists and whether it encompasses the dispute between the

parties. Ultimately, we reverse the district court's denial of Defendants' motions to strike the class-action allegations and to compel arbitration, and we remand for entry of an order striking the class-action allegations and compelling arbitration.

II.

First, we address Donelson's arguments that either we do not have jurisdiction to hear this appeal or, alternatively, at a minimum, we lack jurisdiction over the denial of the motions to strike the class-action allegations. *See, e.g.*, *Anderson ex rel. Anderson v. City of Minneapolis*, 934 F.3d 876, 880 (8th Cir. 2019) ("Before reaching the merits of the dispute, we begin with jurisdiction, which is always our first and fundamental question." (brackets and internal quotation marks omitted)). Neither argument has merit.

First, the Federal Arbitration Act ("FAA") gives us jurisdiction to review the denial of the motions to compel arbitration. Section 16 of the FAA provides that "[a]n appeal may be taken from . . . an order . . . denying a petition under section 4 of [the FAA] to order arbitration to proceed." 9 U.S.C. § 16(a)(1)(B). Here, Defendants invoked § 4 of the FAA in their motions to strike the class-action allegations and to compel arbitration. *See id.* § 4 (permitting a "party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration" to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement"). The district

court denied these petitions in its order denying Defendants' motions to strike and to compel arbitration. Therefore, we have jurisdiction to hear an appeal of this denial.

Donelson claims that the district court's order denying Defendants' motions to strike class-action allegations and to compel arbitration was not an order denying a petition under § 4 because the district court did not hold the trial required by that section. Section 4 states: "If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof." However, the fact that the district court did not hold a trial does not mean that the district court did not deny a petition under § 4 and does not preclude appellate jurisdiction.

Donelson also argues that even if we have jurisdiction to review the district court's denial of the motions to compel arbitration, we do not have jurisdiction to review the district court's denial of the motions to strike the class-action allegations. We disagree. Under § 4, which permits an appeal to be taken from an "order," we have jurisdiction to review the entire order. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (holding that 28 U.S.C. § 1292(b)'s grant of appellate jurisdiction over certain interlocutory orders permitted the appellate court to review "any issue fairly included within the certified order because it is the *order* that is appealable" (internal quotation marks omitted)). Here, § 16 of the FAA provides for the appeal of "order[s]." 9 U.S.C. § 16(a)(1). Thus, we have appellate jurisdiction to review the district court's denial of

Defendants' motions to strike class-action allegations because this denial was contained in an order reviewable under 9 U.S.C. § 16(a)(1)(B).

III.

Next, we consider Donelson's claim that Defendants waived their right to arbitrate by moving to strike his class-action allegations at the same time they moved to compel arbitration. "The issue of waiver of arbitration is one of law and subject to de novo review." *Dumont v. Saskatchewan Gov't Ins.*, 258 F.3d 880, 886 (8th Cir. 2001). "A party may be found to have waived its right to arbitration if it: (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090 (8th Cir. 2007) (internal quotation marks omitted). But "[i]n light of the strong federal policy in favor of arbitration, any doubts concerning waiver of arbitrability should be resolved in favor of arbitration." *Id.* Here, there is no dispute that Defendants knew of an existing right to arbitration. Therefore, we consider whether Defendants acted inconsistently with their right to arbitrate and prejudiced Donelson by their inconsistent acts.

Donelson fails to show that Defendants acted inconsistently with their right to arbitrate. "A party acts inconsistently with its right to arbitrate if the party substantially invokes the litigation machinery before asserting its arbitration right." *Id.* (brackets and internal quotation marks omitted). "A party

substantially invokes the litigation machinery when, for example, it files a lawsuit on arbitrable claims, engages in extensive discovery, or fails to move to compel arbitration and stay litigation in a timely manner." *Id.* "[R]equest[ing] [that a court] dispose of a case on the merits before reaching arbitration is inconsistent with resolving the case through arbitration" and also counts as substantially invoking the litigation machinery. *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 921 (8th Cir. 2009) (holding that moving to dismiss for failure to state a claim three months prior to moving to arbitrate "substantially invoked the litigation machinery").

Donelson argues that Defendants substantially invoked the litigation machinery by filing motions to strike his class-action allegations in his first amended complaint at the same time they moved to compel arbitration, which Donelson contends counts as requesting disposition on the merits. Donelson is mistaken. The motions to strike Donelson's class-action allegations did not request a decision on the merits. They only requested that the district court rule that Donelson's claims were individual and could not be class claims under Federal Rule of Civil Procedure 23 so that the court could compel arbitration under the terms of the Client Agreement. A motion to strike class-action allegations (without an accompanying motion to dismiss the underlying individual allegations) is not a request for the court to dispose of the case "on the merits." *See* Black's Law Dictionary (11th ed. 2019) (defining "judgment on the

merits" as "[a] judgment based on the evidence rather than on technical or procedural grounds"); *see also Dumont*, 258 F.3d at 886-87 (holding that a party's motion to dismiss based on jurisdictional or quasi-jurisdictional grounds, which included a statement that it would seek to compel arbitration, was not inconsistent with a known right to compel arbitration). This is especially the case here, where the purpose of moving to strike was so that the district court could compel arbitration under the terms of the Client Agreement. *See Morgan v. Sundance*, 992 F.3d 711, 714 (8th Cir. 2021) (holding that, when a party makes efforts to avoid invoking the litigation machinery, this weighs in favor of finding that the party did not act inconsistently with its right to arbitrate).

Defendants did not substantially invoke the litigation machinery by moving to strike Donelson's class-action allegations. Therefore, they have not acted inconsistently with their right to arbitrate, meaning they have not waived this right.

Thus, we have jurisdiction to hear this case, and Defendants have not waived their right to arbitrate.

IV.

Next, we turn to the merits of Defendants' appeal. We begin by addressing Defendants' argument that, under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the district court erred by determining the enforceability of the contract containing the arbitration clause because an arbitrator should have made that determination.

