No. 12-

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stolt-Nielsen* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010), this Court made clear that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration." In this case, an arbitrator concluded that the parties affirmatively consented to class arbitration on the basis of a contract provision stating: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." The question presented is:

Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively "*agreed to authorize* class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

CORPORATE DISCLOSURE STATEMENT

Oxford Health Plans LLC is a wholly-owned subsidiary of UnitedHealth Group Incorporated, a publicly held company. No publicly held company owns 10% or more of UnitedHealth Group Incorporated's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

STATUTES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Oxford Health Plans LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 675 F.3d 215. The opinion of the district court (App. 19a-30a) is unpublished, but is available at 2011 WL 734933. The opinion of the arbitrator (App. 31a-53a) is unreported. A prior opinion of the court of appeals (App. 55a-59a) is unpublished, but is available at 227 F. App'x 135. Prior opinions of the district court (App. 61a-77a) and the arbitrator (App. 79a-85a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2012. A petition for rehearing en banc was denied on April 30, 2012. App. 87a-88a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 10, are reprinted at App. 89a-90a.

INTRODUCTION

In *Stolt-Nielsen* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010), this Court held that, under the Federal Arbitration Act, "a party may not be compelled … to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." The Court did not address what "contractual basis" would suffice. *Id.* at 1776 n.10. It made clear, however, that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775. Rather, arbitrators and courts must demand proof that parties affirmatively "*agreed to authorize* class arbitration." *Id.* at 1776.

The next year, in *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1750-1752 (2011), the Court again explained how any shift from bilateral to class arbitration fundamentally alters the arbitration process, including "greatly increas[ing] risks to defendants" while strictly limiting appellate review on the merits, *id.* at 1752. Indeed, the Court observed that it was "hard to believe" that defendants would ever agree to class arbitration, thus "bet[ting] the company with no effective means of review." *Id.*

Stolt-Nielsen and *Concepcion* together made clear that arbitrators who order class arbitration without a sufficient contractual basis have "exceeded their powers" in a way that requires judicial vacatur under Section 10(a)(4) of the Act. 9 U.S.C. § 10(a)(4); *see Stolt-Nielsen*, 130 S. Ct. at 1767-1768. Since then, however, courts of appeals have expressly disagreed about the scope of that judicial review. In this case, the Third Circuit joined a divided panel of the Second Circuit in requiring courts to confirm any decision in which an arbitrator has purported to ground his authority in the parties' agreement—even if he or she points to nothing more than standard language precluding litigation and requiring that "any" or "all" disputes be sent to arbitration. *See* App. 12a-18a; *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 114, 124-127 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012). These decisions give *Stolt-Nielsen* no practical effect. *See Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting) ("Given my colleagues' narrow reading of the decision … *Stolt-Nielsen* has been rendered an insignificant precedent in this circuit.").

In contrast, the Fifth Circuit has now expressly "disagree[d] with the Second Circuit's decision in *Jock*" and the Third Circuit's decision in this case. *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 644 n.13, 645 (5th Cir. 2012), *reh'g denied*, June 15, 2012. It instead "read[s] *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination," which "necessarily requires some consideration of the arbitrator's award and rationale." *Id.* at 645. "Although the agreement to submit to class arbitration may be implicit, it should not be lightly inferred," *id.* at 640; and, while a court may not "substitute [its] own judgment for that of an arbitrator," it also "should not confirm" an award that lacks a sufficient

"contractual or legal basis," *id.* at 646. In particular, the Fifth Circuit held that an "any dispute" clause—"a standard provision" used in many arbitration agreements to express the parties' intent to arbitrate rather than litigate their disputes—cannot provide such a basis. *Id.* at 642-643.

A party's right not to be dragooned into class arbitration proceedings that it never agreed to authorize should not depend on which federal court is asked to enforce the FAA's "basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773. Moreover, as a practical matter, the question presented here, while important and recurrent, is frequently not litigated to an appellate conclusion because of the settlement pressure on defendants facing potential class liability in arbitration, with very limited opportunity for appellate review on the merits. The Court should take this opportunity to answer the question left open in *Stolt-Nielsen*, resolve the conflict in the circuits, and prevent the transformation of routine bilateral arbitrations into *ultra vires* class proceedings.

STATEMENT

1. Petitioner Oxford Health Plans LLC, through a subsidiary, entered into a professional services contract with respondent Dr. John Sutter in 1998. The contract's arbitration clause reads as follows:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

App. 93a. Nothing in the agreement refers to class arbitration, and there is no parol evidence or other indication that the parties ever actually contemplated class proceedings.

In 2002, Sutter filed a complaint in New Jersey Superior Court, seeking to represent both himself and a putative class of physicians who had signed similar contracts with Oxford. App. 2a. The suit alleged breach of contract and other claims under New Jersey law. *Id.* Oxford moved to compel arbitration. The state court granted Oxford's motion to compel arbitration, leaving other issues to the arbitrator. App. 2a-3a.

2. Before the arbitrator, the parties disputed whether their contract authorized class arbitration. In September 2003—just after this Court's plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003)—the arbitrator decided that it did. App. 43a.

The arbitrator reasoned that the clause prohibited "any conceivable court action," instead sending "all such disputes" to arbitration. App. 47a. He concluded that the "intent of the clause, read as a whole" was "to vest in the arbitration process everything that is prohibited from the court process." *Id.* Because "[a] class action is plainly one of the possible forms of civil action that could be brought in a court," "the arbitration clause must have been intended to authorize class actions in arbitration." App. 48a.[1] Moreover, in the arbitrator's view, the chief defect of Oxford's reading was that it would effectively prohibit the claimant from

[1] The arbitrator did not address the fact that what the clause bars is civil actions "*concerning* any *dispute*," while what it directs to arbitration is "all such *disputes*"—not all "civil action[s]" that might "concern[]" such disputes. *See* App. 93a (emphasis added).

bringing a class action in any forum—a result he thought so "bizarre" that it would have to be stated expressly in the contract to be accepted. *Id.*[2]

In March 2005, the arbitrator certified a plaintiff class, which Dr. Sutter asserts includes as many as 20,000 physicians. *See* App. 81a-85a. Under the AAA's Supplementary Rules for Class Arbitrations (issued shortly after the initial clause construction ruling), the certification ruling was set out in a partial final "class determination" award, which attached and incorporated the arbitrator's original "clause construction" award. *See* App. 79a, 85a. Oxford asked the United States District Court for the District of New Jersey to vacate both rulings, as contemplated by Rule 5 of the supplementary rules. *See* App. 97a-98a. The court denied the motion to vacate. App. 61a. An appeal was taken challenging the class certification award (but not the underlying clause construction) and the court of appeals affirmed. App. 55a-59a. The arbitration has since proceeded on a class basis, with a final award not likely until sometime in 2014.[3]

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[2] The arbitrator suggested that "since Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be bound by judicial estoppel" not to argue against the maintenance of a class arbitration. App. 48a.

[3] Dr. Sutter's counsel requested bifurcation of the proceeding into phases addressing different types of claims. Hearing of the Phase I claims before the arbitrator is likely to commence in early 2013. The current proposed schedule for Phase II contemplates expert discovery through October 2013, suggesting a hearing beginning sometime in 2014. The parties have agreed that the arbitrator's final award will not be entered until after his ruling on the Phase II claims.

3. In April 2010, this Court decided *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). There, the parties to a commercial contract contested whether or not their broad arbitration clause should be construed to permit class arbitration, while "stipulat[ing]" that they had never reached any actual agreement on that issue. *See* 130 S. Ct. at 1766, 1768-1770 & nn.6-7. An arbitration panel concluded that the clause should be interpreted to permit class proceedings—reasoning, for example, that the evidence did not prove an intent to *preclude* class arbitration, and that the defendants' position "would leave 'no basis for a class action'" at all. *Id.* at 1766, 1769 n.7; *compare* App. 48a. This Court set aside the ruling as inconsistent with the FAA.

This Court fully recognized the "high hurdle" faced by a party seeking vacatur of an arbitrator's decision, 130 S. Ct. at 1767, and that "the interpretation of an arbitration agreement is generally a matter of state law," *id.* at 1773. The Court also made clear, however, that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* From that principle, "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775; *see also id.* at 1776 ("[C]onsistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration."). Moreover, the Court explained:

> An implicit agreement to authorize class-action arbitration … is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-

> action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Id. at 1775.

In the case before it, the Court reasoned, the parties agreed that they had never reached any actual agreement with respect to class arbitration. *E.g.*, 130 S. Ct. at 1766, 1770, 1776. Accordingly, the Court had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776 n.10. In the conceded absence of any actual agreement, neither party could be "compelled to submit the[] dispute to class arbitration." *Id.* at 1776.

4. In light of *Stolt-Nielsen*, Oxford asked the arbitrator to reconsider his initial clause construction award. App. 4a. In an order dated July 6, 2010, attaching and incorporating the initial award, the arbitrator considered *Stolt-Nielsen* but adhered to his original decision. App. 31a-32a.

In the arbitrator's view, "the crucial fact in *Stolt-Nielsen* was the parties' stipulation that the arbitration award was silent with respect to class arbitration." App. 37a. Because there had been "no meeting of the minds on that point and hence no agreement," there was "nothing of the parties' intent for the arbitrators to discover and enforce." *Id.* This case, the arbitrator maintained, "could not be more different," because he had engaged in "a vital exercise to determine what the parties intended by the[ir arbitration] clause regarding class arbitration." App. 38a.

Quoting the language of the clause—"No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration"—the arbitrator concluded that a class action could proceed in arbitration because "a class action is a form of civil action." App. 38a-39a. Because the clause prohibits bringing a class action in court, while directing all "disputes" under the agreement to arbitration, he reasoned that those "disputes" must include "the entire universe of actions that could possibly have been brought in any court, necessarily including class actions." App. 41a. He concluded that "the parties' intent to have class arbitration [was] clear," App. 42a, because "the text of the clause itself authorizes, indeed requires, class-action arbitration," App. 39a.

The arbitrator further sought to distinguish *Stolt-Nielsen* on the ground that the arbitrators there exceeded their powers by construing an arbitration clause to permit class proceedings "essentially for reasons of public policy." App. 35a; *see Stolt-Nielsen*, 130 S. Ct. at 1768-1770. He maintained that in this case he was always "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." App. 35a.[4] He continued, however, to stress his point that if class arbitration were not available, Dr. Sutter would not be able to maintain any class action at all. *See* App. 41a-42a. That outcome, which the arbitrator

[4] The arbitrator retreated from his previous reliance on the lack of any specific exclusion of class arbitration, conceding that such reasoning "would run afoul of *Stolt-Nielsen*." App. 39a. He now suggested that "[t]he absence of such an exclusion … merely corroborated what was already obvious from the language of the clause itself." *Id.*

had previously called "bizarre" (App. 48a), was one he remained unwilling to entertain. *See, e.g.*, App. 41a ("[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether[,] … and the court class action should be reinstated.").

5. Oxford asked the district court to vacate the arbitrator's reconsidered clause construction award under Section 10 of the FAA, 9 U.S.C. § 10.[5] In February 2011, the court denied Oxford's motion and granted Sutter's cross-motion to confirm the award. App. 19a-20a. In reaching that conclusion, the court stressed the "highly deferential standard of review under the FAA." App. 27a. Noting that this Court in *Stolt-Nielsen* "expressly declined 'to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,'" the court reasoned that the arbitrator had "concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration.'" App. 28a. Thus, the award would be confirmed because the arbitrator's decision "suggests that [he] performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [he] examined the parties' intent, and gave effect to the arbitration agreement." App. 28a-29a.

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[5] The district court had jurisdiction over Oxford's petition under 28 U.S.C. § 1332(a), because the parties are of diverse citizenship and the amount in controversy exceeds $75,000. *See* App. 5a, 23a.

6. The court of appeals affirmed. App. 1a-2a.[6] The court acknowledged that, under *Stolt-Nielsen*, "[a]n arbitrator may exceed his powers by ordering class arbitration … unless there is a contractual basis for concluding that the parties agreed to that procedure." App. 8a; *see also* App. 8a-12a. It rejected, however, Oxford's contention that the arbitration clause at issue in this case is just as "silent" as the clause at issue in *Stolt-Nielsen*. App. 13a. In this case, the court reasoned, "[n]o stipulation between Oxford and Sutter is conclusive of the parties' intent." App. 13a. Instead, the arbitrator had purported to discern such an intent in the language of the agreement and thus "articulate[d] a contractual basis for his decision." App. 14a; *see also* App. 15a ("Without a conclusive statement of the parties' intent or clear evidence of arbitral overreaching, we must conclude that the arbitrator … endeavored to give effect to the parties' intent.").

In reaching that conclusion, the court summarized the arbitrator's textual analysis:

> He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration …," sends all conceivable civil actions—including class actions—to arbitration. In other words, the phrase "no civil action … shall be instituted in any court" meant that a

[6] The court of appeals had jurisdiction over Oxford's appeal from the district court's order confirming the arbitrator's decision under 9 U.S.C. § 16(a)(1)(D) and (a)(3). *See* App. 5a.

> class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

App. 14a.

The court accepted that reasoning as sufficient to establish contractual "intent" for purposes of *Stolt-Nielsen*. App. 14a-17a. It rejected Oxford's arguments that the parties had never reached any actual agreement as to class arbitration and "that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration." App. 16a. All these, the court reasoned, were "simply dressed-up arguments that the arbitrator interpreted [the] agreement erroneously." App. 15a.

Thus, the court of appeals refused to undertake or require any independent review of the "contractual basis" asserted by the arbitrator in response to the question required by the FAA and *Stolt-Nielsen*: whether the parties ever actually "*agreed to authorize* class arbitration." 130 S. Ct. at 1776 & n.10. Rather, the court declared the FAA's "basic precept" that arbitration is "'a matter of consent, not coercion,'" *id.* at 1773, satisfied here because the arbitrator purported to have discerned "the parties' intent" and "articulate[d] a contractual basis for his decision" that the court deemed not "totally irrational." App. 14a, 17a. In the court's view, "[n]othing more is required under § 10(a)(4) of the Federal Arbitration Act." App. 17a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED OVER THE "CONTRACTUAL BASIS" QUESTION LEFT OPEN IN *STOLT-NIELSEN*

The courts of appeals are now expressly divided on the question left open in *Stolt-Nielsen*: "[W]hat contractual basis may support a finding that the parties agreed to authorize class-action arbitration"? 130 S. Ct. at 1776 n.10. The Second and Third Circuits give arbitrators effectively unfettered discretion to impose class proceedings so long as the arbitrator purports to find an implicit "agreement" in the language of the parties' contract—even where that language says nothing more than that the parties will resolve all disputes through arbitration, not litigation. In contrast, the Fifth Circuit recognizes that *Stolt-Nielsen* requires a court applying the FAA to provide meaningful review of an arbitrator's reasoning, to ensure that there is a true contractual basis for compelling class proceedings—*not* including a mere broad arbitration provision. That conflict calls for review by this Court.

a. In *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 114 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012), a divided panel of the Second Circuit sustained an arbitrator's determination that a contract implicitly authorized class arbitration. The agreement made no mention of class claims. *Id.* at 117.[7] In deciding to impose class ar-

[7] The agreement provided:

> I hereby utilize the Sterling RESOLVE program to pursue any [employment] dispute, claim, or controversy ("claim") against Sterling …. I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g., monetary, injunctive or reinstatement) through any government agency or court,

bitration over the defendant's objection, the arbitrator (i) "construed the absence of an express prohibition on class claims against the contract's drafter, Sterling"; (ii) reasoned that the agreement's conferral of power to award any type of *relief* available in a court meant that the employee could not have waived the right to participate in a collective action; and (iii) concluded that the agreement could not be construed to *prohibit* class arbitration, "which thus permitted the plaintiffs to proceed" to seek class certification. *Id.*; *see also id.* at 126-127 (discussing "all remedies" aspect of arbitrator's reasoning). The district court initially sustained the arbitrator's decision, but after this Court's decision in *Stolt-Nielsen* that court reversed itself and vacated the arbitrator's award. *See id.* at 117-118.

The Second Circuit reversed. Emphasizing that the plaintiffs in the case had not, as in *Stolt-Nielsen*, "stipulat[ed] that the parties had reached no agreement on the issue," *id.* at 123, the court held that judicial review was limited to verifying "that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator," *id.* at 124. If the issue was submitted to the arbitrator and she purported to be construing the parties' agreement, any degree of inquiry into the plausibility of her construction exceeded

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> and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE program. … The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.