Ordinarily, we review *de novo* whether the district court or the arbitrator should have determined arbitrability. *See Fallo v. High-Tech Inst.*, 559 F.3d 874, 877 (8th Cir. 2009). As Donelson points out, however, Defendants forfeited the *Prima Paint* argument by not raising it in the district court. Therefore, we review this issue for plain error at most. *See Plummer v. McSweeney*, 941 F.3d 341, 345 (8th Cir. 2019) (holding that the argument that an arbitrator rather than a court should have decided a matter relating to contract enforceability was "an entirely new issue" on appeal rather than "merely a new argument" and therefore was reviewed, at most, for plain error when it was not made in the district court). Defendants cannot satisfy the plain-error standard because "the requirement to proceed in a federal court can hardly be considered a miscarriage of justice necessitating plain-error relief." *Id.* (internal quotation marks omitted). Thus, the district court's determination of arbitrability does not require reversal under plain-error review.

V.

Next, we consider Defendants' claim that the district court erred in denying their motions to compel arbitration. The district court denied the motion to compel arbitration because it found that there was no valid arbitration clause between the parties due to the absence of mutual agreement and lack of consideration. The district court went on to deny the motions to strike the class-action allegations, suggesting that Donelson's allegations met Rule 23(a)(2)'s "single common question" requirement and

that the Defendants' arguments to the contrary were "more appropriate on a motion for class certification."

We review *de novo* a district court's ruling on a motion to compel arbitration under § 4 of the FAA. *See M.A. Mortenson Co. v. Saunders Concrete Co.*, 676 F.3d 1153, 1156 (8th Cir. 2012). Under the FAA, "[a] motion to compel arbitration must be granted if a valid arbitration clause exists which encompasses the dispute between the parties." *Id.* at 1156-57 (internal quotation marks omitted). We conclude both that a valid arbitration clause exists and that it encompasses the dispute between the parties.

A.

With respect to the validity issue, the parties disagree about the threshold question of which law governs this issue. Donelson argues that Missouri substantive law governs whether the arbitration clause is valid. Sachse claims that Minnesota substantive law controls in light of a choice-of-law clause in the Client Agreement so providing. We need not resolve this dispute because, even assuming that Donelson is right about Missouri substantive law governing this issue, we agree with Defendants that the arbitration clause is valid. *See Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 445 (2014) (assuming for the sake of argument that one part of the losing party's argument was correct but holding that, even so, the losing party would not prevail for other reasons).

On the merits of this issue, Defendants argue that the district court erred when it refused to enforce the arbitration clause on the basis that it was not

supported by mutual assent or consideration. Donelson also argues that the arbitration clause was invalid because it was unconscionable. We agree with Defendants that the arbitration clause was valid because it was supported by mutual assent, was supported by consideration, and was not unconscionable.

First, the parties mutually assented to the arbitration clause. Under Missouri law, "[a] valid arbitration clause . . . requires mutuality of agreement, which implies a mutuality of assent by the parties to the terms of the contract." *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 810 (Mo. 2015) (internal quotation marks omitted). Parties may assent to terms expressly in a contract or "incorporated into the contract by reference" so long as "[t]he intent to incorporate [is] clear." *See id.* "To incorporate terms from another document, the contract must make clear reference to the document and describe it in such terms that its identity may be ascertained beyond a doubt." *Id.* at 810-11 (brackets and internal quotation marks omitted); *see also Dunn Indus. Grp. v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. 2003) (holding that an arbitration clause can be incorporated by reference into a contract).

Defendants argue that the district court erroneously ruled that Donelson had not "knowingly accept[ed] the terms of the Client Agreement" based on its findings that Donelson never signed or received the Client Agreement (which included the arbitration clause) and Donelson was not shown the Account Application. Defendants are correct.

Though Sachse did not provide Donelson with a copy of the Client Agreement, which contained the arbitration clause, Donelson still agreed to the arbitration clause because he was presented with and signed the Account Application, which expressly incorporated the arbitration clause in the Client Agreement. It stated:

> You acknowledge that you have received and read the [Client] Agreement and agree to abide by the terms and conditions as currently in effect . . . . You hereby consent to all these terms and conditions with full knowledge and understanding . . . . This account is governed by a predispute arbitration clause which is found in Section 26, Page 3 of the [Client] Agreement . . . .

Thus, the arbitration clause was clearly incorporated by reference in the Account Application. *See Kerr*, 461 S.W.3d at 810-11. And because Donelson signed the Account Application, there was mutual assent to the arbitration clause. *See Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. 2013) ("A signer's failure to read or understand a contract is not, without fraud or the signer's lack of capacity to contract, a defense to the contract.").

Second, the arbitration clause was supported by consideration because Ameriprise provided a client account to Donelson. In general, "bilateral contracts are supported by consideration and enforceable when each party promises to undertake some legal duty or liability." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770,

776 (Mo. 2014). But when the promises of one party are illusory rather than binding, there is no consideration. *Id.* "A promise is illusory when one party retains the unilateral right to amend the agreement and avoid its obligations." *Id.* But, "[i]f two considerations are given for a promise, one . . . legally sufficient . . . and the other not . . . , the promise is enforceable." *Id.* at 774.

Relying on *Baker*, Donelson argues that the arbitration agreement lacks consideration because Ameriprise retained the unfettered right to amend the Client Agreement containing the arbitration clause. In *Baker*, an employee and her employer entered into an agreement in which the parties agreed to arbitrate all legal claims against the other. *Id.* at 773. This arbitration agreement stated that consideration consisted of the employee's continued employment and mutual promises to resolve claims through arbitration. *Id.* But the agreement also clarified that the employee was an at-will employee and that the employer could unilaterally amend, modify, or revoke the agreement upon thirty days' prior written notice to the employee. *Id.* at 773. The Missouri Supreme Court held that the arbitration agreement failed for lack of consideration because the two sources of consideration were illusory. *Id.* at 776-77.

But *Baker* is inapposite here because the source of consideration supporting the arbitration clause is not illusory and because Ameriprise does not have the unilateral right to amend the Client Agreement. The Client Agreement states:

> You agree that we shall have the right to amend this Agreement by modifying or rescinding any existing provisions or by adding any new provision. You understand and acknowledge that we may modify or change the terms and conditions of this Agreement by mailing a written notice of the modification or change or a new printed Agreement to you . . . . Such written notice or posting of the amendment will include the effective date of the modification or change. No such amendment shall become effective prior to 30 days from the date of such notice . . . . The use of your account after the mailing of any written notice . . . shall constitute your acknowledgement and agreement to be bound thereby.

Though this provision permits modification of the Client Agreement, it also specifies that "use of your account . . . shall constitute your acknowledgement and agreement to be bound thereby." Thus, the amendment provision presupposes that an account will still be provided, which constitutes consideration. *See id.* at 774 (defining consideration in part as "the transfer . . . of something of value to the other party"). In addition, unlike in *Baker*, Ameriprise does not have the right to unilaterally change the Client Agreement. *See id.* at 773. Rather, any change requires "acknowledgement and agreement" by Donelson in the form of "use of [his] account."

Third, the arbitration agreement is not unconscionable. Donelson claims that the arbitration provision is unconscionable because it requires him to

arbitrate all claims he may have against Ameriprise, but Ameriprise is not required to arbitrate all claims it may have against him. "Unconscionability is defined as an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. 2015) (internal quotation marks omitted). The unconscionability doctrine "guards against one-sided contracts, oppression, and unfair surprise." *Id.* But the fact that an arbitration provision applies to one party but not the other does not itself render the provision unconscionable. *Id.* at 433-34. Therefore, even assuming that the arbitration provision applied only to Donelson, it would not be unconscionable.

Because the arbitration clause was supported by mutual consent, was supported by consideration, and was not unconscionable, it is valid and thus enforceable.

B.

Because the arbitration clause is valid, we must consider whether it "encompasses the dispute between the parties." *See M.A. Mortenson*, 676 F.3d at 1156-57. By its own terms, the arbitration clause provides for arbitration of "ALL CONTROVERSIES THAT MAY ARISE BETWEEN US[2] . . . , WHETHER

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[2] Before the district court, Donelson argued that "US" did not include Sachse or the Ameriprise officers, but this issue has not been raised on appeal.

ARISING BEFORE, ON OR AFTER THE DATE THIS ACCOUNT IS OPENED," except for "PUTATIVE OR CERTIFIED CLASS ACTION[S]." Thus, whether the arbitration clause encompasses this case turns on whether the class-action allegations should be stricken, as Defendants argue they should. Accordingly, we consider whether the district court abused its discretion when it denied Defendants' motions to strike Donelson's class-action allegations. *See Nationwide Ins. v. Cent. Mo. Elec. Co-op., Inc.*, 278 F.3d 742, 748 (8th Cir. 2001) (reviewing a motion to strike for abuse of discretion).

Under Federal Rule of Civil Procedure 12(f), "the court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Judges enjoy liberal discretion to strike pleadings under Rule 12(f)." *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007). And because this remedy is "drastic" and "often is sought by the movant simply as a dilatory or harassing tactic," *see* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (3d ed.), "[s]triking a party's pleading . . . is an extreme and disfavored measure," *BJC Health*, 478 F.3d at 917; *see* Wright & Miller, *supra*, § 1380. But despite this, it is sometimes appropriate to strike pleadings, such as when a portion of the complaint lacks a legal basis. *See, e.g.*, *BJC Health*, 478 F.3d at 916-18 (affirming a district court's grant of a motion to strike the plaintiff's prayer for punitive damages on the basis that fraud had not

been pleaded with the particularity required by Rule 9(b)).

Federal courts are split as to whether class-action allegations may be stricken under Rule 12(f) prior to the filing of a motion for class-action certification when certification is a clear impossibility. Some courts permit this. *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *cf. John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 444-45 (5th Cir. 2007) (affirming dismissal of unsupportable class-action allegations on Rule 12(b)(6) motion). Others deny as premature motions to strike class-action allegations made before a plaintiff moves to certify a class. *See, e.g.*, *Weske v. Samsung Elecs., Am., Inc.*, 934 F. Supp. 2d 698, 706-07 (D.N.J. 2013).

We agree with the Sixth Circuit that a district court may grant a motion to strike class-action allegations prior to the filing of a motion for class-action certification. It is "sensible . . . to permit class allegations to be stricken at the pleading stage" if it is "apparent from the pleadings that the class cannot be certified" because "unsupportable class allegations bring 'impertinent' material into the pleading" and "permitting such allegations to remain would prejudice the defendant by requiring the mounting of a defense against claims that ultimately cannot be sustained." Wright & Miller, *supra*, § 1383. This is consistent with Rule 23(c), which governs class-action certification, because Rule 23(c)(1)(A) directs district courts to decide whether to certify a class "[a]t an early practicable time," and nothing in Rule 23(c)

indicates that the court must await a motion by the plaintiffs. *See Pilgrim*, 660 F.3d at 949.

We conclude it was an abuse of discretion for the district court to deny the motions to strike the class-action allegations. We reach this conclusion because not only was it apparent from the pleadings that Donelson could not certify a class but also the class allegations were all that stood in the way of compelling arbitration. As for Counts I and II, Donelson cannot maintain a class action because the class claims would not be cohesive. As for Count III, Donelson cannot maintain a class action because that cause of action could not provide the injunctive or declaratory relief required by Rule 23(b)(2).[3] Under these circumstances, delaying the decision on whether Donelson could certify a class would needlessly force the parties to remain in court when they previously agreed to arbitrate. It also risks forcing Defendants to litigate, until the district court rules on Donelson's not-yet-filed motion for class certification, with one hand tied behind their backs to avoid substantially invoking the litigation machinery and waiving their right to arbitrate.

With respect to Counts I and II, the class-action allegations should have been stricken because class claims based on these counts would not be cohesive. Rule 23(b)(2) permits "[a] class action [to] be maintained if Rule 23(a) is satisfied and if . . . the

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[3] At oral argument, Donelson clarified that he seeks to maintain a class action only under Rule 23(b)(2).

party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." To certify a class under Rule 23(b)(2), the "class claims . . . must be cohesive." *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005). "[T]he cohesiveness requirement of Rule 23(b)(2) is more stringent than the predominance and superiority requirements for maintaining a class action under Rule 23(b)(3)." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). The existence of a significant number of individualized factual and legal issues defeats cohesiveness and is a proper reason to deny class certification under Rule 23(b)(2). *St. Jude*, 425 F.3d at 1122. A significant number of individualized factual and legal issues exist "where members of a proposed class will need to present evidence that varies from member to member" such that the class claim is not "susceptible to generalized, class-wide proof." *See Ebert*, 823 F.3d at 478-79 (internal quotation marks omitted).