646 F.3d at 116-117 (quoting agreement).

the scope of judicial review permitted by the FAA. *See id.* ("[I]t is not for the district court to decide whether the arbitrator 'got it right[.]'"); *id.* at 127 ("Regardless, whether the arbitrator was right or wrong in her analysis, she had the authority to make the decision, and the parties to the arbitration are bound by it.").

In dissent, Judge Winter criticized the panel majority for failing to give due consideration to *Stolt-Nielsen*, "a binding precedent on all fours." 646 F.3d at 128 (Winter, J., dissenting). The full court denied a petition for rehearing en banc.

b. In the decision below, the Third Circuit joined the Second in holding that, under *Stolt-Nielsen*, arbitrators have essentially unconstrained discretion to "interpret" routine bilateral arbitration clauses to authorize class arbitration. *E.g.*, App. 13a-18a.

As explained above, the arbitrator in this case principally reasoned that the parties must have affirmatively "intended" to authorize class arbitration (App. 45a-48a) because their arbitration clause barred any "civil action concerning any dispute" in court, instead directing "all such *disputes*" to arbitration, App. 93a (emphasis added). The arbitrator also found no "clear manifestation" of any intent to *preclude* class arbitration (App. 48a), and thought that any construction under which "class actions are not possible in any forum" would be "bizarre," *id.* On reconsideration after *Stolt-Nielsen*, he added that there was no post-dispute "stipulation" that the parties never had any actual "meeting of [the] minds" on the question of class arbitration. App. 37a.

In sustaining this analysis, the court of appeals, like the Second Circuit in *Jock*, ruled that the arbitrator's "decision to order class arbitration is within his author-

ity so long as it stands on a contractual basis," App. 14a—and that any "contractual basis" the arbitrator "articulate[s]" (*id.*) must be accepted unless the court is prepared to declare it "totally irrational," App. 17a. The court, too, distinguished *Stolt-Nielsen* on the ground that there was no post-dispute "stipulation" that the parties never reached any actual agreement at all about class proceedings. App. 13a-14a. That circumstance, the court held, left the arbitrator "not constrained" in ascertaining the parties' "intent." App. 13a.

c. In sharp contrast, the Fifth Circuit has recognized that, under *Stolt-Nielsen*, a court reviewing a motion to vacate or confirm under the FAA must meaningfully review an arbitrator's purported "contractual basis" for imposing class arbitration. *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 646 (5th Cir. 2012), *reh'g denied*, June 15, 2012. And unlike the Second and Third Circuits, the Fifth Circuit has held that a broad arbitration clause cannot, by itself, establish the parties' agreement to authorize class proceedings. *Id.* at 642-643.

In *Reed*, as in this case and in *Jock*, an arbitrator determined that the parties implicitly agreed to class arbitration. In particular, he pointed to two provisions of the parties' agreement. One, as in this case, precluded "any lawsuit" between the parties and required arbitration of "'any dispute …, no matter how described, pleaded or styled.'" 681 F.3d at 641. The second, as in *Jock*, provided that "'[a]ny remedy available from a court under the

law shall be available in the arbitration.'" *Id.*[8] Also as in this case, the arbitrator noted that without an arbitration clause the defendant "'would have clearly been required to submit to a class action lawsuit.'" *Id.* at 641-642. Finally, he "relied upon the [defendant's] failure to expressly ban class arbitration" in an agreement that it had drafted. *Id.* at 642. On these grounds, the arbitrator concluded that the defendant had implicitly agreed to class arbitration. *See id.* at 641.

When reviewing the arbitrator's decision, the court of appeals fully acknowledged the limited nature of FAA review, *id.* at 636-638; that the arbitrator purported to construe the parties' agreement, *id.* at 641-642; and that the parties "did not stipulate that their agreement was silent on class arbitration," *id.* at 642. Nonetheless, the court ruled that the arbitrator exceeded his authority "by ordering the parties into class arbitration without a sufficient basis for concluding that the parties agreed to resolve their dispute in this manner." *Id.*

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[8] The agreement provided:

> The student agrees that any dispute arising from my enrollment … no matter how described, pleaded or styled, shall be resolved by binding arbitration….
>
> 1. Both student and Everest University irrevocably agree that any dispute between them shall be submitted to Arbitration.
>
> 2. Neither the student nor Everest University shall file or maintain any lawsuit in any court against the other, and agree that any suit filed in violation of this Agreement shall be dismissed by the court in favor of an arbitration conducted pursuant to this Agreement.
>
> ...
>
> 5. Any remedy available from a court under the law shall be available in the arbitration.

Reed, 681 F.3d at 632-633.

The Fifth Circuit noted that, even on FAA review, an arbitrator's purported interpretation of an arbitration agreement "'must, in some logical way, be derived from the wording or purpose of the contract.'" 681 F.3d at 637 n.8. It also recognized this Court's particular teaching in *Stolt-Nielsen* and *Concepcion* of the significant disadvantages of class arbitration, which indicate that while an "agreement to submit to class arbitration may be implicit, it should not be lightly inferred." *Id.* at 640; *see also id.* at 640 n.10. Reviewing the arbitrator's decision in light of those principles, the court concluded that "[n]one of the provisions the arbitrator identified … even remotely relates to or authorizes class arbitration." *Id.* at 642.

In particular, the Fifth Circuit rejected reliance on the "any dispute" clause. 681 F.3d at 642-643. That language, the court stressed, was "a standard provision that may be found, in one form or another, in many arbitration agreements" and "merely reflects an agreement between the parties to arbitrate their disputes." *Id.* at 642. Reliance on the "any remedy" provision was likewise "improper," because "while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy," and thus the existence of such a clause "says nothing whatsoever about class arbitration." *Id.* at 643. The arbitrator's observation that class actions would have been available in court was at best beside the point, because "the central purpose of the arbitration agreement is to *avoid* such provisions of state law, not to incorporate them"; and, in any event, the availability of class actions in the *absence* of an arbitration agreement "is not a sufficient basis to conclude that [the parties] agreed to class arbitration when they entered into an arbitration agreement." *Id.* Finally, any suggestion that class arbitration could be im-

posed because the defendant had failed to include an express exclusion in the parties' agreement was "directly contrary" to *Stolt-Nielsen*, which "requires that the parties 'agree[] to authorize' class arbitration, not merely that they fail to bar such a proceeding." *Id.* at 644 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776; alterations in *Reed*).

The Fifth Circuit recognized that its analysis could not be squared with *Jock* or the decision in this case. 681 F.3d at 644-646 & n.13. After describing *Jock*, the court "respectfully disagree[d] with the Second Circuit's decision," *id.* at 645:

> We read *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review. 130 S. Ct. at 1775. Such an analysis necessarily requires some consideration of the arbitrator's award and rationale. … To the extent that the Second Circuit decided not to undertake an inquiry into the arbitrator's reasoning, we must part ways.
>
> Nor can we agree that the deferential standard of review applicable to arbitration awards precludes such an inquiry. Indeed, the same standard of review was at issue in *Stolt–Nielsen*, but it did not prevent the Court from examining and vacating the arbitrator's award.

Id. at 645-646. The court "disagree[d] with *Sutter* for essentially the [same] reasons." *Id.* at 644 n.13.

d. There is now a firm and acknowledged conflict among the courts of appeals as to the proper judicial treatment of an arbitrator's determination that there is

a sufficient "contractual basis" for imposing class arbitration. In the Second and Third Circuits, an arbitrator may impose class arbitration based on any broad arbitration agreement, and courts must sustain that determination so long as the arbitrator purports to be "divining the parties' intent," *Jock*, 646 F.3d at 126.[9] In the Fifth Circuit, on the other hand, an arbitrator's construction will be subject to deferential but meaningful review, and parties will not be compelled to submit to class arbitration without a real "contractual basis" for concluding they agreed to do so—*not* including their having used routine, broad arbitration language. *See Stolt-Nielsen*, 130 S. Ct. at 1775. Only one of these positions can be correct. The Court should grant review to ensure nationwide uniformity in application of its arbitration precedents and the FAA.

II. THE DECISION BELOW IS INCORRECT AND WARRANTS FURTHER REVIEW IN THIS CASE

In *Stolt-Nielsen*, this Court observed that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 130 S. Ct. at 1773 (citations omitted). The fol-

[9] In a recent decision, the First Circuit affirmed a district court's conclusion that the parties to a set of commercial contracts had agreed to have their arbitrators decide whether certain of the contracts permitted a particular sort of associational arbitration. *Fantastic Sam's Franchise Corp.* v. *FSRO Ass'n Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012). In reaching that decision, the court cited *Jock* and *Sutter* in rejecting the proposition "that there must be express contractual language evincing the parties' intent to permit class or collective arbitration." *Id.*

lowing year, in *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1750 (2011), the Court reiterated that imposing *class* arbitration without a true contractual basis violates that precept, because "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" including involving "absent parties, necessitating additional and different procedures and involving higher stakes." *See also id.* at 1750-1753. Entertaining class claims "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. It remains uncertain whether class arbitration can either protect the rights of absent class members or bind them as to matters resolved in favor of the defendant. *See id.* at 1751. On the other hand, it is clear that class proceedings "greatly increase[] risks to defendants," while essentially eliminating appellate review of errors of fact and law. *Id.* at 1752.

For all these reasons, the Court has framed the question on FAA review as "whether the parties *agreed to authorize* class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776—and has expressed frank skepticism that any defendant ever *would* agree to "bet the company with no effective means of review," *Concepcion*, 131 S. Ct. at 1752. Yet, the Second and Third Circuits have embraced an approach to FAA review that gives arbitrators essentially unreviewable discretion to impose class arbitration on the basis of any broad arbitration clause. That approach undermines the basic premises of FAA arbitration, strips *Stolt-Nielsen* of continuing significance, and warrants further review in this case.

A. Undue Deference To An Arbitrator's Assertion Of Authority To Impose Class Proceedings Improperly Limits FAA Review

Under the decision below and the Second Circuit's decision in *Jock*, an arbitrator has unreviewable discretion to impose class proceedings so long as he or she purports to construe the parties' contract and "divine" their contractual "intent." *See* pp. 13-16, *supra*. As the Fifth Circuit has recognized, that approach cannot be reconciled with the promise of the FAA—and the holding of *Stolt-Nielsen*—that courts will intervene when an arbitrator has "exceeded [his] powers," asserting authority far beyond that fairly conferred by the parties' agreement. 9 U.S.C. § 10(a)(4); *see Reed*, 681 F.3d at 645.

This case is a good example. The parties signed their professional services contract, including a broad arbitration clause, in 1998—before most parties would reasonably have entertained any notion of class arbitration. *Cf. Stolt-Nielsen*, 130 S. Ct. at 1768 n.4 (noting testimony that class arbitrations were uncommon before this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and the ensuing adoption of the AAA's supplementary rules). Nothing in their agreement even hints at the possibility of class proceedings. App. 93a-94a (reprinting clause).

The arbitrator asserted that a clause barring any "civil action concerning any dispute … before any court" and referring "all such disputes" to arbitration "must have been intended to authorize class actions in arbitration," because "[a] class action is plainly one of the possible forms of civil action." App. 48a; *see also* App. 14a. That contention cannot survive even cursory analysis. The clause requires arbitration of "all such

disputes," not all such *actions*. And it is simply perverse to conclude that parties who comprehensively barred court litigation and required arbitration "must have intended" to commit themselves to the possibility of extended, uncertain, costly, and high-stakes class proceedings. *Compare Concepcion*, 131 S. Ct. at 1753 (class arbitration "is not arbitration as envisioned by the FAA"); *Reed*, 681 F.3d at 643 ("[T]he central purpose of the arbitration agreement is to *avoid* … provisions [such as a state statute permitting certain class actions], not to incorporate them into the arbitration agreement."). Indeed, under the arbitrator's reasoning, it is the parties who strive hardest to avoid the expense, inefficiency, and delay of litigation who are most likely to be saddled with a complex, protracted, and risky class arbitration. That result makes no sense.

The arbitrator's "interpretation" of the contract did not purport to rest on any background rule of law from which contractual consent to class proceedings might be inferred. *See Stolt-Nielsen*, 130 S. Ct. at 1768-1769 (noting possibility of an applicable "'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent"); *Reed*, 681 F.3d at 641, 642 & n.12; *cf. Bazzle*, 539 U.S. at 447 (plurality opinion) (Court granted review to determine whether such a state default rule would be consistent with the FAA, but did not reach that question). Nor could it have. In 1998, no rule of New Jersey law authorized class proceedings where the parties to an arbitration agreement had not spoken to the issue; and the prevailing federal rule was that the FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *see, e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1771

(describing conflict between *Champ* rule and state-law decisions in California and South Carolina that this Court did not resolve in *Bazzle*).[10]

In short, there is no sustainable basis for concluding that the arbitration clause in this case reveals any actual agreement or intent to authorize class arbitration. The arbitrator's contrary ruling is best explained as a *post hoc* rationalization for a result clearly based in fact on the policy preference revealed by the arbitrator's original decision: avoiding the "bizarre result" that Dr. Sutter might not be able to pursue his contract claims against Oxford on a class basis "in any forum." App. 48a. There is nothing "bizarre" about that result unless one concludes, as the arbitrator implicitly did, that all dispute resolution *must* include the right to bring claims on behalf of a class.

Of course, as *Stolt-Nielsen* makes clear, the FAA forbids precisely that sort of assertion of arbitral power to impose class procedures based on the arbitrator's view that they should be available as a policy matter. *E.g.*, 130 S. Ct. at 1767-1770. Such a decision cannot be squared with "the central or 'primary' purpose of the FAA … to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Id.* at 1773. Yet, the Third Circuit refused to examine the merits of

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[10] In the Third Circuit, see *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) ("This court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure." (citing *Champ*)). Under general New Jersey contract law, "[t]he law will not … supply a term or condition with respect to which [a contract] is silent." *See, e.g.*, *Crewe Corp.* v. *Feiler*, 49 N.J. Super. 532, 543 (App. Div. 1958), *rev'd on other grounds*, 28 N.J. 316 (1958).

the arbitrator's ruling here, beyond asserting that it was not "totally irrational" for him to claim to have interpreted the parties' agreement and divined a mutual "intent" to authorize class proceedings. App. 17a. To hold, as the court of appeals has, that "[n]othing more is required under § 10(a)(4) of the Federal Arbitration Act" is not appropriate deference to an arbitrator's resolution of some arguable contractual question. It is an abdication of the judicial responsibility to vacate awards when arbitrators have "exceeded their powers." 9 U.S.C. § 10(a)(4).

In his dissent in *Jock*, Judge Winter observed that his colleagues' unduly restrictive approach to review of arbitrators' decisions with respect to the authorization of class arbitration has rendered *Stolt-Nielsen* "an insignificant precedent" in the Second Circuit. 646 F.3d at 129 n.2 (Winter, J., dissenting).[11] That observation has already been borne out. A recent decision from the Southern District of New York, for example, sustained an arbitrator's imposition of class proceedings even though the court agreed that, at the time of contracting, "neither party expressly contemplated the issue of class arbitration." *Rame, LLC* v. *Popovich*, No. 12-

[11] *See also Reed Elsevier, Inc.* v. *Crockett*, No. 3:10cv248, 2012 WL 604305, at *13 n.17 (S.D. Ohio Feb. 24, 2012) (deeming it "inappropriate to limit or to distinguish Stolt–Nielsen" as in *Jock* and endorsing Judge Winter's dissent as "well reasoned and faithful to Supreme Court authority"). The district court in *Jock* likewise held that the arbitrator's order imposing class arbitration had to be vacated "in light of *Stolt-Nielsen*'s essential holding," *Jock* v. *Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010), because "plaintiffs … fail[ed] to identify any concrete basis in the record for the arbitrator to conclude that the parties manifested an intent to arbitrate class claims," *id.* at 449.

1684, 2012 WL 2719159, at *9 (S.D.N.Y. July 9, 2012). "Post-*Jock*," the court observed, before a court may enforce *Stolt-Nielsen*'s prohibition on inferring consent from contractual silence, the disputing parties "must be in agreement regarding their intent and also stipulate that there was 'no explicit or implicit intent to submit to class arbitration.'" *Id.* (quoting *Jock*, 646 F.3d at 120). Surely, however, no well-advised party will ever again make such a post-dispute "stipulation." Thus, in the Second Circuit, the FAA's requirement that there be an actual agreement to authorize class proceedings is now unenforceable whenever an arbitrator purports to have "'look[ed] to state law principles of contract interpretation in order to divine whether such intent exists.'" *Id.* (quoting *Jock*, 646 F.3d at 126). And the same is now true in the Third Circuit as well.

In recent years, this Court has clearly and repeatedly taught that class arbitration "is not arbitration as envisioned by the FAA," *Concepcion*, 131 S. Ct. at 1753; that an arbitrator "exceed[s his] power under § 10(a)(4) of the FAA by imposing class procedures" without a proper contractual mandate, *id.* at 1750; and that an arbitration agreement that is "silent on the question of class procedures[] [may] not be interpreted to allow them because the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" *id.* (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). Those teachings are too important to allow the courts of appeals to render them merely hortatory by refusing to provide meaningful review.

B. The Question Presented Is Important, Recurring, And Ripe For Review

The question whether a court applying Section 10 of the FAA will meaningfully review arbitral awards

finding a contractual basis for imposing class arbitration is one of significant importance. For parties to view arbitration as a desirable alternative to litigation, they must be confident that courts will not allow arbitrators to arrogate to themselves the power to impose "fundamental changes" in the normal arbitration model without a real basis in the parties' own agreement. *See Stolt-Nielsen*, 130 S. Ct. at 1776 & n.10; *Concepcion*, 131 S. Ct. at 1750-1753. A primary protection against that risk is the ability to obtain judicial review under Section 10(a)(4) when arbitrators have "exceeded their powers." If courts refuse to discharge that duty, their dereliction will undermine—not reinforce—the longstanding federal policy favoring arbitration.[12]

The question presented is also widely recurrent. In addition to *Jock*, *Reed*, and the decision below, at least five district courts have squarely addressed the issue.[13]

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[12] *See, e.g.*, *Solvay Pharm., Inc.* v. *Duramed Pharm., Inc.*, 442 F.3d 471, 475-476 (6th Cir. 2006) ("[P]eriodic judicial intervention [under Section 10(a)(4)] promotes arbitration in the long run. More parties will contract for arbitration if they can tailor arbitration to their particular needs; and fewer will opt for arbitration if they cannot.").

[13] *See, e.g.*, *Rame*, 2012 WL 2719159; *Southern Commc'ns Servs., Inc.* v. *Thomas*, 829 F. Supp. 2d 1324, 1340 (N.D. Ga. 2011) ("[The arbitrator] identified contract law principles in order to determine the parties' intent. Therefore, the arbitrator did not exceed his power."), *appeal pending*, No. 11-15587 (11th Cir.); *Amerix Corp.* v. *Jones*, No. 11-2844, 2012 WL 141150, at *6 (D. Md. Jan. 17, 2012) ("Rather than interpret *Stolt-Nielsen* as holding that courts should reconsider arbitrators' decisions in class arbitration proceedings, as plaintiffs contend, courts seem to read *Stolt-Nielsen* as underscoring the pre-existing deference to arbitrators' decisions as long as their interpretations have some basis in the parties' agreement."), *appeals being held in abeyance*, No. 12-1219 (4th Cir.); *Louisiana Healthcare Serv. Indemnity Co.* v. *Gambro*

Appeals on this question are pending in the Fourth and Eleventh Circuits and the Vermont Supreme Court.[14] As noted below, other cases presenting the issue have recently been settled. Persistent uncertainty over what sort of "contractual basis" suffices to permit imposition of class arbitration, and what degree of judicial review an arbitrator's decision on that issue will receive under the FAA, is imposing significant burdens on parties and courts—routinely taking a process that was meant to produce "lower costs, greater efficiency and speed" and making it "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751.[15]

The issue is also now ripe for review. The conflict in the circuits that has now emerged is square and acknowledged. The grounds of disagreement and lines of analysis are also clear, and unlikely to change or

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A.B., 756 F. Supp. 2d 760, 768 (W.D. La. 2010) (*Stolt-Nielsen* applicable only where arbitral panel tries "to ascertain what the best result could have been by imposing its own policy choices"); *Smith & Wollensky Restaurant Group Inc.* v. *Passow*, 831 F. Supp. 2d 390 (D. Mass. 2011) (upholding arbitrators' determination that broad arbitration clause authorized class arbitration and construing *Stolt-Nielsen* as limited to cases involving "stipulation" that agreement is silent regarding class arbitration).

[14] *Southern Commc'ns Servs.* v. *Thomas*, 11th Cir. No. 11-15587 (oral argument scheduled for August 27, 2012); *Amerix Corp.* v. *Jones*, 4th Cir. No. 12-1219 (appeals being held in abeyance pending proceedings in underlying arbitration); *Bandler* v. *Charter One Bank*, Vt. Supreme Ct. No. 2011-249 (oral argument held Mar. 27, 2012).

[15] Again, this case is a good example. Dr. Sutter's contract claim was filed in 2002. There is little doubt it would have been resolved years ago if handled, as intended, on an individual basis.

evolve significantly through further decisions in the same or other courts. And this case is an appropriate vehicle for resolving the conflict.

Moreover, as a practical matter, while the question presented is frequently recurring in the lower courts, this case may be one of the few to reach this Court. The question presented in this case is typically litigated in the courts after an arbitrator has already entered an award authorizing class arbitration—and sometimes, as here, after the arbitrator has also certified a class. Defendants in such cases face well-recognized pressures to settle rather than continue to litigate through appeal. As this Court observed in *Concepcion*, "the risk of 'in terrorem' settlements that class actions entail" is "no different" in the case of class arbitrations; "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." 131 S. Ct. at 1752. Indeed, the pressure to settle is especially acute in arbitration, because of the very limited opportunity for further review on the merits. *See id.*

Thus, deferring review would place defendants facing demands for class arbitration in an extraordinarily difficult position, in many cases forcing them to abandon sound legal arguments because of the threat of classwide liability without effective appellate review. This is not an academic concern. In at least two recent cases, arbitration defendants in the First and Tenth Circuits pursued challenges to arbitral decisions that they had implicitly agreed to class arbitration through full briefing on appeal, but then settled before the courts heard oral argument.[16] Thus, even a significant

[16] *See The Smith & Wollensky Group, Inc.* v. *Passow*, 1st Cir. No. 11-1179, Appellants' Br. at *6, 2011 WL 2118480 (arguing that

volume of litigation in the lower courts may generate, in the end, few cases litigated through decision on appeal. The present case squarely raises an important question on which the circuits are divided. It warrants immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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arbitrator's decision construing agreement "to permit class or collective proceedings notwithstanding the agreement's silence on the matter, is in direct conflict with *Stolt-Nielsen*"), *appeal dismissed*, Oct. 14, 2011; *Long John Silver's, Inc.* v. *Stewart*, 10th Cir. No. 10-6249, Appellant's Br. at *21, 2011 WL 1352471 ("After *Stolt-Nielsen*, the arbitrator lacks the authority under the arbitration agreement to conduct a class arbitration."), *appeal dismissed*, Dec. 30, 2011. Doubtless there are other cases not apparent from the public record where the threat of class liability has induced defendants to settle rather than to seek judicial or appellate review of disputed clause constructions.

Respectfully submitted.

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JULY 2012

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1773

JOHN IVAN SUTTER, M.D.

v.

OXFORD HEALTH PLANS LLC, *Appellant.*

Argued November 17, 2011
Opinion Filed: April 3, 2012
As Amended April 4, 2012

OPINION OF THE COURT

Before: FUENTES, CHAGARES, Circuit Judges, and POGUE, Judge.[*]

FUENTES, Circuit Judge:

Oxford Health Plans, LLC, and Dr. John Ivan Sutter are parties to a Primary Care Physician Agreement, drafted by Oxford, which contains a broad arbitration clause. Neither the arbitration clause nor any other provision of the agreement makes express reference to class arbitration. Nevertheless, when a dispute arose regarding Oxford's alleged failure to make prompt and accurate reimbursement payments to participating physicians, an arbitrator construed the

[*] Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.

broad text of the clause to authorize class arbitration. Oxford contends that the Supreme Court's decision in *Stolt–Nielsen S.A. v. Animal-Feeds International Corp.*, ––– U.S. ––––, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), requires vacatur of the award authorizing class arbitration. We disagree, and we will affirm the Order of the District Court denying Oxford's motion to vacate the award.

I

By their 1998 Primary Care Physician Agreement (the "Agreement"), the parties agreed that Sutter would provide primary care health services to members of Oxford's managed care network in exchange for compensation at predetermined reimbursement rates. They also agreed to arbitrate their disputes under the Agreement by a clause that states:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 55).

A dispute arose in April 2002, when Sutter accused Oxford of engaging in a practice of improperly denying, underpaying, and delaying reimbursement of physicians' claims for the provision of medical services. Sutter filed a complaint on behalf of himself and a class of health care providers against Oxford and other health insurers in New Jersey Superior Court, alleging breach of contract and other violations of New Jersey law. Oxford moved to compel arbitration of Sutter's

claims against it under the Agreement. Sutter opposed the motion, arguing that referral of the class claims to individual arbitration would violate New Jersey public policy. He urged the Superior Court either to refuse to enforce the clause or to certify the class before sending the claims to arbitration. In October 2002, the Superior Court granted Oxford's motion to compel arbitration and ordered that all procedural issues, including those of class certification, be resolved by the arbitrator.

The parties commenced arbitration before William L.D. Barrett and submitted to him the question of whether the arbitration clause in their Agreement allows for class arbitration. By memorandum and order dated September 23, 2003, he determined that it does. Framing the question as one of contract construction, the arbitrator turned first to the text of the arbitration clause. He described the clause as "much broader even than the usual broad arbitration clause;" it was "unique in [his] experience and seem[ed] to be drafted to be as broad as can be." (App. 47). The arbitrator thus determined that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," embraces all conceivable court actions, including class actions. Because the clause's second phrase sends "all such disputes" to arbitration, he reasoned that class disputes must also be arbitrated. Thus, the arbitrator concluded that the clause expressed the parties' intent to authorize class arbitration "on its face." (App. 48). He observed that an express carve-out for class arbitration would be required to negate this reading of the clause. He mused, however, that it would be bizarre for the parties to have intended to make class action impossible in any forum. Since he found the clause unambiguous, the arbitrator did not reach

Sutter's argument that any ambiguity in the clause should be construed against its drafter, Oxford. The arbitrator subsequently incorporated this clause construction into his Partial Final Class Determination Award, dated March 24, 2005.

In April 2005, Oxford filed a motion to vacate the award in the District Court, arguing that the arbitrator had exceeded his powers and manifestly disregarded the law by ordering class arbitration. The District Court denied Oxford's motion in October 2005, and a panel of this Court affirmed in February 2007. *Sutter v. Oxford Health Plans, LLC*, No. 05–CV–2198, 2005 U.S. Dist. LEXIS 25792 (D.N.J. Oct. 31, 2005), *aff'd* 227 Fed.Appx. 135 (3d Cir. 2007). The arbitration thereafter proceeded on a classwide basis.

This action represents Oxford's second foray into federal court to vacate the award authorizing class arbitration as in excess of the arbitrator's powers. Since Oxford's first unsuccessful attempt at vacatur, the Supreme Court decided *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.*, —— U.S. ——, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), in which it held that an arbitral panel had exceeded its authority by allowing class arbitration when the parties had reached no agreement on the issue. *See id.* at 1775. Oxford contends that *Stolt–Nielsen* controls this case and compels the conclusion that the arbitrator's construction of the clause was in excess of his powers. Oxford first moved the arbitrator for reconsideration of his clause construction award, but the arbitrator distinguished *Stolt–Nielsen* and reaffirmed his construction of the parties' clause. Oxford then moved the District Court to vacate the arbitrator's most recent award or, in the alternative, to reconsider its own 2005 decision denying vacatur. The District Court

denied Oxford's motion and granted Sutter's cross-motion to confirm the award. *Sutter v. Oxford Health Plans, LLC,* Nos. 05–CV–2198, 10–CV–4903, 2011 WL 734933, 2011 U.S. Dist. LEXIS 17123 (D.N.J. Feb. 22, 2011). Oxford appeals.

II

The District Court exercised diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332. We have jurisdiction over Oxford's appeal under the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(D) ("An appeal may be taken from … an order … confirming or denying confirmation of an award or partial award.").[1]

On appeal from a district court's ruling on a motion to confirm or vacate an arbitration award, we review its legal conclusions de novo and its factual findings for clear error. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947–48, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), *aff'g* 19 F.3d 1503, 1509 (3d Cir.1994); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 278–79 (3d Cir. 2003).

A more deferential standard of review applies to the arbitration award itself. We do not entertain claims that an arbitrator has made factual or legal errors. Rather, mindful of the strong federal policy in favor of

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[1] Anomalously, the Federal Arbitration Act creates a body of federal substantive law without creating any independent federal-question jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). It does, however, confer appellate jurisdiction, including over interlocutory judicial orders. *See* 9 U.S.C. § 16(a). In a court of competent jurisdiction, assuming ripeness, interlocutory arbitral awards on the availability of class arbitration are reviewable under the Act. *See Stolt–Nielsen,* 130 S.Ct. at 1766–67 & n. 2.

commercial arbitration, we begin with the presumption that the award is enforceable. *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). An award may be vacated only upon one of the four narrow grounds enumerated in the Federal Arbitration Act:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). These grounds are exclusive and may not be supplemented by contract. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), *overruling Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001). In sum, when parties agree to resolve their disputes before an arbitrator without involving the courts, the courts will enforce the bargains implicit in such agreements by enforcing arbitration awards absent a reason to doubt the authority or integrity of the arbitral forum. *See id.* at 586, 128 S.Ct. 1396 (characterizing the exclusive statutory bases for

vacatur as "egregious departures from the parties' agreed-upon arbitration").

The basis for vacatur asserted in this case, § 10(a)(4) of the Federal Arbitration Act, permits district courts to vacate awards when arbitrators exceed their powers. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). By contractually restricting the issues they will arbitrate, the individuals with whom they will arbitrate, and the arbitration procedures that will govern, parties to an arbitration agreement may place limits upon the arbitrator's powers that are enforceable by the courts. *See Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 181 (3d Cir. 2010) (en banc). An arbitrator oversteps these limits, and subjects his award to judicial vacatur under § 10(a)(4), when he decides an issue not submitted to him, grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 295–96 (3d Cir. 2010) (citing *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52, 56 (3d Cir. 1989)). In other words, the task of an arbitrator is to interpret and enforce a contract. When he makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur. *See Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005) (upholding an arbitration award despite the arbitrator's inexplicable reliance on language not found

in the relevant agreement). But when the arbitrator "strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice,' " he exceeds his powers and his award will be unenforceable. *Stolt–Nielsen*, 130 S.Ct. at 1767 (quoting *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (per curiam) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960))).[2]

An arbitrator may exceed his powers by ordering class arbitration without authorization. In *Stolt–Nielsen*, the Supreme Court held that arbitrators may not infer parties' consent to class arbitration procedures solely from the fact of their agreement to arbitrate. 130 S.Ct. at 1775. Therefore, an arbitrator lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure. *Id.*

III

Stolt–Nielsen arose out of a Department of Justice investigation which revealed that Stolt–Nielsen and

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[2] Like the Supreme Court, this Court will refer to the federal common law developed under *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), for judicial review of labor arbitration awards under the Labor Management Relations Act, 29 U.S.C. § 185, to elaborate the meaning of the Federal Arbitration Act's statutory grounds for vacatur. *See Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130 & n. 11 (3d Cir. 1972); *cf. Hall St.*, 552 U.S. at 585, 128 S.Ct. 1396 (suggesting without deciding that the judicially created manifest disregard of law ground for vacatur may be properly considered only as a judicial gloss on the statutory grounds); *Stolt–Nielsen*, 130 S.Ct. at 1768 n. 3 (same).

other shipping companies were engaged in an illegal price fixing conspiracy. *Id.* at 1765. AnimalFeeds and other customers of the shipping companies brought class action antitrust lawsuits, which were consolidated by the Judicial Panel on Multidistrict Litigation. *Id.* AnimalFeeds' suit was subsequently referred to arbitration on the basis of an arbitration clause in the "Vegoilvoy" charter party, a standard form shipping contract that AnimalFeeds had selected. *Id.* at 1764–65. When AnimalFeeds then sought to proceed in arbitration on a classwide basis, the parties agreed to submit the issue of class arbitration to a panel of three arbitrators. *Id.* at 1765. After hearing argument and testimony, the arbitrators concluded that class arbitration was permitted. *Id.* at 1766.