Here, Donelson cannot bring a Rule 23(b)(2) class action with respect to Counts I and II because a significant number of individualized determinations must be made in deciding whether the class members' claims have merit. Count I asserts violations of § 10(b) of the Securities Exchange Act and Rule 10b-5. Count II asserts violations of § 20(a) of the Securities Exchange Act. For Count I, the putative class would have to show "(1) misrepresentations or omissions of material fact or acts that operated as a fraud or deceit

in violation of the rule; (2) causation, often analyzed in terms of materiality and reliance; (3) scienter on the part of the defendants; and (4) economic harm caused by the fraudulent activity occurring in connection with the purchase and sale of a security." *In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 888 (8th Cir. 2002). At least three of these four elements would require a significant number of individualized factual and legal determinations to be made, as the allegations in the first amended complaint demonstrate. For instance, whether Sachse or any of the other defendants committed misrepresentations, whether those misrepresentations were material, whether class members relied on the misrepresentations, and whether economic harm resulted from the misrepresentations would need to be resolved separately for each class member. *See Ebert*, 823 F.3d at 479-81 (noting that "even if a determination [could] be made class-wide on the fact and extent of [the defendant's] role," a number of matters would "still need to be resolved household by household" and therefore the claims lacked cohesiveness); *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023, 1037 (8th Cir. 2010) (holding that a class was "not cohesive enough to satisfy Rule 23(b)(2)" because "resolution of the plaintiffs' claims would require numerous individual determinations regarding [the defendant's] representations and each purchaser's reliance"); *cf. McCrary v. Stifel, Nicolaus & Co.*, 687 F.3d 1052, 1059 (8th Cir. 2012) (affirming a district court's dismissal of a Rule 23(b)(3) class action alleging churning, unauthorized trading, and

misrepresentation by a broker and his firm on the basis that such claims are highly individualized).

The same is true for Count II. For a § 20(a) violation, Donelson must prove "(1) that a primary violator violated the federal securities laws; (2) that the alleged control person actually exercised control over the general operations of the primary violator; and (3) that the alleged control person possessed—but did not necessarily exercise—the power to determine the specific acts or omissions upon which the underlying violation is predicated." *Lustgraaf v. Behrens*, 619 F.3d 867, 873 (8th Cir. 2010) (internal quotation marks omitted). Here, the violations of the federal securities laws needed for element (1) are the alleged violations of § 10(b) and Rule 10b-5 on which Count I is based. Therefore, Count II requires the same individualized determinations as Count I, which defeat cohesiveness.

As for Count III, breach of fiduciary duty under 15 U.S.C. § 80b-6, the class-action allegations should have been stricken because Donelson cannot obtain the relief required by Rule 23(b)(2) for this count. There is no private cause of action for violations of this section of the statute. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) (holding that Congress did not provide a private right of action for § 80b-6 because the statute expressly provided other means of enforcing compliance with its terms). Rule 23(b)(2) permits a class action to be maintained if "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Because § 80b-6 does not afford any relief

to private litigants, much less injunctive or declaratory relief, Donelson cannot certify class claims under Rule 23(b)(2) for violations of § 80b-6.[4]

The district court abused its discretion by denying Defendants' motions to strike without considering whether Donelson could bring a class action under Rule 23(b), as it is "apparent from the pleadings that the class cannot be certified" under Rule 23(b)(2). *See* Wright & Miller, *supra*, § 1383. Because the class-action allegations should have been stricken, the dispute between the parties here should have been deemed one encompassed by the arbitration clause. *See M.A. Mortenson*, 676 F.3d at 1156.

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[4] To the extent Donelson claims that he can establish a class under § 80b-15 of the Investment Advisors Act, he has waived this argument. Section 80b-15 permits private parties to bring a cause of action solely to declare certain contracts void because they were made in violation of the Investment Advisors Act. *Transamerica*, 444 U.S. at 16-19. Even assuming this would be sufficient injunctive or declaratory relief under Rule 23(b)(2), the only contracts Donelson seeks to avoid are the arbitration clauses in the Client Agreements. But Donelson does not even hint at how the arbitration clauses violate the Investment Advisors Act. Because his argument that the arbitration clause violates the Investment Advisors Act consists of nothing more than a sentence in his brief without argument or citation to legal authority, we deem this argument waived and hold that he cannot certify a class under § 80b-15 to invalidate the arbitration agreements. *See Milligan v. City of Red Oak, Iowa*, 230 F.3d 355, 360 (8th Cir. 2000) ("[I]nasmuch as [the appellant's] brief does not support his assertion with any argument or legal authority, he has waived the issue and we do not address it.").

In sum, the arbitration clause in question here is valid, and it encompasses the dispute between the parties. *See id.* Therefore, Defendants' motions to compel arbitration "must be granted," *see id.* at 1156-57, and the district court erred in denying them.

VI.

Thus, we reverse the district court's denial of Defendants' motions to strike the class-action allegations and to compel arbitration, and we remand for entry of an order striking the class-action allegations and compelling arbitration.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MARK DONELSON,
individually and on behalf of all others similarly situated,
v.

AMERIPRISE FINANCIAL SVS. INC., ET. AL.,

Case No. 4:18-cv-01023-HFS

ORDER

Mark Donelson has brought a putative class action complaint against his former investment advisor, Mark Sachse, his former investment advising firm, Ameriprise Financial Services, Inc. ("Ameriprise") and individual officers of Ameriprise: James Cracchiolo, Kelli Hunter Petruzillo, Neal Maglaque, and Patrick O' Connell ("Officer Defendants"). (Doc. 9).