Before the arbitrators, the parties stipulated that the arbitration clause in the Vegoilvoy charter party was "silent" with respect to class arbitration, in the sense that they had not reached any agreement on that issue. *Id.* at 1766. "Counsel for AnimalFeeds explained to the arbitration panel that the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he said, 'all parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.' " *Id.* Thus, the arbitration clause was silent but "not ambiguous so as to call for parol evidence" because "the parties were in complete agreement regarding their intent." *Id.* at 1770 (internal quotation marks omitted). The arbitrators were bound to conclude that the parties intended neither to authorize nor to preclude class arbitration. *See id.*

The parties' stipulation left the arbitrators unable to apply traditional principles of contract interpretation. It obviously "left no room for an inquiry

regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." *Id.* Nor could the panel construe the text of the arbitration clause because, in light of the parties' stipulation, "the particular wording of the charter party was quite beside the point." *Id.*

"Because the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." *Id.* at 1768 (identifying the Federal Arbitration Act, federal maritime law, and New York law as possible sources of a governing rule). Instead, the panel based its decision that class arbitration was permitted on the parties' failure to contractually preclude the procedure and on other arbitral decisions construing other clauses to allow class arbitration. *Id.* In so doing, the Supreme Court held, the arbitrators impermissibly assumed the power of a common law court to fashion a rule of decision. *Id.* at 1769. By doing so, rather than interpreting the contract under the governing law, the arbitrators exceeded their powers within the meaning of § 10(a)(4) of the Federal Arbitration Act. *Id.* at 1770.

The Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). The Court therefore faulted the arbitrators for imposing class arbitration in the absence of any agreement on the issue and on the basis that the parties had not intended to *preclude* class arbitration. *Id.* Although parties may implicitly authorize arbitrators to adopt necessary procedures, the Court held that "[a]n implicit agreement to authorize class-

action arbitration … is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume … that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776; *see also AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1752, 179 L.Ed.2d 742 (2011) (further articulating the "fundamental" differences between bilateral arbitration and class arbitration).[3]

Stolt–Nielsen did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants "class arbitration" or otherwise expressly provides for aggregate procedures. *Stolt–Nielsen*, 130 S.Ct. at 1776 n. 10; *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011) (holding that an arbitrator did not exceed her powers by ruling that class arbitration was allowed under an agreement lacking an express class provision). The Court underscored this point, writing, "We have no

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[3] In *AT & T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act preempts a California common law rule invalidating class waivers in arbitration clauses as unconscionable. *See* — U.S. —, 131 S.Ct. 1740, 1753, 179 L.Ed.2d 742 (2011). The Court found its decision in *Stolt–Nielsen* to be "instructive." *Id.* at 1750. Because class arbitration necessarily sacrifices the informality, speed, and cost savings of arbitration and increases the stakes without increasing the level of judicial scrutiny available under the Federal Arbitration Act, the Court found "it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 1752. Recognizing that parties *could* agree to class arbitration if they so chose, the Court held that this procedure may not be *required* by state law. *Id.* at 1752–53.

occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." 130 S.Ct. at 1776 n. 10; *see also id.* at 1783 (Ginsburg, J., dissenting) ("[T]he Court does not insist on express consent to class arbitration.").

Instead, *Stolt–Nielsen* established a default rule under the Federal Arbitration Act: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). Absent a contractual basis for finding that the parties agreed to class arbitration, an arbitration award ordering that procedure exceeds the arbitrator's powers and will be subject to vacatur under § 10(a)(4).[4]

IV

Oxford argues that the clause construction award at issue in this case should be vacated because the arbitrator exceeded his powers under *Stolt–Nielsen*. According to Oxford, "the arbitrator found that the arbitration clause between Sutter and Oxford is silent

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[4] Thus, the District Court misstated the law when it wrote that the arbitrator must decide whether the arbitration clause "forbids" class arbitration. *See Sutter v. Oxford Health Plans, LLC*, 2011 WL 734933, at *4, 2011 U.S. Dist. LEXIS 17123, at *12 (quoting *Vilches v. The Travelers Cos.*, 413 Fed.Appx. 487, 492 (3d Cir.2011)). It is evident from the District Court's discussion, however, that it properly understood that *Stolt–Nielsen* allows class arbitration only where the parties intend to authorize it, as the arbitrator found they did in this case. In any event, upon de novo review under the appropriate standard, we conclude that the arbitration award stands.

on the issue of class arbitration, but he went on to conclude that the clause permits class arbitration in light of its breadth and the absence of a class arbitration exclusion." (Appellant's Br. at 14). Oxford charges that the arbitrator imposed his own default rule, in derogation of *Stolt–Nielsen* and New Jersey law, based on his own conceptions of public policy.

As an initial matter, we reject Oxford's attempt to cast this case in the mold of *Stolt–Nielsen*. The arbitration clause in its Agreement does not refer to class arbitration. Yet it is not "silent" in the way that the Vegoilvoy charter party was "silent" in *Stolt–Nielsen*, and Oxford equivocates when it suggests otherwise.[5] No stipulation between Oxford and Sutter is conclusive of the parties' intent and, indeed, the parties dispute whether or not they intended to authorize class arbitration. Therefore, the arbitrator in this case was not constrained to conclude that the parties did not intend to authorize class arbitration or, on the other hand, to identify a contrary default rule of New Jersey law. *Cf. Stolt–Nielsen*, 130 S.Ct. at 1769–

[5] Oxford seems to suggest that an arbitration provision is "silent" whenever the words "class arbitration" are not written into the text of the arbitration clause. This rule finds no support in *Stolt–Nielsen*. It would effectively impose on all contracting parties an obligation to use the words "class arbitration" to signal their intention to authorize class arbitration. But *Stolt–Nielsen* did not purport to restrict the freedom of contracting parties in this way. Rather, it repeatedly emphasized that the fundamental duty of the arbitrator and the courts to effectuate parties' intentions. *Stolt–Nielsen*, 130 S.Ct. at 1773–74. Oxford's approach would cabin the freedom of contracting parties, safeguarded by the Federal Arbitration Act, to structure their arbitration provisions as they see fit. *See id.* at 1774 ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.") (internal quotation marks and citation omitted).

70. His decision to order class arbitration is within his authority so long as it stands on a contractual basis. *See id.* at 1775.

As Oxford concedes, the arbitrator did articulate a contractual basis for his decision to order class arbitration. Appropriately, the arbitrator made first resort to the text of the arbitration clause:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 55). He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator," sends all conceivable civil actions—including class actions—to arbitration. In other words, the phrase "no civil action … shall be instituted in any court" meant that a class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

Oxford attacks the contractual basis for the arbitrator's decision by asserting that the arbitrator's purported examination of the parties' intent was pretext for the imposition of his policy preferences. *See Stolt–Nielsen*, 130 S.Ct. at 1769–70 (concluding that the arbitral panel had impermissibly imposed its preferred policy notwithstanding its references to the parties'

intent, where the parties stipulated that they had formed no intent). According to Oxford, if the arbitrator were actually desirous of determining the parties' intent, he would have sought it not in the text of their agreement to arbitrate but instead in their briefing before the New Jersey Superior Court. In that forum, Sutter opposed enforcement of the arbitration agreement on the ground that it would send the dispute to individual arbitration, which, he argued, would be contrary to New Jersey public policy. Oxford argues that Sutter's submissions to the Superior Court, together with Oxford's own representations that its Agreement did not contemplate arbitration on a class-wide basis, were tantamount to a stipulation that the parties did not intend to authorize class arbitration. *Cf. id.* at 1766.

Oxford's argument lacks force because Sutter's litigation position in the Superior Court is not conclusive, or even particularly probative, of the meaning of a clause drafted solely by Oxford. *Cf. id.* at 1775 (relying on the stipulation of the sophisticated business entity that had selected the charter party). We observe, further, that Sutter's litigation position was not uniform: Sutter alternatively urged the Superior Court to certify the class before sending the claims to arbitration, and he argued before the arbitrator that the clause could be construed to affirmatively authorize class arbitration. Without a conclusive statement of the parties' intent or clear evidence of arbitral overreaching, we must conclude that the arbitrator performed his duty appropriately and endeavored to give effect to the parties' intent. In this light, Oxford's allegations of pretext are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously.

The remainder of Oxford's arguments are similarly uncognizable claims of factual and legal error. In particular, Oxford argues that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration. In his clause construction award, the arbitrator remarked that the parties' arbitration clause was unique in its breadth. Construing the broad text and structure of the clause, he concluded that the parties affirmatively intended to authorize arbitration on a class-wide basis. Then, given his construction of the clause, the arbitrator noted that an express exception for class arbitration would be required to carve out and prohibit class arbitration. Oxford submits that the arbitrator thereby relied on two grounds that *Stolt–Nielsen* had expressly proscribed.

The arbitrator unquestionably relied on the breadth of the arbitration agreement, but *Stolt–Nielsen* does not proscribe such reliance. Rather, it acknowledges the relevance of an arbitration agreement's breadth to the determination of whether it authorizes class arbitration. In *Stolt–Nielsen*, the Supreme Court concluded that the arbitration panel "imposed its own conception of sound policy" in derogation of its duty to interpret the arbitration agreement and apply the law. 130 S.Ct. at 1769. The Court acknowledged indications that were arguably contrary to its conclusion: The panel had referred to the parties' intent and had commented on the breadth of the arbitration agreement. *Id.* at 1770. But the Court nonetheless held that these references and comments could not overcome the parties' stipulation that they had reached no agreement on the issue of class arbitration. In light of the parties' stipulation,

"the panel had no occasion to ascertain the parties' intention" and "the particular wording of the charter party was quite beside the point." *Id.* (internal quotation marks omitted). The lesson from this discussion is that where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question.

Stolt–Nielsen does prohibit an arbitrator from inferring parties' consent to class arbitration solely from their failure to preclude that procedure, but the arbitrator did not draw the proscribed inference in this case. Rather, the arbitrator construed the text of the arbitration agreement to authorize and require class arbitration. Then he observed that an express carve-out for class arbitration would have made it unavailable even under the clause's otherwise broad language. As the arbitrator later articulated when he revisited his construction of the clause in light of *Stolt–Nielsen*, the lack of an express exclusion was merely corroborative of his primary holding that the parties' clause authorized class arbitration; it was not the basis of that holding. Thus, the arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it.

We are satisfied that the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational. Nothing more is required under § 10(a)(4) of the Federal Arbitration Act.

V

Because the arbitrator did not exceed his powers by construing the parties' arbitration agreement to

authorize class arbitration, we will affirm the Order of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 05-2198 (GEB)
Civ. No. 10-4903 (GEB)

JOHN IVAN SUTTER, M.D., *Plaintiff*,

v.

OXFORD HEALTH PLANS LLC, *Defendant*.

Filed February 22, 2011

MEMORANDUM OPINION

NOT FOR PUBLICATION

BROWN, Chief Judge:

This matter comes before the Court upon the following motions filed in Civ. No. 05-2198 (hereinafter, the "'05 Case"): (1) the motion to vacate arbitration award and/or for reconsideration filed by Defendant Oxford Health Plans, LLC ("Oxford"); (2) the cross-motion to confirm arbitration award filed by Plaintiff John Ivan Sutter, M.D. ("Sutter"); and (3) the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) filed by Sutter. (Doc. Nos. 31, 38, 42.) And, further, upon the following motions filed in Civ. No. 10-4903 (hereinafter, the "'10 Case"): (1) the motion to dismiss filed by Oxford; and (2) the motion to remand filed by Sutter. (Doc. Nos. 5, 8.) All of the foregoing

motions are opposed, and the Court has considered them without oral argument pursuant to Fed. R. Civ. P. 78. Having done so, for the reasons that follow, the Court concludes that federal subject-matter jurisdiction exists in both cases, that the arbitrator's award should be confirmed in the '05 Case, and that Oxford's motion to dismiss should be denied in the '10 Case.

I. BACKGROUND

As the Court writes only for the parties, discussion will be limited to the allegations, the facts, and the aspects of these two cases' procedural histories that are relevant to the Court's present decision.

On September 23, 2003, W.L.D. Bennett ("Bennett"), arbitrator in the parties' underlying arbitration, issued a Clause Construction Award that allowed class arbitration pursuant to the parties' arbitration agreement. Thereafter, on March 25, 2005, Bennett issued his "Partial Final Class Determination Award" (the "Partial Award") that, among other things, integrated and gave effect to Bennett's prior Clause Construction Award. Subsequently, on April 25, 2005, Oxford filed a petition in the District of New Jersey to vacate Bennett's Partial Award. That matter, the '05 Case, was assigned to then-District Judge Joseph A. Greenaway, Jr, since elevated to the United States Court of Appeals for the Third Circuit. On May 9, 2005, Sutter opposed Oxford'spetition to vacate, and also filed a cross-motion to dismiss the '05 Case based upon Sutter's assertion that subject-matter jurisdiction did not exist.

On October 31, 2005, Judge Greenaway issued an opinion and order that denied both Sutter's motion to

dismiss, and Oxford's motion to vacate the Partial Award. In support of that decision, Judge Greenaway concluded: (1) that federal subject-matter jurisdiction exists in this matter pursuant to 28 U.S.C. Section 1332(a), because the parties are diverse and substantially more than $75,000 is at issue; and (2) that under then-controlling precedent, Bennett did not exceed his powers or manifestly disregard the law in the Partial Award. Oxford promptly appealed, and on February 28, 2007, a panel of the Third Circuit affirmed. Following these rulings, class arbitration proceeded before Bennett in accordance with the Partial Award.

On April 27, 2010, the United States Supreme Court decided *Stolt-Nielsen S.A., ET AL. v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010), and therein addressed the issue of class arbitration. In light of *Stolt-Nielsen*, Oxford asked Bennett to reconsider and vacate his prior decisions that allowed class arbitration pursuant to the parties' arbitration agreement. On July 6, 2010, Bennett issued Procedural Order No. 18. ("Order No. 18"), in which he revisited both the Clause Construction Award and the Partial Award, but concluded that class arbitration of the claims at issue remained mandated by the parties' arbitration agreement following the *Stolt-Nielsen* decision.

On August 13, 2010, Oxford moved to reopen this case, and on September 7, 2010, this Court ordered the '05 Case case reopened and reassigned to the undersigned in light of Judge Greenaway's elevation. Also on August 13, 2010, in addition to its motion to reopen, Oxford filed its present motion to either vacate Bennett's July 6, 2010 decision pursuant to provisions of the Federal Arbitration Act ("FAA"), or for

reconsideration of Judge Greenaway's October 31, 2005 decision in light of *Stolt-Nielsen*. In response, Sutter filed: (1) opposition to Oxford's motion; (2) a cross-motion to confirm Bennett's July 6, 2010 decision; and (3) a motion to dismiss for lack of subject-matter jurisdiction. Oxford opposes Sutter's motions.

On September 23, 2010, as the parties briefed the various motions filed in the '05 Case, Oxford removed a verified complaint filed by Sutter in Essex County Superior Court, Law Division, to the District of New Jersey. As a result, the '10 Case was opened and assigned to this Court. While both the '05 and '10 Cases arise out of the class arbitration between the parties, the specific issues presented by each case are different. In the verified complaint that frames the '10 Case, Sutter seeks an order to show cause why Bennett's Procedural Order No. 19 ("Order No. 19"), which was issued on July 29, 2010, should not be vacated, apparently pursuant to provisions of the FAA. Less than a week after removing Sutter's verified complaint, and before either Sutter or the Court took further action on Sutter's underlying request for an order to show cause, Oxford filed a motion to dismiss Sutter's verified complaint in the '10 Case. In support of that motion, Oxford argues that: (1) Order No. 19 is not subject to judicial review; and (2) if reviewed by the Court, Bennett's decision should not be vacated. In response, Sutter opposed Oxford's motion, and on November 12, 2010, also filed a motion to remand the '10 Case for lack of subject-matter jurisdiction.

II. DISCUSSION

A. Subject-Matter Jurisdiction

Sutter argues that there is no federal subject-matter jurisdiction in either the '05 or the '10 Cases.[1] Fundamentally, Sutter challenges the existence of Section 1332 diversity jurisdiction on the following two bases: (1) that Oxford's citizenship is not diverse; and (2) that the $75,000 amount in controversy requirement is not met. The Court concludes that both arguments are specious for the following reasons.

Nearly six years ago, shortly after Oxford filed the petition to vacate Bennett's Partial Award that gave rise to the '05 Case, Sutter lodged a similar challenge to federal subject-matter jurisdiction in a cross-motion to dismiss. (Doc. No. 5.) In his October 31, 2005 memorandum opinion, Judge Greenaway decided that Section 1332 diversity jurisdiction exists in the '05 Case because: (1) "[t]he parties do not dispute that they are of diverse citizenship: Sutter is a citizen of New Jersey and Oxford is a citizen of Minnesota"; and (2) "as Sutter has not questioned Oxford's $5,000,000 [alleged damages] figure, and this Court discerns no basis to conclude to a legal certainty that the claim is really for less than $75,000, the amount in controversy requirement of Section 1332(a) is satisfied." (JAG 10/31/05 Mem. Op at p. 5; Doc. No. 21) Sutter did not appeal Judge Greenaway's decision that diversity

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[1] Sutter makes the identical argument in both the '05 and '10 Cases via two different motions: (1) in the '05 Case, Sutter has filed a motion to dismiss; and (2) in the '10 Case, Sutter has filed a motion to remand. In support of his after-filed motion to remand in the '10 Case, Sutter expressly relies upon his filings in support of his motion to dismiss in the '05 case. The Court's analysis of both motions, therefore, is coextensive.

jurisdiction exists in the '05 Case. Further, in affirming Judge Greenaway's October 31, 2005 denial of Oxford's motion to vacate the Partial Award, the Third Circuit did not address subject-matter jurisdiction in any way. As such, the procedural history of this case makes clear that Judge Greenaway explicity, and a panel of the Third Circuit implicitly, determined that diversity jurisdiction exists in this case. In light of these well-reasoned and settled decisions, the Court shall not revisit that determination.