Donelson asserts claims based on violations of federal securities laws and breach of fiduciary duties and he also seeks to represent a class of clients of Ameriprise and Sachse. Three motions are currently pending: (1) Ameriprise's Motion to Strike Class

Allegations and to Compel Arbitration (Doc. 28); (2) Sachse's motion to Strike Class Allegations and to Compel Arbitration (Doc. 41); and (3) the Officer Defendants' Motion to Dismiss for Lack of Personal Jurisdiction or, alternatively to Compel Arbitration. (Doc. 30).

Background.

According to the First Amended Complaint, Donelson has been employed for the last 28 years at Sam's Club in Gladstone, Missouri. He is a high school graduate with no formal training in trading securities. Donelson had an investment account with Robert W. Baird & Co. ("Baird"). (Doc. 9, ¶ 16-19).

Sometime in 2008, Sachse contacted Donelson by telephone and told him that he had recently become a broker-advisor at Baird and that he had heard Donelson was adept at trading options. The two became friends over the next couple of years, often meeting for coffee before Donelson's shift at Sam's Club. Sachse told Donelson that he was a former attorney specializing in criminal practice and that he had stopped practicing law because he no longer liked it. Unbeknownst to Donelson, Sachse had a history of sorts; former clients had filed ethical complaints with the Kansas Bar Association, and he was ultimately disbarred by order of the Supreme Court of Kansas in 2007. (Doc. 9 ¶ 19-22).

In 2010, Sachse stopped working at Baird and became a broker-investment advisor at Ameriprise. Sachse told Donelson he changed companies "to make more money." At Sachse's request, Donaldson [sic]

moved his investment account from Baird to Ameriprise. Donelson met Sachse at a restaurant to sign papers needed to open his new account at Ameriprise. (Doc. 37-5, ¶ 15). Sachse had a copy of what he said was an Account Application. (*Id.* at ¶ 16). According to Donelson, Sachse filled out the application himself, in his own handwriting, checking each box that, according to Sachse, required checking. (*Id.* at ¶ 18). Donelson states that he instructed Sachse that "under no circumstances was he to trade any securities in or for my account on margin.[1]" (Doc. 37-5, ¶ 24) (Doc. 9 ¶ 23-25).

Part 8 of the Account Application, however, authorized margin borrowing. (Doc. 37-1, p.4). Donelson explains in his affidavit that Sachse told him he checked the box as a "formality" but assured him he would not trade any securities on margin. (Doc. 37-5, ¶ 24). Donelson signed the Application as instructed, without reading it or being provided a copy of it. (Doc. 37-5 ¶¶ 17- 23).

Part 10 of the Application, a lengthy recitation in small print, states:

> You acknowledge that you have received and read the Agreement and agree to abide by the terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and

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[1] Trading on margin means that the broker dealer uses its funds to buy securities and the purchase is secured by cash and assets in the customer account.

> conditions with full knowledge and understanding of the information contained in the Agreement. This account is governed by a predispute arbitration clause which is found in Section 26, Page 3 of the Agreement. You acknowledge receipt of the predispute arbitration clause. (Doc. 37, Ex. 1).

The "Agreement" apparently referred to is the "Ameriprise Brokerage Client Agreement for Non-Qualified Brokerage Accounts." ("Client Agreement") (Doc. 37, Ex. 2). The twenty-five-page Client Agreement, although referenced in the signed Application, is neither dated nor signed. (*Id*). Donelson states that he did not see, read, or sign the Agreement and was never provided a copy of it. (Doc. 37-5, ¶ 27).

Section 26 of the Client Agreement provides, in part, that "all controversies that may arise between us . . . shall be determined by arbitration . . . " (Doc. 37, Ex. 2 at § 26). Section 26 further provides:

> NO PERSON SHALL BRING A PUTATIVE OR CERTIFIED CLASS ACTION TO ARBITRATION, NOR SEEK TO ENFORCE ANY PRE-DISPUTE ARBITRATION AGREEMENT AGAINST ANY PERSON WHO HAS INITIATED IN COURT A PUTATIVE CLASS ACTION; OR WHO IS A MEMBER OF A PUTATIVE CLASS WHO HAS NOT OPTED OUT OF THE CLASS WITH RESPECT TO AN CLAIMS ENCOMPASSED BY THE PUTATIVE CLASS ACTION UNTIL: (A) THE CLASS CERTIFICATION IS DENIED; (B) THE

> CLASS IS DECERTIFIED; OR (C) THE CUSTOMER IS EXCLUDED FROM THE CLASS BY THE COURT . . . . (DOC. 37, Ex. 2. at § 26).

Section 5 of the Client Agreement allows Ameriprise to amend the Client Agreement:

> **Amendments.** You agree that we shall have the right to amend this Agreement by modifying or rescinding any existing provisions or by adding any new provision. You understand and acknowledge that we may modify or change the terms and condition of this Agreement by mailing a written notice of the modification or change or a new printed modification to you or, if you are on online client, by posting such modifications or changes online. Such written notice or posting of the amendment will include the effective date of the modification or change. No such amendment shall become effective prior to 30 days from the date of such notice unless required or otherwise permitted by law or regulation. The use of your account after the mailing of any written notice or posting of such amendments shall constitute your acknowledgment and agreement to be bound thereby. (Doc. 37, Ex. 2. at § 5).

The First Amended Complaint details numerous and serious improprieties related to Sachse's handling of Donelson's investment account, described generally here as misrepresenting the account value, improper trading on the account, and misrepresenting

reparation for problems with the account. (Doc. 9). Donelson alleges other customers of Sachse and Ameriprise experienced similar improprieties and he seeks to represent those customers in this action. Ameriprise, Sachse, and the individual directors argue that the class action allegations should be stricken, and this dispute should then be ordered to arbitration under Section 26 of the Client Agreement. Donelson responds that the class action allegations preclude arbitration under the terms of the Client Agreement, and in any event, the arbitration agreement should not be enforced because he never agreed to it, and because it lacks consideration and is unconscionable under Missouri law.

Arbitration.

Under the Federal Arbitration Act, "a motion to compel arbitration must be granted if a valid arbitration clause exists which encompasses the dispute between the parties." *M.A. Mortenson Co. v. Saunders Concrete Co.*, 676 F.3d 1153, 1156 (8th Cir. 2012). "Because arbitration is a matter of contract, whether an arbitration provision is valid is a matter of state contract law, and an arbitration provision may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability[.]" *Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015) (citations and internal quotation marks omitted). "If a valid and enforceable arbitration agreement exists under state-law contract principles, any dispute that falls within the scope of that agreement must be submitted to arbitration." *Id.* at

968 (citing *Faber v. Menard*, 367 F.3d 1048, 1052 (8th Cir. 2004)).

When presented with a motion to compel arbitration, the Court's role is limited to two inquiries: "(1) whether there is a valid arbitration agreement and (2) whether the particular dispute falls within the terms of the agreement." *Robinson v. EOR-ARK, LLC*, 841 F.3d 781, 783-84 (8th Cir. 2016) (citation and quotation mark omitted). "The party seeking to compel arbitration bears the burden of proving the existence of a valid and enforceable arbitration agreement." *Driver*, 2018 WL 3363795, at *4 (citation and quotation marks omitted).

Under both the Federal Arbitration Act, 9 U.S.C. 1 et seq, and the Missouri Uniform Arbitration Act, chapter 435, RS MO., whether the parties entered into a valid and enforceable arbitration agreement is a preliminary issue for the court to decide, applying Missouri law. *Johnson v. Vatterott Educ. Ctrs. Inc.*, 410 S.W.3d 735, 738 (Mo. App. W.D. 2013) (citations omitted.).[2] In Missouri, "[t]he essential elements of a any contract, including one for arbitration, are offer,

[2] Section 23 of the Client Agreement states that "the agreement and its enforcement shall be governed by the state of Minnesota without giving effect to its choice of law principles." Although defendants cite this choice of law provision (Doc. 55, p. 7) they do not seriously challenge plaintiff's assertion that Missouri law controls or provide authority that the application of Minnesota law changes the analysis. "The choice-of-law provision can have no effect until the court determines the validity of the contract itself." *John T. Jones Constr. Co. v. Hoot Gen'l Constr. Co., Inc.*, 613 F.3d 778, 782-83 (8th Cir. 2010).

acceptance, and bargained for consideration." *Baker v. Bristol Care Inc.*, 450 S.W.3d 770, 774 (Mo. 2014). Underlying those elements is the requirement of mutuality of agreement which requires that both parties assented to the terms of the contract. *Jay Wolfe Used Cars, LLC v. Jackson*, 428 S.W.3d 683, 688 (Mo. App. 2014). Because arbitration is a matter of consent not coercion, a court must be satisfied that the parties have concluded or formed an arbitration agreement before the court may order arbitration.

Donelson asserts that there was no acceptance or bargained for consideration, and thus, there is no enforceable arbitration contract. "Arbitration is solely a creature of contract and, thus, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 49 (Mo. Banc. 2017). In support, Donelson has filed an affidavit acknowledging that although he signed the Application, he was never provided a complete copy of the Application and had no knowledge of the arbitration provision contained in the Application. (Doc. 37-5 ¶ 29). He states that "Sachse filled out the Application himself, 'checking' each 'box,' that according to Sachse, required 'checking.'" (Doc. 37-5 ¶ 18). Furthermore, he attests that he did not sign the Client Agreement, was never provided a copy of it, and did not know that the Client

Agreement existed until it was produced during this litigation. [3] (Doc. 37-5, ¶ 27).

Defendants respond that Donelson accepted their offer to arbitrate as evidenced by the signed Application, wherein he confirmed that he "received and read" the Client Agreement and agreed to abide by the terms and conditions of the Agreement "as currently in effect or as may be amended from time to time." (Doc. 29, p.15) (Doc. 42, p. 13). The defendants argue that Donaldson's signature shows that he accepted their offer to arbitrate and there was an enforceable agreement. They argue that Donaldson is bound by the arbitration provision because "a party who is capable of reading and understanding is charged with the knowledge of that which he or she signs." *BP Products. N. Am. Inc. v. Walcott Enters. Inc.*, 2009 WL 3229024, at *4 (W.D. Mo.). In this case, however, we have a rather extreme form of adoption by reference of an allegedly unseen document. Moreover, as the cited case indicates, imputed knowledge is only used "absent a showing of fraud." *Id.* A later Eighth Circuit case refers to the parol evidence rule as applying in "the absence of fraud,

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[3] Donelson also argues that there is a subsequent arbitration agreement which is inconsistent with the terms of the arbitration clause in the Client Agreement. Defendants do not attempt to compel arbitration under the terms of that second purported agreement and because this Court concludes that there is no enforceable arbitration agreement, it is unnecessary to determine if there are inconsistent agreements.

accident, mistake, or duress." *Smiley v. Gary Crossley Ford, Inc.*, 859 F.3d 545, 552 (8th Cir. 2017).

It is true that in regard to contracts, "signatures remain a common, though not exclusive, method of demonstrating agreement." *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 23 (Mo. App. 2008) (citing cases). However, in light of the evidence presented by Donaldson, defendants have not met their burden of showing that there was a mutual agreement or meeting of the minds concerning arbitration. *See Jay Wolfe Used Cars, LLC*, 428 S.W.3d at 688.

First, Donaldson's signature on the Application only references an arbitration provision contained in the Client Agreement. It is undisputed that the Client Agreement is unsigned and undated, and defendants do not refute Donaldson's statement that he never received that printed document. What defendant Sachse should have done, does not establish what he did do. In these circumstances, Donaldson's signature alone on the Account Application does not demonstrate a specific agreement to arbitrate when the arbitration provisions are found in another unidentified document which is unsigned and undated. *Compare Stubblefield v. Best Cars KC, Inc.*, 506 S.W.3d 317 (W.D. Mo 2016) (discussing significance of signed arbitration agreement and sales contract which referred to arbitration agreement).