In an abundance of caution, however, the Court will alternately address the grounds upon which Sutter's present jurisdictional motions are based, and explain why those grounds are not sufficient. First, it is apparent from Judge Greenaway's October 31, 2005 memorandum opinion that, in support of his initial challenge to subject-matter jurisdiction, Sutter disputed neither that Oxford was the appropriate party in interest, nor that Oxford's citizenship was diverse. As noted, Sutter did not appeal Judge Greenaway's October 31, 2005 decision. Therefore, Sutter's present, untimely attempt to take a fresh bite at this jurisdictional apple must be rejected. Sutter is plainly estopped from taking a position that he either failed to assume, or to appropriately pursue, in his initial motion to dismiss filed nearly six years ago.

Furthermore, Sutter's second argument, that the $75,000 amount in controversy threshold for diversity jurisdiction is not met, fails for the same reason. Indeed, beyond Judge Greenaway's unappealed and implicitly affirmed prior determination on this point, the Court concludes that the evidence submitted by Sutter in support of his argument does not prove Sutter's point to a legal certainty, as is of course required to defeat diversity jurisdiction in the face of

adequately pled damages. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). Here, Sutter submitted only the certification of a purported damages expert, which was promptly rebutted by Oxford in its opposition via the submission of an affidavit from its own purported expert. Thus, at most, the parties' submissions have created an issue of fact regarding damages. As noted, that falls far short of the threshold required standard.

For these reasons, as Judge Greenaway correctly noted more than five years ago, "[t]his Court has subject matter jurisdiction over this matter." (JAG 10/31/05 Mem. Op at p. 5; Doc. No. 21) In light of that determination, Sutter's motion to dismiss in the '05 Case, and motion to remand in the '10 Case, will be denied.

B. Procedural Order No. 18

The issue that revived the '05 case is Oxford's motion to either vacate Bennett's July 6, 2010 Order No. 18, or alternately, for reconsideration of Judge Greenaway's October 31, 2005 decision to confirm the Partial Award.[2] In support of that motion, Oxford argues that Bennett exceeded his powers when he decided the parties' arbitration agreement allowed for class action arbitration in light of *Stolt-Nielsen*. In response, Sutter opposes Oxford's motion, and in a

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[2] The Court will not reconsider Judge Greenaway's October 31, 2005 decision, which was subsequently affirmed by the Third Circuit. Instead, the Court will consider in the first instance whether Bennett's Order No. 18 should be vacated pursuant to the relevant provisions of the FAA and related jurisprudence. Thus, the Court will henceforth refer to Oxford's present motion as one to "vacate".

cross-motion, argues that Bennett's decision should be confirmed. The Court agrees with Sutter, and will confirm Bennett's Order No. 18 for the following reasons.

As relevant here, Section 10 of the FAA provides that the district court may only vacate an arbitrator's award, "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. Section 10(a)(4). In *Stolt-Nielsen*, the Supreme Court reinforced the narrowness of judicial review pursuant to this statute. Here, Oxford contends that Bennett's Order No. 18 must be vacated, but for the Court to grant that relief, Oxford "must clear a high hurdle." *Stolt-Nielsen*, 130 S. Ct. at 1767. Indeed, for this Court to vacate, it is not enough for Oxford to show that Bennett "committed an error—or even a serious one." *Id.* (citing *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). Rather, "'it is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision is unenforceable.'" *Id.* (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504 (2001) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). "In that situation, an arbitration decision may be vacated under [Section 10(a)(4) of the FAA] on the ground that the arbitrator 'exceeded his powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id.*

Further, "'[t]he Supreme Court has made clear that questions of 'contract interpretation' aimed at discerning *whether* a particular procedural mechanism

is authorized by a given arbitration agreement are matters for the arbitrator to decide.'" *Vilches, ET AL. v. The Travelers Cos., Inc., ET AL.*, No. 10-2888, 2011 U.S. App. LEXIS 2551 at *11 (3d Cir. Feb. 9, 2011) (quoting *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 179 (3d Cir. 2010) (emphasis in original). "Where contractual silence is implicated, 'the arbitrator and not a court should decide whether a contract [was] indeed 'silent' on the issue of class arbitration," and "whether a contract with an arbitration clause forbids class arbitration." *Id.* (quoting *Stolt-Nielsen*, 130 S. Ct. 1771-72).[3]

In light of this standard, the Court will confirm Bennett's Order No. 18, because the Court concludes that Oxford's motion to vacate is fundamentally flawed on at least the following two critical points: (1) the Court's standard of review; and (2) the upshot of *Stolt-Nielsen*. As to the first issue, though Oxford's motion to vacate recites case-law that acknowledges the Court's highly deferential standard of review under the FAA, in substance, Oxford's submissions ask the Court to revisit and reconsider virtually every aspect of Order No. 18. Viewed in sum, Oxford's arguments advocate for a standard that appears closer to *de novo*

[3] In *Stolt-Nielsen*, the Supreme Court expressly declined to address the present vitality or efficacy of the so-called "'manifest disregard'" standard. *Stolt-Nielsen*, 130 S. Ct. at 1768, fn 3 (quoting *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 553 U.S. 576, 585 (2008)). Similarly, this Court will not engage that issue, but rather, will apply the foregoing, which tracks the standard applied in *Stolt-Nielsen*. For the sake of completeness, however, the Court notes that Oxford's motion plainly fails under any application of the "manifest disregard" standard, as Bennett's Order No. 18 is entirely dedicated to the discussion and application of *Stolt-Nielsen*, the decision that gives rise to this matter and indisputably controls the issue presented.

than deferential review. This confusion may be attributable to the hazy procedural basis for Oxford's motion to vacate, which, as noted, was alternately couched as a motion for reconsideration of Judge Greenaway's October 31, 2005 decision. In any event, the Court concludes that Oxford's motion to vacate is unpersuasive because, for the most part, it is fundamentally out-of-step with the well-established and highly deferential standard of review under the FAA.

Furthermore, Oxford appears to misconceive the upshot of *Stolt-Nielsen*. Indeed, Oxford essentially argues that because the parties' arbitration agreement does not state that class action arbitration is allowed, Bennett "exceeded his powers" by not vacating the Partial Award in light of *Stolt-Nielsen*. That interpretation of *Stolt-Nielsen*, however, is not supportable in the present context. While the insertion of the words "class action" to the parties' arbitration agreement would certainly obviate this dispute, as Bennett correctly noted in Order No. 18, *Stolt-Nielsen* does not categorically require the presence of such terms for class action arbitration. To the contrary, in *Stolt-Nielsen*, the Court expressly declined "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776, fn 10. Here, after giving full consideration to *Stolt-Nielsen*, Bennett concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration despite omission of the words "class action". Simply put, *Stolt-Nielsen* does not militate a contrary result. In fact, the Court concludes that Order No. 18 suggests that Bennett performed the appropriate function of an arbitrator under the FAA

after *Stolt-Nielsen*; Bennett examined the parties' intent, and gave effect to the arbitration agreement.

In sum, given the highly deferential standard of review applicable in this matter, the Court discerns no basis to overturn Bennett's Order No. 18. Rather, the Court concludes that Bennett thoroughly considered and rationally applied *Stolt-Nielsen* to this complex case. For example, Bennett identified and addressed the following critical issues raised in *Stolt-Nielsen*: (1) the issue of "silence" in the parties' arbitration agreement; (2) the issue of the parties' intent regarding class action arbitration; and (3) the importance of "public policy" determinations to the *Stolt-Nielsen* decision, and the absence of those determinations in this matter. Ultimately, having addressed *Stolt-Nielsen* head-on, Bennett again concluded that the parties' arbitration agreement contemplates class action arbitration. For the foregoing reasons, the Court will confirm that decision. Thus, Oxford's motion to vacate will be denied, and Sutter's cross-motion to confirm will be granted.

C. Procedural Order No. 19

Finally, as noted, Oxford filed a motion to dismiss Sutter's verified complaint in the '10 Case shortly after Oxford removed that verified complaint from New Jersey state court. Having considered the parties' submissions, the Court will deny Oxford's motion to dismiss without prejudice in the interests of justice and fairness. The verified complaint in the '10 Case requests issuance of an order to show cause why Bennett's Procedural Order No. 19 should not be vacated, apparently pursuant to the FAA. By removing the verified complaint and immediately filing a notice to dismiss, Oxford essentially deprived Sutter

of the initiative he sought to gain via the order to show cause in state court. In an effort to avoid any prejudice to Sutter that might result from this procedural anomaly, and given the apparent complexity of the issues presented by the '10 Case, the Court will deny Oxford's motion to dismiss. In accord with standard federal practice regarding disputes under Section 10 of the FAA, the Court will grant the parties' 30 days to file motions to vacate/confirm Bennett's Procedural Order No. 19. Those motions, if any, can then be fully and fairly briefed pursuant to the Local Civil Rules that govern litigation in this Court.

III. CONCLUSION

For the foregoing reasons, Sutter's motions to dismiss and to remand in the '05 and '10 Cases will be DENIED; Oxford's motion to vacate Bennett's Order No. 18 will be DENIED; Sutter's cross-motion to confirm Bennett's Order No. 18 will be GRANTED; Oxford's motion to dismiss in the '10 Case will be DENIED, and the Court will grant the parties' 30 days to file motions to vacate/confirm Bennett's Procedural Order No. 19 in the '10 Case. Finally, in light of the foregoing decisions, the Court will order the Clerk of the Court to CLOSE the '05 Case. An appropriate form of order accompanies this memorandum opinion.

Dated: February 22, 2011

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent*.

Procedural Order No. 18
Determining Motion

July 6, 2010

Oxford has moved for reconsideration of the Memorandum and Order of September 23, 2003 (the "Clause Construction Award")[1], which found that the arbitration clause in the Agreement in this case allowed for class action arbitration. The Clause Construction Award is attached as Exhibit A; its findings and

[1] The Memorandum and Order is referred to in this Order as the Clause Construction Award because at the time it was issued, the Supplemental Rules for Class Action Arbitrations had not yet been adopted by the American Arbitration Association. The parties subsequently agreed that this case would proceed under and be governed by these Rules. When the Class Determination Award was entered, the Memorandum and Order was attached to it and both were subject to motions to confirm and vacate in the United States District Court for the District of New Jersey. The awards were confirmed and the confirmation was affirmed by the Third Circuit Court of Appeals.

conclusions are incorporated in this memorandum. This case has proceeded as a class action since that time.

Oxford seeks redetermination of the Clause Construction Award under a recent decision of the United States Supreme Court, *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, No 08-1198, 50 U.S._, slip op. (April 27, 2010) Oxford argues that the *Stolt-Nielson* ruling has retroactive effect, and under the teaching of *Stolt-Nielsen*, the determination previously made in this case is incorrect, should be reversed and the class action proceedings discontinued.

For the reasons below, I agree with Oxford that *Stolt-Nielson* has retroactive effect, but I find that it does not require vacating the previous ruling.

Background

Dr. Sutter originally brought this case in April 2002 as a class action case in the Superior Court of Essex County, New Jersey. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims and reduced payment on claims as a result of Oxford's allegedly improper claims processing.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the arbitration clause in the Agreement between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised

should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. That motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, when I had been appointed arbitrator in this case, *Green Tree Financial Corp, et al.* v. *Bazzle, et al.* (Docket No. 02-634) was pending before the Supreme Court of the United S[t]ates. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the *Green Tree* case had been received and analyzed.

On June 23, 2003 the Supreme Court rendered a decision in the *Green Tree* case (539 U.S. 444). Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the *Green Tree* case for this arbitration. At a conference with the parties it was agreed that under the *Green Tree* case, I had to determine whether the parties' Agreement allows for class action arbitration. The parties agreed that I should proceed to make that determination *de novo.* Oxford then moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue.

I found, for the reasons discussed in the Clause Construction Award, that on its face, the arbitration clause in the Agreement expressed the parties' intent that class action arbitration could be maintained.

Discussion

Before discussing Oxford's present contentions in detail, it is necessary to note several points on which Oxford seems to me to be correct. First, this arbitration is governed by the Federal Arbitration Act ("FAA") and not by New Jersey procedural law. The FAA applies to all actions affecting commerce. See *Citizens Bank v. Alafabco, Inc., et al.*, 539 U.S. 52 (2003). The arguments made by the Class that this case is somehow an intra-New Jersey matter cannot be accepted. Although the members of the class are New Jersey physicians and health care providers, Oxford's operations including its payment processing and other aspects of its business are located in other states and are not all located in New Jersey. Moreover, the previous awards in this case have been referred to the Federal court in New Jersey for confirmation and an appeal from that court was taken to the United States Court of Appeals for the Third Circuit.

I also agree with Oxford that the ruling of the Supreme Court in *Stolt-Nielsen* should be given retroactive effect. I consider Oxford's motion in this case for reconsideration under the possible retroactive effect of *Stolt-Nielsen* on my prior ruling to be proper. It is accordingly necessary to proceed to the merits of Oxford's motion.

Oxford attacks the Clause Construction Award in this case on several grounds. First it says that because the Award concluded that the arbitration clause was unambiguous and silent on the issue of class arbitration, under *Stolt-Nielsen* there can only be one conclusion: the parties did not agree to authorize class arbitration. Second, Oxford says that the Award suggested that the broad scope of the arbitration clause, contrary to *Stolt-*

Nielsen, implied an agreement by the parties to authorize class arbitration. Third, it says that the Award inferred agreement by the parties to authorize class arbitration due to the lack of a carve-out or prohibition of class proceedings, reasoning that has been expressly rejected by *Stolt-Nielsen*.

The *Stolt-Nielsen* court viewed the central inquiry to be "whether the parties agreed to authorize class arbitration." Moreover, the Supreme Court provided the following directives: 1) a clause that is unambiguous and silent on the issue of class arbitration can lead to "only one possible outcome"—a ruling that the parties did not agree to authorize class arbitration; 2) the substantive breath and 3) the lack of an express prohibition on class arbitration cannot be used to infer an implicit agreement between the parties to authorize class arbitration.

For several reasons, however, the *Stolt-Nielsen* case is not applicable to the determination previously made in this arbitration.

The facts of the *Stolt-Nielsen* arbitration are very different from those presented in this arbitration. The arbitrators in *Stolt-Nielsen* had decided to proceed with class arbitration not on the basis of clause construction but essentially for reasons of public policy and in reliance on determinations made in other arbitral awards. The Supreme Court specifically noted that the panel's reliance on these arbitration determinations confirmed that their award was not based on a finding of the parties' intent.

By contrast, the determination in this arbitration involved no such adventures into public policy but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself.

In the *Stolt-Nielson* case, the Supreme Court found that the arbitrators had no reason to "ascertain the parties intent, because the parties had stipulated that they were in complete agreement regarding their intent." The parties had stipulated that their agreement was "silent on whether [it] permitted or precluded class arbitration," but that the agreement was not ambiguous so as to call for parole evidence. The Supreme Court said that the stipulation of the parties left no room for inquiry by the arbitrators regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.

By contrast, the parties in this arbitration had entered into no such stipulation of agreement. It was accordingly necessary to determine what the intent of the parties was. I found that the arbitration clause unambiguously evinced an intention to allow class arbitration, indeed to require it.

Finally, this case differs from *Stolt-Nielsen* because of its procedural history prior to the arbitration. The claimant in this case actually started a class-action in the New Jersey state court. At the time it was one of many such class actions throughout the United States brought by medical providers against insurance companies, such as Oxford. So far as I know, all of the rest of those cases were consolidated by the multidistrict panel and eventually tried in the United States District Court for the Southern District of Florida. An appeal from the class determinations made by the court is referred to in the class certification award in this case. Dr. Sutter's case was unique among all of those others in that Oxford had inserted into its provider agreement the arbitration clause that was subject to the earlier proceedings.