Second, Donaldson's affidavit supports the inference that he did not knowingly accept the terms of the Client Agreement. *See Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646 (Mo. Ct. App. 2014)

(discussing circumstances of "knowing" acceptance). Defendants offer no response to Donaldson's description of how Sachse handled the opening of his account or the signing of the Application. For example, Defendants do not deny that Donaldson was not shown the Account Application or Client Agreement, and that Sachse filled out the Application without showing it to Donaldson. (Doc. 37-5 ¶¶ 17-21). *Cf. Pleasants v. American Express Co.*, 2007 WL 2407010 (E.D. Mo.) (defendants filed affidavits creating a presumption that plaintiff received arbitration clause).

Third, "[a]n arbitration agreement could be declared unenforceable if state law defenses such as fraud, duress, or unconscionability impact the formation of a contract." *Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015) (discussing Missouri law). Defendants' theory that Donaldson's signature shows an agreement to an unattached document is overly simplistic and fails to consider or address the circumstances as described by Donaldson surrounding his signing the Account Application.

The foregoing analysis is not the only basis for rejecting arbitration here – an alternative rationale follows. The purported agreement to arbitrate also fails for lack of consideration because Ameriprise retained the unilateral right to amend the agreement. "Consideration consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party." *Baker v. Bristol Care Inc.*, 450 S.W.3d 770 (Mo. 2014). Mutual

promises can constitute adequate consideration to support an enforceable contract:

> Bilateral contracts are supported by consideration and enforceable when each party promises to undertake some legal duty or liability. These promises, however, must be binding, not illusory. A promise is illusory when one party retains the unilateral right to amend the agreement and avoid its obligations. *Id.* at 777 (internal citations omitted).

In *Baker*, the Missouri Supreme Court held that an employer's promise to arbitrate its claims against an employee to be illusory when the employer retained the "right to amend, modify or revoke this agreement upon thirty (30) days prior notice to the employee." 450 S.W.3d at 776. Because the agreement permitted the employer to modify the arbitration agreement retroactively, apart from future dealings and controversies, the Supreme Court held that it was illusory and could not support adequate consideration. *See also Soars v Easter Seals Midwest*, 563 S.W.3d 111, 116 (Mo. 2018) (contract that purports to exchange mutual promises lacks legal consideration if one party retains unilateral right to modify as to permit the party to unilaterally divest itself of an obligation to perform promise initially made).

Ameriprise and Sachse respond that *Baker* does not control and there was adequate consideration because Ameriprise does not have unilateral authority to amend the agreement *retroactively* as in

Baker. Under the Agreement, Ameriprise has "the right to amend the Agreement by modifying or rescinding any existing provisions or by adding any new provision" by "mailing a written notice of the modification or change or a new printed Agreement," but "[n]o such amendment shall become effective prior to 30 days from the date of such notice." (Doc. 55, p. 8). Defendants assert that the Eighth Circuit has compelled arbitration under an agreement containing a similar provision, citing *Cicle v. Chase Bank*, 583 F.3d 549, 555 (8th Cir. 2009) (compelling arbitration of plaintiff's claims under an agreement that gave plaintiff "thirty days to reject the changes to the agreement in writing which would close her account.").

The "fact that an employer has the unilateral right to amend an arbitration agreement may not render the agreement illusory if the employer's power to modify the agreement is meaningfully restricted." *Patrick v. Altria Group Dist. Co.*, 570 S.W.3d 138 (2019). Meaningful restriction has been construed to permit a party to make unilateral amendments to an agreement which: (1) are prospective in application and (2) about which the other party has reasonable advance notice. *Id.* at 144 (citing *Frye*, 321 S.W.3d at 429).

In *Patrick*, the employer argued that its right to amend the arbitration agreement was not illusory because the right to amend was limited. Any amendment could not be made to "a Dispute previously submitted to arbitration under the Program" and any amendment was not effective until

the employer published notice to the amendment in a reasonable manner. *Id.* at 141. After reviewing case law from Missouri and other jurisdictions, the court held that the consideration was still illusory despite these limitations because (1) the amendment could apply to claims which have accrued, and of which the employer has notice, but which have not yet been submitted to arbitration ("accrued-but-unasserted") and (2) the agreement did not require advance notice of the amendment and the amendments became effective upon publication of the notice. *Id.* at 144. Similar considerations apply here. Ameriprise could amend the purported arbitration agreement to alter its obligation to arbitrate accrued-but-unasserted claims even though the amendment may not be effective for thirty days after notice. *See Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423 (Mo. Ct. App. E.D.) (arbitration agreement lacked consideration when employer could modify agreement with thirty days' notice). Defendants' reliance on *Cicle* is misplaced as the dispute in that case was whether the agreement was unconscionable, not whether there was adequate consideration. 583 F.3d at 554-557. Moreover, as a prediction of Missouri law it is superseded by the later Missouri cases. For these reasons, the purported agreement to arbitrate also fails for lack of consideration. Accordingly, the motions of Ameriprise, Sachse, and the Officer Defendants to compel arbitration are denied.

Motion to Strike Class Allegations.

Ameriprise and Sachse contend that Donelson's class action allegations in the Amended Complaint

should be stricken because Donelson cannot satisfy Rule 23's predominance, typicality, or adequacy requirements. (Defendants' moved to strike the class allegations in order to avoid the class action limitation contained in the purported arbitration agreement. Because this Court has ruled that the parties did not have an enforceable agreement to arbitrate, the motion to strike class allegations may have lost significance.)

In any event, striking a party's pleadings is an extreme measure, and motion to strike under Fed. R. Civ. P. 12(f) are generally viewed with disfavor and infrequently granted. *Beal v. Outfield Brew House LLC*, No. 2:18-cv-4028-MDH (Sept. 27, 2018). "The propriety of class action status can seldom be determined on the basis of pleadings alone." *Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977).

Despite this general disfavor, defendants assert that this Court is bound by the Eighth Circuit's ruling in *McCrary v. Stifel Nicolaus & Co.*, 687 F.3d 1052 (8th Cir. 2012), and that "securities fraud claims are ineligible for class treatment where, as here, the claims are based on unique oral representations made to a plaintiff and on distinct trading in a plaintiff's investment account." (Doc. 29, p. 7-8). The claims made in *McCrary*, like here, allege securities fraud violations based on misrepresentations made by an investment broker. The court found that the individualized nature of the churning, unauthorized trading, and misrepresentation claims rendered the claims insufficient under Rule 23(b)(3) for class action treatment and dismissed the class claims. *Id.* at 1059.