By invoking the arbitration clause in this case, Oxford succeeded in obtaining an order from the New Jersey Court staying the class-action and referring Dr. Sutter's case to arbitration.

It seems to me that the foregoing matters are sufficient to distinguish this case from *StoltNielsen.* I do not believe that the ruling in that case is controlling here. Even if it were, however, I believe that the Clause Construction Award would withstand *Stolt-Nielsen* scrutiny.

Oxford's first contention is that the arbitration clause in this case was unambiguous and silent on the issue of class arbitration, from which Oxford draws the conclusion that the parties cannot have authorized class arbitration. Oxford is wrong on this issue for several reasons.

Stolt-Ni[elson] reaffirmed the bedrock proposition that the FAA was designed to place arbitration agreements on the same footing as other contracts. Thus, one would construe an arbitration clause in the same way as one would treat any other contractual provision. Oxford argues that since the clause in this case does not explicitly mention class action, the inquiry under the teaching of *Stolt-Nielson* is at an end. Oxford misinterprets both the holding in *Stolt-Nielson* and the words of its own arbitration clause.

First, the crucial fact in *Stolt-Nielson* was the parties' stipulation that the arbitration clause was silent with respect to class arbitration. There had been no meeting of minds on that point and hence no agreement as to class arbitration. There was nothing of the parties' intent for the arbitrators to discover and enforce. The parties themselves had stipulated that there was no intent regarding class arbitration. Since

the Court went on to hold that where there is an absence of such intent to have class arbitration, agreement to have class arbitration cannot be inferred, and the determination of the arbitrators could not have been correct or within their powers.

This case could not be more different. There was no stipulation. The issue of the meaning of the arbitration clause and what the parties intended by it came to the arbitrator *de novo*. It was necessary to construe the arbitration clause in the ordinary way to glean the parties' intent. It was not futile, as it would have been in *Stolt-Nielson*, in the face of the parties' stipulation. It was rather a vital exercise to determine what the parties intended by the clause regarding class arbitration. The Court in *Stolt-Nielsen* said that it had no occasion to decide what contractual basis might support a finding that the parties agreed to authorize class action arbitration.

Second, Oxford simply announces that the clause is unambiguous and silent as to class arbitration. However, that conclusion is not for Oxford to make. It is rather for the arbitrator, under *Greentree*, *Stolt-Nielson* itself, and the specific order of the New Jersey court that sent this case to arbitration.

Even assuming that *Stolt-Nielsen* stands for the proposition that under the FAA, a class action arbitration can be maintained only if the arbitration clause authorizes such action, Oxford's argument still fails.

The arbitration clause in this case is as follows:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be

> submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

The arbitration clause speaks of "no civil action." No civil action, in my view, means no civil action, of any form whatsoever. Since a class action is a form of civil action, the clause can be paraphrased: "No class action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted ... to ... arbitration." "No civil action" simply cannot, as a matter of English, be read to exclude any particular civil proceeding, including a class action, from its coverage.

Therefore, the text of the clause itself authorizes, indeed requires, class-action arbitration.

Oxford argues that the Clause Construction Award relied on absence of specific exclusion of class-action arbitration from this clause to indicate that it was the intention of the parties to include class arbitration[.] If true, this reasoning would run afoul of *Stolt-Nielsen*. However, the Clause Construction Award was not based on such reasoning. The absence of such an exclusion was not something that had to be to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" means all. As noted in the Clause Construction Award, if it had been the parties' intention to exclude class actions from the clause, in the face of such sweeping language, normal drafting would have suggested a specific exclusion. Similarly, noting that the clause is extraordinarily broad is corroborative of the construction noted above, but not essential to it.

Finally, if there were any doubt about what Oxford itself understood the clause to mean, its actions during the earlier court proceedings speak volumes. Dr. Sutter started a class action, not in arbitration but in court. Oxford itself moved in court successfully to invoke the arbitration clause to force Dr. Sutter's court case into arbitration. Under Oxford's own reading of the clause, it not only authorized a class action in arbitration, it required this particular class action to be sent to arbitration.

I find that there are two consequences from this. First, I think Oxford is judicially estopped from claiming that this case cannot proceed in arbitration as a class action. There is nothing in the *Stolt-Nielsen* case that would support a contrary interpretation. Second, Oxford's actions clearly demonstrate its own construction of its own clause.[2]

Oxford places considerable reliance on the briefing of the parties in connection with the Clause Construction Award. It uses various assertions to try to draw this clause into the cone of silence that *Stolt-Nielsen* suggests obviate intention of the parties to have class arbitration. It claims that parties' briefing made clear there had been no agreement reached on the issue of class arbitration. See Oxford's brief in support, footnote 16, quoting extensively from such sources. For, example, "Dr. Sutter does not point to

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[2] The Clause Construction Award did not find it necessary to deal with the *contra proferentem* arguments raised by Claimants. However, it is obvious that Oxford drafted the arbitration clause; it was not a negotiated clause. Accordingly, it would be construed against Oxford. Oxford's original interpretation of what the clause means is consistent with this construction and must be considered highly persuasive, if not conclusive.

any contract term that reasonably could be interpreted to provide for 'class arbitration,' or any evidence suggesting the parties intended to permit class arbitration?

These arguments, ingenious as they are, all founder on two immovable positions: First, Oxford persuaded the New Jersey court, using exactly the opposite argument made here, that Dr. Sutter's class action in court was required by the clause in question to be sent to arbitration.

Under Oxford's reading of the application of *Stolt-Nielsen* to this case, if the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated. This is another way of describing why Oxford should be judicially estopped from advancing this argument.

The second position is that the clause is not at all silent: It plainly says "No civil action … and <u>all</u> (emphasis supplied) such disputes" are to go to arbitration. It was my task to construe that clause. "All," I found, and would find again, means all, without exception, the entire universe of actions that could possibly have been brought in any court, necessarily including class actions. This is, after all, Oxford's own clause, and we have Oxford's own interpretation of what its clause meant when it used it to require Dr. Sutter to bring this case in arbitration, when he very much wanted to be in court all along. Oxford quotes its own reply brief in the Clause Construction proceeding:

> "If large-scale class action disputes had in fact been contemplated, it is likely the parties

> … would have opted for the courts, which have a well-developed body of procedural and substantive law to deal with class actions. Nothing of that sort was provided for in the contract."

Being in court, however, was what Dr. Sutter attempted; arbitration is where Oxford put him, using this clause.

In sum, we know what the clause plainly means and we know that in 2002, Oxford successfully persuaded a court of that same plain meaning.

For these reasons, I conclude that this case is distinguishable on the facts from the *Stolt-Nielsen* case and is not controlled by it. Moreover, even if *Stolt-Nielsen* applied, the result would be the same because the parties' intent to have class arbitration is clear. Finally, Oxford's own construction of its own clause makes the arguments it advances here untenable; that alone would put this case outside the contemplation of *Stolt-Nielsen.*

On reconsideration, accordingly, I find that the Clause Construction Award of 2003 was and remains correct.

Oxford's motion is denied.

/s/ W.L.D. Barrett
W.L.D. Barrett, Arbitrator

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent*.

MEMORANDUM AND ORDER

Dr. Sutter asserts that this case can be maintained as a class action. Oxford seeks by motion to have the case declared not a class action.

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims

and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, having been appointed arbitrator in this case, I conferred with the parties about how to proceed.

It was noted at that time that the Supreme Court of the United States had granted certiorari in a case called *Green Tree Financial Corp, et al. v. Bazzle et al.* (Docket No. 02-634). That case involved issues that might control the determination of the class action issues in this arbitration. Oral argument in that case had been scheduled for April 23, 2003 and a decision by the Supreme Court was expected before early July. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the *Green Tree* case bad been received and analyzed. Accordingly, in Procedural Order No. 1, all proceedings

in this arbitration were stayed until further order of the arbitrator.

On June 23, 2003 the Supreme Court rendered a decision in the *Green Tree* case. Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the *Green Tree* case for this arbitration. At a conference with the parties it was agreed that under the *Green Tree* case, I must determine whether the parties' Agreement allows for class action arbitration. As outlined in procedural Order No. 2, Oxford moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue. The motion is determined as provided in this memorandum and order.

Discussion

It is axiomatic that questions of Arbitrability begin with an analysis of the parties' agreement. This is particularly true since the *Green Tree* case. It was widely supposed that the Supreme Court would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration. It can be noted that neither in the *Green Tree* case nor in this case does the arbitration clause contain any such express mention of class action arbitrations.

While commentators will no doubt spend much ink and learning on the several opinions the divided Supreme Court issued, one thing seems clear to me at least: a blanket prohibition on arbitration class actions without specific authorization in the arbitration clause was firmly rejected. The argument to that effect by the Petitioner and the *amici* persuaded only three Justices.

It can be argued that all of the remaining six, explicitly or implicitly, believed that class action arbitration without specific authorization is not impossible, but is rather a question of construction of the parties' agreement. In any event, whatever else *Green Tree* stands for, it means that whether a class action in arbitration is possible turns on the interpretation of the parties' agreement and that such interpretation is to be made by the arbitrator. I therefore commence analysis of this case with the premise that a class action arbitration is a possible outcome and that it is for me, as arbitrator, to make that determination.

I further note that in this case the prior determination of the Superior Court of Essex County admits the possibility that class action arbitration is available in this case. It could be argued that under the *Green Tree* case, the Court did exactly the right thing, that is it sent the case to arbitration with the specific statement that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." The Court may have thought that it had already determined that a class action was available, with only the procedural issues, such as determination of the actual class, left for the arbitrator. The parties in this case have agreed that I should proceed to make the determination, which I do in this memorandum, *de novo*.

The Arbitration Clause

To begin the analysis at the beginning, we turn first to the arbitration clause in the Agreement. It provides in part:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be

> submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

This clause is much broader even than the usual broad arbitration clause. The introductory phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can be. "No civil action" must mean no civil action of any kind whatsoever. The clause prohibits civil actions in law, equity, admiralty or even probate. No such action shall be instituted in "any court." Any court includes any Federal or State Court, any foreign court or the Court at the Hague. Taken together, this phrase has the effect of prohibiting any conceivable court action concerning any dispute under the Agreement. It would not be possible to draft a broader or more encompassing clause.

Having prohibited all conceivably possible civil actions, the clause takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration ..."

This means that the clause sends to arbitration "all such disputes," which, apart from the prohibition, could have been brought in the form of any conceivable civil action. Since there can be no dispute in any court without a civil action of some sort, the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. In fact, a class action in court is just what Dr. Sutter commenced in the first place.

Therefore, because all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration. Indeed, to avoid a finding that such was the parties' intention, it would be necessary for there to be an express exception for class actions in the prohibition. Such a carve-out cannot be inferred absent some clear manifestation of such intent. Similarly, that class actions in court are absolutely prohibited by the first part of the clause but are at the same time not allowed under the second part would mean that class actions are not possible in any forum. In my view, that reading cannot be inferred in the absence of a clear expression that such a bizarre result was intended.

Accordingly, I find that, on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained.

In addition, I note that, since Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be bound by judicial estoppel from arguing in this arbitration that the class action part of the case is not governed by the "and all such disputes [including the class action it has just successfully had stopped] shall be submitted to final and binding arbitration" clause.

Since I do not find that the clause is ambiguous, it is not necessary to pass on the *contra proferentem* arguments.

The Agreement as a Whole

It remains to discuss Oxford's arguments that the agreement read as a whole limits the possible interpretation of the arbitration clause to eliminate class actions. While Oxford notes correctly that the Agreement must be viewed as a whole, I do not find persuasive its contentions that other provisions of the Agreement undermine what appears to be facially allowed by the arbitration clause.

Oxford notes, for example, that the parties to the agreement are only Dr. Sutter and Oxford. The contract repeatedly refers to those parties as Oxford, on the one hand, and the "Primary Care Physician," "his/her" or "he/she" on the other hand. Paragraph after paragraph, Oxford notes, the contract defines the duties and obligations of each party, without a single reference to any other physician or health care provider.

This argument is not persuasive. Every contract, except one that expressly refers to class arbitration, will necessarily deal only with the parties to the particular contract. It can be noted that similar language in the contracts in the *Green Tree* case did not cause any of the lower courts, or the Supreme Court, to conclude as a matter of law that the parties thereby intended to preclude class arbitration. Indeed, the whole argument seems to me to be beside the point. In a class arbitration, the members of the class are not necessarily parties to the same contract; rather, they have similar or identical contracts with the same defendant that raise the same or similar issues. The references in the Agreement to individual parties, accordingly, have no bearing on whether this Agreement allows class arbitrations.

The ADR Clause in the Agreement

The Agreement contains, in addition to the arbitration clause discussed above, an ADR clause that allows for adjustment of certain disputes within a procedure maintained internally by Oxford. Oxford also argues that the ADR clause requires that, before Dr. Sutter may pursue arbitration, he must attempt to resolve his dispute through this ADR process.

Oxford notes that the ADR procedure is mandated by New Jersey law to provide a mechanism for providers to resolve disputes on payment of claims arising from individual contracts. In 2001, Oxford updated its Provider Reference Manual to provide the mandated ADR process for the reviews and appeals set forth in these regulations.

Oxford argues that to allow class arbitration to dispense with this individual internal dispute resolution mechanism would subvert the entire statutory scheme. Interpreting the contract to provide for "class arbitration," Oxford argues, would be fundamentally inconsistent with New Jersey law and regulations.

Finally Oxford argues that the explicit terms of the contract permit arbitration only for physicians who have exhausted their disputes through this ADR grievance procedure. This language alone, it argues, precludes "class arbitration" on behalf of all New Jersey Oxford-affiliated physicians, many thousands of whom have never asserted a grievance, let alone exhausted this contractually mandated procedure.

I do not accept Oxford's arguments. With respect to the situation of Dr. Sutter himself, the parties' failure to raise this issue throughout the court proceedings prior to this arbitration indicates that they

interpret the ADR clause as not being a condition precedent. Moreover, their failure to raise it as a bar it seems to me to amount to a waiver.

I interpret the reference at the end of the ADR clause that "Any complaint or grievance which at the end of [the ADR] process is not resolved … may be submitted to arbitration pursuant to [the arbitration clause] to mean just what it says. The ADR process is non-binding; it may or may not result in a resolution of a dispute. If it does not, the provider is free to pursue arbitration. I thus interpret the ADR procedure as an alternative, that the provider can pursue if he chooses, and his use of the ADR procedure does not preclude arbitration if he does not like the ADR result. It is not meant to be a condition precedent to arbitration. Similarly, the ADR clause is found at the end of the Agreement, unattached to the arbitration clause. Contracts that mandate ADR before arbitration typically structure the progression from negotiation to mediation to arbitration in a single clause.

Dr. Sutter's brief refers to the extensive discussion of the same ADR clause by the New Jersey court in connection with a class action against another insurer. Oxford notes correctly that that agreement in that case does not involve arbitration. Nevertheless, the court's analysis of the purpose and application of the ADR clause is consistent with the reading adopted here that this clause is essentially for the benefit of the provider and is not to be used as a condition precedent.

Accordingly, I find that the ADR clause has no current application to Dr. Sutter. As to other members of the class or classes the bearing the ADR clause may have will be one of the issues in administration of the class action. I am making no finding about the same at

this point. That issue, as all others relating to the actual class action, are reserved to be decided in further appropriate proceedings.

Rules of the AAA

Finally, Oxford says that the reference in the arbitration clause to the rules of the American Arbitration Association negate class actions. I disagree. The current AAA rules are silent on the question of class actions. The procedures on consolidation address issues different from those presented by class actions. Consolidations are imposed, by courts, and under special AAA procedures, for reasons unique to each case. These can include efficiency and the avoidance of inconsistent results. While consolidations are imposed, a class action always provides the class members the opportunity to opt out of the proceedings. I therefore conclude that the reference to AAA procedures in the Agreement is not inconsistent with maintaining this case as a class action.

Conclusion

For the foregoing reasons this case shall be maintained as a class action.

This determination does not in any way decide any of the issues relating to the class action itself, such as the definition of the class or classes, the form of notice to class members and similar matters. Nor does it reflect any views on the merits of the underlying case. It was originally agreed with the parties that consideration of all such matters would be deferred until it was first concluded that this case would or would not be maintained as a class action.

A status conference will be scheduled promptly to address what further proceedings will be required.

It is so ordered.

/s/ W.L.D. Barrett

September 23, 2003

W.L.D. Barrett, Arbitrator

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5223

JOHN IVAN SUTTER, M.D., *Appellee*,

v.

OXFORD HEALTH PLANS LLC, *Appellant*.

Submitted pursuant to Third Circuit
L.A.R. 34.1(a) June 30, 2006

Filed February 28, 2007

Before: BARRY, VAN ANTWERPEN and JOHN R. GIBSON,* Circuit Judges.

OPINION OF THE COURT

JOHN R. GIBSON, Senior Circuit Judge:

This is an appeal from a denial of a motion to vacate an arbitration award. Oxford Health Plans LLC appeals the arbitrator's partial final class determination award certifying a class action in a dispute between Oxford and John Ivan Sutter, M.D. Oxford argues that the District Court erred in the standard of review used to analyze the arbitrator's decision and erred in concluding that the arbitrator did not exceed his

* The Honorable John R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

powers or manifestly disregard the law. For the following reasons, we affirm the decision by the District Court.

Sutter is a New Jersey pediatrician and on April 12, 2002, filed a class action complaint against Oxford and other health insurers in the Superior Court of New Jersey. The case was severed as to each defendant, and on October 25, 2002, the New Jersey Superior Court granted Oxford's motion to compel arbitration. Sutter's cases against three of the insurers, Cigna, United Healthcare, and HealthNet, were removed to federal court and transferred to a Multi-District Litigation in the Southern District of Florida as "Provider Track Tag-Along" actions. It was regarding this related dispute that the Eleventh Circuit issued its opinion in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081, 125 S.Ct. 877, 160 L.Ed.2d 825 (2005).

On December 11, 2002, Sutter and Oxford began arbitration before a single arbitrator, William L.D. Barrett. In the dispute between Sutter and the health carriers, Sutter alleged that the carriers failed to pay medical claims timely and correctly under New Jersey law. Specifically, Sutter argued that the carriers did the following: (1) failed to make prompt and timely payment of medical claims; (2) refused to provide compensation for procedures performed by improperly "bundling" them with other procedures; (3) reduced payments by changing or "downcoding" claims to reflect less expensive procedures; and (4) refused to provide appropriate compensation where additional medical services are required-known as the refusal to recognize "modifiers." In the arbitration with Oxford, Sutter sought class certification so as to represent all physicians who provided services to any person

covered by Oxford during a specific eight-year period. On March 25, 2005, Barrett issued a partial final class determination award, where he defined the class of claimants and certified the class. On April 25, 2005, Oxford filed a motion in the United States District Court for the District of New Jersey to vacate the arbitration award together with a motion to stay pending transfer, both of which the District Court denied. Oxford now brings the present appeal.

I.

We review a district court's ruling on a motion to vacate an arbitration award *de novo*. *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994). As a threshold matter, Oxford argues that the District Court used the wrong standard of review in deciding Oxford's motion to vacate. Normally, our review of arbitration awards is "extremely deferential." *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). Parties, however, may agree to vacatur standards other than those specified in the Federal Arbitration Act ("FAA"). *Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001). In order for a court to recognize a standard other than that specified in the FAA, the parties must manifest a clear intent. *Id.*

In the instant case, the agreement between Sutter and Oxford specified that all disputes "shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association." The American Arbitration Association's Supplementary Rules for Class Arbitrations ("AAA Rules") allow for "judicial review" within 30 days of a class determination award. The AAA Rules also require that class determinations be

set forth in a "reasoned, partial final award." Oxford argues that, "[a]s a matter of logic, these rules envision *de novo* review at least as to whether proper legal standards have been applied and followed." (Appellant's Brief at 23).

Oxford's argument is not persuasive. While the AAA Rules call for judicial review, they never specify what standard of review the courts should use. Considering the silence of the AAA Rules on this issue, we are unable to conclude that the parties manifested a clear intent to opt out of the FAA rules. *See Roadway*, 257 F.3d at 293. ("We do not believe that [an arbitration clause and a generic choice of law clause] demonstrate a clear intent to displace the FAA's vacatur standards and replace them with ones borrowed from Pennsylvania law."); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards."). We therefore conclude that the District Court did not err in applying a highly deferential standard of review.

II.

Oxford argues that the arbitrator's award both exceeded his authority and was a manifest disregard of the law by failing to perform the required predominance analysis and by allowing Sutter to relitigate already decided issues. When determining whether an arbitrator exceeded his authority, we have used a two-step process: (1) we must be able to rationally derive the form of the award either from the agreement between the parties or from their submissions to the arbitrators, and (2) the terms of the

arbitral award must not be completely irrational. *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989). Similarly, an award may not be vacated simply because the arbitrator made an error of law, but only because "the arbitrator's decision evidences manifest disregard for the law." *Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 533 (3d Cir. 1985).

Here, the arbitrator neither exceeded his authority nor evidenced manifest disregard for the law. The arbitrator individually went through each requirement for a class action set forth in Rule 4 of the AAA Rules. He examined the effect of the *Klay* decision at length before deciding that it was not directly applicable to the present case. Finally, he analyzed the issue of collateral estoppel and provided extensive reasoning for why it was not applicable. Reviewing the arbitrator's decision, there is no basis for determining that the decision was irrational or evidenced manifest disregard for the law.

We AFFIRM the judgment of the District Court.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 05-2198 (JAG)

JOHN IVAN SUTTER, M.D., *Plaintiff*,

v.

OXFORD HEALTH PLANS LLC, *Defendant*.

October 28, 2005, Decided
October 31, 2005, Filed

MEMORANDUM OPINION

GREENAWAY, JR., U.S.D.J.

This matter comes before the Court on the Motion to Vacate an Arbitration Award by Oxford Health Plans, LLC ("Oxford"), the Motion for Stay Pending Transfer by Oxford, and the Cross-Motion to Dismiss by John Ivan Sutter, M.D. ("Sutter"), pursuant to the Federal Arbitration Act ("F.A.A."), 9 U.S.C. § 10. For the reasons set forth below, each of these Motions will be denied.

INTRODUCTION

On April 12, 2002, Sutter filed a class action complaint against Oxford and other health insurers in the Superior Court of New Jersey, alleging breach of provider agreements with putative class members in

regard to payment of claims, as well as other violations of New Jersey law. Subsequently, the cases were severed as to each defendant. On October 25, 2002, the New Jersey Superior Court granted Oxford's motion to compel arbitration. On December 11, 2002, Sutter and Oxford began arbitration before a single arbitrator, William L.D. Barrett ("Barrett"). On September 23, 2003, the arbitrator rendered a decision in which he concluded that the arbitration clause in the parties' agreement authorized class action arbitration. On March 25, 2005, following the conclusion of discovery, briefing, and oral argument, the arbitrator issued the "Partial Final Class Determination Award" ("Award"). In this Award, which expressly incorporated the 2003 decision, Barrett defined the class of claimants and then certified the class.

On April 25, 2005, Oxford filed the instant Motion to Vacate the Arbitration Award as well as the Motion for Stay Pending Transfer. Oxford stated that it had concurrently filed a "Notice of Potential Tag Along" with the Judicial Panel on Multidistrict Litigation, seeking transfer of this action to the Southern District of Florida for coordination with In Re Managed Care Litigation, MDL No. 1334, pending before that district's court. On May 9, Sutter filed a Cross-Motion to Dismiss under FED. R. CIV. P. 12(b)(1) and 12(b)(6).

ANALYSIS

I. Governing Legal Standards

A. Standard for a Motion to Vacate an Arbitration Award

The Third Circuit restated the highly deferential standard for review of arbitration award decisions in *Hruban v. Steinman*, 40 Fed. Appx. 723 (3d Cir. 2002):

> The grounds upon which this Court may vacate an arbitration award are "narrow in the extreme." … It is not the proper role of the court to "sit as the [arbitration] panel did and reexamine the evidence under the guise of determining whether the arbitrators exceeded their powers."

Id.

Under the F.A.A., 9 U.S.C. § 10(a)(4), a court may grant vacatur of an arbitration award if, *inter alia*, the arbitrator exceeded his powers. The Third Circuit also recognizes a judicially-created, non-statutory ground for vacatur, i.e., that the arbitrator displayed a manifest disregard of the law.

The Third Circuit has stated this test for whether an arbitrator has exceeded his powers:

> To determine whether arbitrators exceeded their powers, this Court has employed a two-step analysis: (a) the form of the award must be rationally derived either from the agreement between the parties or from the parties' submission to the arbitrators, and (b) the terms of the award must not be "completely irrational."

Hruban, 40 Fed. Appx. at 724. Arbitrators exceed their powers when the award, or some aspect of it, has no rational basis. *Brentwood Med. Assocs. v. UMW*, 396 F.3d 237, 242 (3d Cir. 2005). In addition, there is a presumption that the arbitrator acted within the scope of his or her authority, and "a court may conclude that an arbitrator exceeded his or her authority [only] when it is obvious from the written opinion." *Roadway*

Package Sys. v. Kayser, 257 F.3d 287, 301 (3d Cir. 2001).

As to the standard for manifest disregard of the law, the Third Circuit has held that courts making such a determination "generally … affirm easily the arbitration award." *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). The Third Circuit has not articulated a test in detail, but has characterized it as "a manifest disregard for the law rather than an erroneous interpretation of the law." Id. In determining whether an arbitrator acted with manifest disregard for the law, most circuits apply this test: "(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well-defined, explicit and clearly applicable to the case." *George Watts & Son v. Tiffany & Co.*, 248 F.3d 577, 581-2 (7th Cir. 2001) (Williams, J., concurring). *See also Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 382 (5th Cir. 2004) (applying this test). The Eighth Circuit's application of this test requires that the arbitration panel cite the relevant law and then proceed to ignore it. *St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005). Moreover, the Second Circuit holds that "under the test of manifest disregard [the arbitrator] is ordinarily assumed to be a blank slate unless educated in the law by the parties." *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2nd Cir. 2002).

II. Subject Matter Jurisdiction

Sutter argues that this Court lacks subject matter jurisdiction. In the Motion to Dismiss Oxford's Motions to Vacate and Stay, Sutter attacks the three grounds for jurisdiction asserted by Oxford: diversity, federal question, and statutory, under the Class Action

Fairness Act of 2005, 28 U.S.C. § 1332(d)(2). Because this Court determines that it has diversity jurisdiction over Oxford's motions, it need not reach the issues of federal question and statutory jurisdiction.

"It is now well established that § 10 of the FAA does not constitute a grant of subject matter jurisdiction. There must be an independent basis of federal jurisdiction before a district court can entertain a motion to vacate under that section. The petitioning party must demonstrate that diversity or federal question jurisdiction exists." *Minor v. Prudential Sec.*, 94 F.3d 1103, 1104-5 (7th Cir. 1996). *See also Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1471 (11th Cir. 1997) (observing the "long line of decisions holding that section 10 does not confer subject matter jurisdiction on federal courts").

This Court is granted diversity jurisdiction by 28 U.S.C. § 1332(a). The parties do not dispute that they are of diverse citizenship: Sutter is a citizen of New Jersey and Oxford is a citizen of Minnesota. They dispute only whether the $ 75,000 amount in controversy requirement of § 1332(a) has been met.

Sutter argues that the threshold is not met because Dr. Sutter's potential damages do not exceed the minimum. This argument fails because the controversy here is defined by Oxford's motion to vacate—not by the underlying dispute in arbitration. The Seventh Circuit examined relevant cases and made the clearest statement of this principle in *Minor*, 94 F.3d at 1106: "A strong body of caselaw has developed, however, holding that the nature of the underlying dispute is irrelevant for purposes of subject matter jurisdiction."

The Sixth Circuit agreed in *Ford v. Hamilton Inv.*, 29 F.3d 255, 260 (6th Cir. 1994). In *Ford*, the court

began by noting that "the general federal rule has long been to decide what the amount in controversy is from the complaint itself." *Id.* (internal citation omitted). It then looked to the face of the application for vacatur of the arbitration award filed with the district court, and found that it sought to vacate an award that was under the minimum jurisdictional amount. *Id.* See also *Baltin*, 128 F.3d at 1472 (amount in controversy defined by amount of arbitration award petitioner sought to vacate).

Thus, this Court looks not to the amount in controversy in the underlying arbitration, but to the amount of the award stated by Oxford in its application for the motion to vacate. Oxford alleges that the total amount in controversy exceeds $ 5,000,000, which Sutter does not dispute. "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845 (1938). As Sutter has not questioned Oxford's $ 5,000,000 figure, and this Court discerns no basis to conclude to a legal certainty that the claim is really for less than $ 75,000, the amount in controversy requirement of § 1332(a) is satisfied. This Court has subject matter jurisdiction over this matter.

In post-briefing letters, the parties debated the application of the recently decided *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) to the analysis of diversity jurisdiction in this case. This Court need not address this matter: *Exxon Mobil* addressed a different procedural context, one not involving a district court's review of arbitration awards which, as discussed above, requires another approach to the analysis of subject matter jurisdiction.

III. Oxford's Motion to Vacate the Arbitration Award

As a threshold matter, Sutter argues that the two decisions of the arbitrator are interlocutory, not final, and that the F.A.A. restricts a district court's review to final decisions only. Oxford responds with two arguments: 1) The arbitrator titled the award the "Partial *Final* Class Determination *Award* of Arbitrator"; and 2) the F.A.A. allows parties to an arbitration to set their own standards for vacatur, which the parties have done in consenting to the AAA Class Supplementary Rules, which allow a motion to vacate this Award.

In *Roadway*, 257 F.3d at 293, the Third Circuit held that "parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own." The question, under *Roadway*, is whether the parties manifested a "clear intent" to do so. *Id.* Sutter argues that Oxford has proffered no extrinsic evidence of such intent to allow review of this Award. This is not the case. Oxford has proffered persuasive evidence of a clear intent to adopt review standards that differ from the F.A.A., allowing review at this stage of the arbitration. The Award states: "The parties agreed in 2004 that the [AAA Supplementary Rules for Class Arbitrations] would govern the future proceedings in this case, including the class determination matters decided in this award." (De Leeuw Decl. Ex. A 2.) Rule 5(d) of the AAA Supplementary Rules provides: "The arbitrator shall stay all proceedings following the issuance of the Class determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award." (De Leeuw Decl. Ex. G 2.) In accord with this provision, the Arbitrator

concluded the Award with this statement: "as required by the Rules, all proceedings in this arbitration are stayed for thirty days from the date of this award. If the parties proceed to the courts, this stay can be extended as appropriate, either by me or by the courts." (De Leeuw Decl. Ex. A 14.) Thus, the Award appears to have been issued in conformity with Rule 5(d) of the AAA Supplementary Rules, and these rules grant Oxford the right to come to court to move to vacate the award at this time.

Crucially, Sutter does not claim that it never agreed to the AAA Supplementary Rules. This Court concludes that the parties have demonstrated a clear intent to fashion standards which differ from those set out in the F.A.A.; these standards expressly grant Oxford the right to move to vacate this Award.

Having determined that this Court has subject matter jurisdiction over this case, and that judicial review of the Award is appropriate, this Court turns to the merits of Oxford's Motion to Vacate the Arbitration Award. Oxford argues that the arbitrator rendered two decisions in which he exceeded his powers and manifestly disregarded the applicable law: the 2003 decision on contract interpretation, and the 2005 decision on class certification which incorporated it.

Oxford asks that this Court conduct a *de novo* review of the Award. Oxford argues that, as *Roadway* recognizes the right of parties to fashion their own standards, the parties here have fashioned their own standard of review for the district court: the AAA Supplementary Rules change the district court's standard of review to *de novo.* Oxford, however, overlooks *Roadway*'s requirement that the parties

manifest a "clear intent" to do so.[1] *Roadway*, 257 F.3d at 293. Oxford does not argue that the Supplementary Rules evidence a clear intent to change the standard of review. Nor does any intent to do so—no less clear intent—appear on the face of the Supplementary Rules. Provision 5(d), which, as discussed above, grants the parties the right to seek judicial review of this Award, says nothing to characterize the standard of review. (De Leeuw Decl. Ex. G 2.) The absence of any statement about how the district court should conduct judicial review supports a finding that no clear intent to change the standard of review has been manifested.

Oxford makes four arguments that the arbitrator exceeded his powers and manifestly disregarded the law.

A. The Arbitrator Disregarded Green Tree

Oxford claims that, in making the award, the arbitrator ignored the Supreme Court's holding in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), which requires him to construe the contract to determine whether class arbitration is permissible. Oxford argues that his decision to allow class arbitration contradicts contractual provisions making it impermissible. This argument is insufficient to state a valid claim that the arbitrator exceeded his powers. Oxford does not assert that this decision is completely irrational. Rather, its boldest claim is that "the arbitrator's reasoning is directly contradictory to … *Green Tree*." (Oxf. Mem.

[1] Moreover, the Third Circuit has expressly opposed the position Oxford advocates: "it is our duty to resist the urge to conduct de novo review of the award on the merits." *Brentwood Med. Assocs. v. UMW*, 396 F.3d 237, 241 (3d Cir. 2005).