It is true that many of the allegations in the first amended complaint are unique to Donelson and his specific account at Ameriprise. However, there are allegations which are broader and not necessarily unique to Donelson. For example, there are allegations that Sachse and Ameriprise misrepresented the fee structure, misrepresented the type of securities bought and sold, misrepresented accounting errors, and improperly and fraudulently classified distributions from investment accounts as dividends. (Doc. 9, ¶ 1). These allegations are broader than those alleged in *McCrary*. For the purpose of satisfying Rule 23(a)(2), a single common question "will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Donaldson is entitled to explore whether class action treatment might be available. *Beal v. Outfield Brew House LLC*, 18-CV-4028-MDH, (C.D. Mo. Sept. 27, 2018) (denying motion to strike class allegations as premature).

Thus, the extensive briefing of the defendants is more appropriate on a motion for class certification and Defendants' motion to strike class allegations is denied.[4]

Personal Jurisdiction.

The officer defendants also assert that the claims should be dismissed against them for lack of personal jurisdiction under Federal Rule of Civil Procedure

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[4] Because I no longer am a trial judge, the class action issue may be reserved for a transferee judge who would have trial responsibilities.

12(b)(2). They contend that plaintiff has failed to state a "colorable" claim under the Securities Exchange Act of 1934, and therefore, there is no personal jurisdiction over them under the nationwide service of process provision of the 1934 Act. (Doc. 30, p. 2). The officer defendants state that a claim is not colorable "if it is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous," citing *Garcia-Aguillon v. Mukaskey*, 524 F.3d 848, 850 (8th Cir. 2008).

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court accepts all of a complaint's factual allegations as true, and construes them in the light most favorable to the plaintiff, drawing all reasonable inferences in its favor. *See Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). The Court then asks whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal citations and quotations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

To sustain a Rule 10b–5 action, a plaintiff must show "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v.*

Sci.–Atlanta, 552 U.S. 148, 157 (2008); *see also Minneapolis Firefighters' Relief Assn v. MEMC Elec. Materials, Inc.*, 641 F.3d 1023, 1028 (8th Cir. 2011) (quoting *Stoneridge*).

In this case, the officer defendants argue that Donaldson has failed to state a colorable securities law violation, and therefore, there can be no claim against them as control persons. Specifically, the officer defendants contend that Donaldson has not alleged: (1) any connection between the alleged misrepresentation or omission and the purchase or sale of a security; and (2) any allegation that the officer defendants exercised control over Defendant Sachse's activities. The officer defendants characterize plaintiffs' claims against them as based solely on their status as an officer and director and that this status is insufficient to trigger liability.

The Officer Defendants' primary complaint is that Donelson has not alleged any "connection between the [alleged] misrepresentation or omission and the purchase or sale of a security." (Doc. 31, p. 7). As support, the Officer Defendants highlight certain allegations in the amended complaint relating to payments that were promised to Donaldson, accounting errors, and alleged offers of health insurance. (*Id*). The Officer Defendants, however, fail to examine the amended complaint and ignore numerous allegations which relate to the purchase and sale of securities. Donaldson includes allegations about transactions in specified securities, (Doc. 9 ¶¶ 153-158) and the allegations are consistent with those in *Lewis v. Scottrade, Inc.*, 879 F.3d 850, 852 (8th Cir.

2018), in which the Eighth Circuit concluded it is "obvious" that the misconduct alleged was in connection with the purchase and sale of covered securities. *Accord Zola v. TD Ameritrade Inc.*, 889 F.3d 920 (8th Cir. 2018) (brokerage firms' alleged misconduct in routing orders to certain traders meets the in connection with the purchase or sale of a covered security requirement); *Arrington v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 651 F.2d 615 (9th Cir. 1981) (broker's failure to inform customer about the risks of margin accounts constituted a misrepresentation in connection with the purchase and sale of securities).

The officer defendants' argument that this Court should dismiss Donaldson's allegation that Sachse improperly traded on margin because these allegations are "contradicted by his Account Application in which he explicitly agreed to the creation of a margin account" (Doc. 31, p. 8) ignores the standard of review on a motion to dismiss. Fed. R. Civ. P. 12(b)(6). As does the officer defendants' argument that Donaldson has "failed to show that the [officer defendants] actually exercised control over Mr. Sachse's alleged acts or omissions." (Doc. 31, p. 9). In this circuit, "culpable participation by the alleged control person in the primary violation is not part of a plaintiff's prima facie case." *Lustgraff v. Behrens*, 619 F.3d 867, 873 (8th Cir. 2010). Control person liability requires only some indirect means of discipline or influence short of actual direction to hold a controlling person liable. *Id.* Donaldson has included allegations of both direct and indirect control, including specific

allegations that Officer Defendant Cracchiolo was actively involved in the mishandling of his account. (Doc. 9, ¶67-75). There are sufficient allegations to support control person liability to survive a motion to dismiss.

Conclusion.

For the reasons stated above, Ameriprise's Motion to Strike Class Allegations and to Compel Arbitration (Doc. 28) is DENIED; (2) Sachse's motion to Strike Class Allegations and to Compel Arbitration (Doc. 41) is DENIED; and (3) the Officer Defendants' Motion to Dismiss for Lack of Personal Jurisdiction or, alternatively to Compel Arbitration (Doc. 30) is DENIED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Court Judge

Dated: December 3, 2019
Kansas City, Missouri

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19-3691

MARK DONELSON,
individually and on behalf of all others similarly situated,
Appellee,
v.

AMERIPRISE FINANCIAL SERVICES, INC.
Appellant,

MARK J. SACHSE,

JAMES CRACCHIOLO, et al.,
Appellants.

No. 19-3693

MARK DONELSON,
individually and on behalf of all others similarly situated,
Appellee,
v.

AMERIPRISE FINANCIAL SERVICES, INC.

MARK J. SACHSE,
Appellant,

JAMES CRACCHIOLO, et al.

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eight Circuit.

/s/ Michael E. Gans