Supp. Mot. Vac. 19). This fails to state a valid claim that the decision has no rational basis or is completely irrational.

Oxford next argues that the arbitrator manifestly disregarded the law in deciding to allow class arbitration. Examination of the Award, in the light of *Green Tree*, shows that there is no basis for this argument. *Green Tree* involved a case in which an arbitrator certified a class in arbitration. The trial court confirmed the award, and *Green Tree* appealed, arguing that class certification was contractually impermissible. The Supreme Court accepted *Green Tree*'s claim that class certification was imposed on the parties by a court, not by the arbitrator, and remanded the case with the order that the arbitrator, not the courts, should decide the question of class certification by interpreting the contract.

There are two reasons to conclude that, here, the arbitrator did not manifestly disregard *Green Tree*. First, *Green Tree* is distinguishable on its facts. Here, arbitrator Barrett conducted arbitration proceedings and made the determination to certify a class; he did not certify based only on a court's order. But, more importantly, arbitrator Barrett's decision relies on *Green Tree* and conforms to its holding. *Green Tree* holds that the arbitrator must interpret the contract to determine whether class certification is permissible under its terms. On September 23, 2003, Barrett issued an 8-page decision (the "2003 Decision") concluding that the case will be maintained as a class action. (De Leeuw Decl. Ex. A 15-22.) In this decision, Barrett began by observing that he had stayed arbitration proceedings so that the *Green Tree* decision could be received and analyzed. (De Leeuw Decl. Ex. A 16.) The parties agreed that, under *Green Tree*, Barrett

must determine whether the parties' agreement allows for class action arbitration. (*Id.*) Barrett began his discussion by examining the holding of *Green Tree*. (*Id.* at 16-17.) He observed that, under *Green Tree*, he must determine whether the parties' agreement allowed for class action arbitration. (*Id.* at 16.) He proceeded to perform a detailed analysis and interpretation of the agreement, concluding that "the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained." (*Id.* at 19.) The March 24, 2005 Award incorporates this decision. (*Id.* at 2.) Thus, Barrett did exactly what the Supreme Court said in *Green Tree* an arbitrator must do: interpret the agreement to determine whether the contract permits class certification. Barrett knew about and followed the law. The Award does not support a claim that he disregarded or ignored it.

Moreover, in *Green Tree*, the Supreme Court did not instruct on the method the arbitrator must use in interpreting the contract. To the contrary, the Court held that interpretation of the arbitration agreement "should be for the arbitrator, not the courts, to decide." *Green Tree*, 539 U.S. at 453. Oxford, in seeking that this Court impose a contract interpretation on the arbitrator, asks this Court to do what *Green Tree* says it should not do.

Oxford's argument boils down to a disagreement with Barrett's interpretation of the agreement, cloaked in the incorrect assertion that Barrett disregarded the Supreme Court. This Court will not conduct *de novo* review of the arbitrator's interpretation of the agreement. Under the deferential standard of review that this Court must follow, Barrett's interpretation is reasoned and rational. Oxford has not shown how the

interpretation ignores or refuses to apply a clearly applicable rule of law.

Oxford next argues that Barrett disregarded New Jersey law and exceeded his powers by ignoring the parties' intent, as reflected in the contract. This simply repeats the argument that Barrett interpreted the contract incorrectly, and is legally insufficient to state a claim. Oxford neither alleges that the contract interpretation is irrational, nor that the arbitrator ignored a clearly applicable legal principle. The Award relies on the legal principle that Oxford states, that New Jersey requires enforcement of the parties' shared intent as evidenced in the contract. As discussed above, Barrett based his decision to allow class action arbitration on an interpretation of the contract performed so as to enforce the parties' shared intent. Oxford's argument is defeated by the plain language of the 2003 Decision.

B. The Arbitrator Disregarded *Klay*

Oxford next argues that the arbitrator disregarded the decision in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), cert. denied, 125 S.Ct. 877, 160 L. Ed. 2d 825 (2005). In so doing, Oxford makes lengthy arguments that lead this Court through *de novo* review of the Award. Following the guidance of the Third Circuit in *Brentwood*, 396 F.3d at 241, this Court will resist Oxford's urging to do so. Instead, this Court shall evaluate Oxford's argument under the "manifest disregard for the law" standard, and finds it has no merit. Barrett devoted three pages of the Award decision to discussion of the application of *Klay*. (De Leeuw Decl. Ex. A 3-5.) Rather than ignoring *Klay*, Barrett paid careful attention to it: "[*Klay*] cannot be disregarded. Mindful of this principle, I have read and

re-read the *Klay* opinion. After careful consideration, I cannot agree with Oxford that it applies to this case as controlling precedent." (*Id.* at 4.) Barrett next explained in detail why he concluded that it was inapplicable to the facts of this case. This Court finds no basis to conclude that the arbitrator manifestly disregarded *Klay*.

As noted by Barrett, Oxford argues that *Klay* is binding precedent for the arbitrator. Yet Oxford does not explain how an Eleventh Circuit decision has binding authority in this New Jersey arbitration. Oxford has not shown how *Klay* is clearly applicable law so as to satisfy that element of the manifest disregard standard.

Oxford also argues that *Klay* should control under the doctrine of collateral estoppel, as Sutter was a party in *Klay*. Again, however, Barrett did not manifestly disregard the doctrine of collateral estoppel. Rather, he expressly discussed the doctrine and provided a reasoned explanation for why he concluded that the doctrine did not apply. (De Leeuw Decl. Ex. A 5-6.) Again, this Court will not conduct a *de novo* review of Barrett's decision on this issue. Barrett stated that, under New Jersey law, collateral estoppel is an equitable doctrine, requiring a judgment of fairness. (De Leeuw Decl. Ex. A 6.) Oxford does not dispute that this is a correct statement of applicable law. Barrett made an equitable determination and explained his reasoning. (Id.) As Barrett did not manifestly disregard either *Klay* or the law of collateral estoppel, Oxford's argument has no merit.

C. The Arbitrator Failed to Perform the Required Predominance Analysis

Oxford next argues that the arbitrator manifestly disregarded the law and exceeded his powers by refusing to perform the predominance analysis required by AAA Supplementary Class Rules 4(b) and 5(a). This argument rests on Oxford's mischaracterization of 4(b), which states: "An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members …" (De Leeuw Decl. Ex. G 2.) Oxford argues that 4(b) requires the arbitrator to identify the individual issues and weigh them against the common issue, but that reading is contrary to the plain language of the rule. The rule requires the arbitrator to make a finding that common questions predominate, not to state a particular predominance analysis. In the Award, Barrett specifically addressed the requirements of Rule 4(b), articulating his finding that common questions predominate and laying out the reasons for this determination. (De Leeuw Decl. Ex. A 11-12.)

Rule 5(a) does not help Oxford either: "The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award … which shall address each of the matters set forth in Rule 4." (De Leeuw Decl. Ex. G 2.) Again, Barrett followed this mandate. He articulated the reasoning for his determination that common questions predominated and addressed each of the matters set forth in Rule 4. (De Leeuw Decl. Ex. A 11-12.) Rather than

disregarding either Rules 4(b) or 5(a), Barrett followed them to the letter. There is no basis for this Court to conclude that the arbitrator disregarded the pertinent mandates.

D. The Arbitrator Disregarded *Sutter v. Horizon*

Lastly, Oxford argues that the arbitrator exceeded his powers and disregarded the law by refusing to follow the New Jersey Superior Court case of *Sutter v. Horizon Blue Cross*, No. L-3685-02 (N.J. Super. Ct. 2004), in which, it alleges, the court denied class certification to (the same) Sutter under similar facts. Oxford maintains that the arbitrator should have held that *Horizon*, under the principle of collateral estoppel, bars class certification. As above, Oxford has not even stated a claim that the arbitrator exceeded his powers since it has not alleged that Barrett was completely irrational in this matter. As to manifest disregard of the law, Oxford's argument is unpersuasive. Oxford has not explained how the principle of collateral estoppel was clearly applicable to the case. Moreover, Barrett considered the relevance of *Horizon* and the issue of collateral estoppel, and decided that he had "equitable discretion under New Jersey law not to apply collateral estoppel." (De Leeuw Decl. Ex. A 6.) As discussed above, Oxford has offered no legal basis for this Court to conclude that the arbitrator was even incorrect as to his equitable discretion under New Jersey law, no less that he manifestly disregarded such law. Barrett recognized the law, and provided a rational explanation for why he declined to apply it. (*Id.*) Oxford has not provided a complete argument, no less a persuasive one, that the arbitrator manifestly disregarded the law.

IV. The Parties Remaining Motions are Now Moot

This Court's ruling that Oxford's Motion to Vacate the Arbitration Award is denied renders moot the two remaining motions in this case, Oxford's Motion to Stay Pending Appeal, and Sutter's Cross-Motion to Dismiss. Oxford's Motion to Stay Pending Transfer and Sutter's Cross-Motion to Dismiss are denied on grounds of mootness.

CONCLUSION

For the reasons stated above, Oxford's Motion to Vacate the Arbitration Award is denied. Oxford's Motion for Stay Pending Transfer is denied. Sutter's Cross-Motion to Dismiss is denied.

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

Dated: October 28, 2005

ORDER CLOSED

GREENAWAY, JR., U.S.D.J.

This matter having come before the Court on the Motion to Vacate an Arbitration Award by Oxford Health Plans, LLC ("Oxford"), the Motion for Stay Pending Transfer by Oxford, and the Cross-Motion to Dismiss by John Ivan Sutter, M.D. ("Sutter"), pursuant to the Federal Arbitration Act ("F.A.A."), 9 U.S.C. § 10; and it appearing that this Court reviewed the parties' submissions; and for the reasons set forth in the accompanying Opinion, and good cause appearing,

IT IS on this 28th day of October, 2005,

ORDERED that Oxford's Motion to Vacate an Arbitration Award (Docket Entry No. 1) is hereby DENIED; and it is further

ORDERED that Oxford's Motion for Stay Pending Transfer (Docket Entry No. 2) is hereby DENIED; and it is further

ORDERED that Sutter's Cross-Motion to Dismiss (Docket Entry No. 5) is hereby DENIED; and it is further

ORDERED that a copy of this Order be served on the parties within seven (7) days of the entry of this Order.

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION
Commercial & Class Action Arbitration Tribunal

In the Matter of the Arbitration between

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

PARTIAL FINAL CLASS DETERMINATION AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated October 25, 2002, contained in a Primary Care Physician Agreement (the "Agreement") between Claimant Dr. Sutter and Respondent Oxford Health Plans, Inc. ("Oxford"[1]), and having been duly sworn and having duly heard the proofs and allegations of the parties, and for the reasons set forth below, do hereby make this PARTIAL/FINAL AWARD pursuant to Rule 5 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association (the "Rules") as follows:

The Proposed Class

Dr. Sutter proposes to define the class in this arbitration as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided services to any person who is a subscriber of; or is insured by, Oxford Health Plans, Inc. ("'Oxford") in the class period of December 11, 1996 through the present.[1]

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under the Agreement, Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Dr. Sutter also applied to the Superior Court for an order certifying the case as a class action and

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[1] Dr. Sutter filed his class-wide arbitration demand on December 11, 2002. New Jersey's contract statute of limitations is six (6) years. See N.J.S.A. § 2A:14-1.

determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

By agreement of the parties, this case was stayed until the determination of the United States Supreme Court in *Green Tree Financial Corp, et al. v. Bazzle et al.*, which was then pending, could be analyzed.

Thereafter, and before the Rules became effective, the parties briefed and I determined that the arbitration clause in the Agreement allowed for class actions (Memorandum and Order of September 23, 2003, a copy of which is attached to and incorporated into this award as Appendix A).

The parties agreed in 2004 that the Rules would govern the future proceedings in this case, including the class determination matters decided in this award.

After extensive discovery, the class determination issues were briefed and I heard the parties in oral argument at a docketed hearing on October 29, 2004. Based on all of the foregoing, my determination of the class issues is as follows.

Discussion

* * *

PARTIAL/FINAL AWARD

Definition of the Class

For purposes of all further proceedings in this arbitration the class of Claimants is defined and certified as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided medical services to any person who is a subscriber of, or is a member of a health plan administered by Oxford Health Plans, LLC. ("Oxford") in the class period of December 11, 1996 through December 31, 2004* and who have signed with Oxford a New Jersey provider agreement containing an arbitration clause the same as or similar to that in Dr. Sutter's contract. Excluded from the class are any individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine) who have executed provider agreements with Oxford that contain a prohibition on class action arbitrations.

The Claim of the Class

The Class alleges that:

> Oxford has uniformly processed the claims for reimbursement submitted by over 16,500 physicians—regardless of the specialty of these doctors—through the use of the same automated software that arbitrarily delays, denies, impedes and reduces compensation for the medical services

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* Certification of a class of New Jersey physicians and physician groups who provided medical services through December 31, 2004, does not prohibit either party from recovering damages for bills submitted for medical services subsequent to December 31, 2004, as part of the final award in this class arbitration, nor does it prohibit either party from seeking such damages in another arbitration, subject to the limits imposed by the doctrines of res judicata and collateral estoppel.

these doctors provide to members of Oxford's insurance plans.

The centerpiece of this case are the common practices carried out by Oxford's computer system that has been responsible for depriving physicians of proper reimbursement.

This computer system has not processed claims in accordance with the terms of the provider agreements—that is, based on the claims information submitted by the physician and his/her applicable fee reimbursement schedule.

Nor has Oxford's automated, uniform computer programs adjudicated claims in accordance with the requirements of New Jersey's statutory prompt pay laws.

Rather, Oxford's computer system, inter alia, has re-coded, manipulated, eliminated, bundled and downcoded claims submitted by physicians and has then processed these claims to achieve one common, class wide goal—to save Oxford substantial amounts of money and to pay less to doctors in breach of the provider agreements and in violation of the prompt pay statutes.

This has been done in an across-the-board fashion, not based upon any individualized review of claims or medical records for the services provided, but by pre-programmed, arbitrary computer software that has not been based on standard medical or objective coding practices.

The foregoing has damaged the members of the class in amounts to be determined.

Class Representative and Counsel

Dr. Sutter and his counsel are found to be adequate representatives of, and capable of protecting, the interests of the class in this arbitration.

Bifurcation for Further Proceedings

When and if it is determined that Oxford breached its agreements with the members of the class, the issue of sub-classes and suitable further proceedings will be considered, and no determination with respect to those matters is being made in this award.

Notice

Notice of this arbitration and the method for opting out of the arbitration shall be given to all members of the class in the Form of Notice attached to and made a part of this Award as Appendix B.

Stay

As required by the Rules, all proceedings in this arbitration are stayed for thirty days from the date of this award. If the parties proceed to the courts, this stay can be extended as appropriate, either by me or by the courts.

03/24/05 /s/ William L.D. Barrett
Date William L.D. Barrett

I, William L.D. Barrett do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

03/24/05 /s/ William L.D. Barrett
Date William L.D. Barrett

[Notary information omitted]

APPENDIX A

[The Memorandum and Order of September 23, 2003 originally attached to and incorporated into the preceding award is reproduced in this booklet as an Exhibit A to APPENDIX C (at page 43a)]

APPENDIX B

[Omitted]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1773

JOHN IVAN SUTTER, M.D.

v.

OXFORD HEALTH PLANS LLC, *Appellant.*

Filed April 30, 2012

SUR PETITION FOR REHEARING EN BANC

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and VANASKIE, Circuit Judges, and [*]Pogue, Judge

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the

[*] Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.

Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: April 30, 2012

MB/cc: Eric D. Katz, Esq.
P. Christine Deruelle, Esq.
Adam N. Saravay, Esq.
Edward Soto, Esq.

APPENDIX H

STATUTORY PROVISIONS

9 U.S.C. § 9—Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10—Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made

may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

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

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

APPENDIX I

OXFORD HEALTH PLANS (NJ), INC.
PRIMARY CARE PHYSICIAN AGREEMENT
SIGNATURE PAGE

IN WITNESS WHEREOF, Primary Care Physician and Oxford Health Plans (NJ), Inc. have executed this PRIMARY CARE PHYSICIAN AGREEMENT as set forth below. This PRIMARY CARE PHYSICIAN AGREEMENT shall be effective on the date it is signed by both parties hereto contingent only upon Primary Care Physician being successfully credentialed by Oxford.

Line of Business	For Oxford Use Only
Primary Care Physician elects to participate in Oxford's Commercial managed care plans, as shown below.	
☒ Commercial/ Freedom Network at the rates shown in Attachment A-1.	☐ Yes ☐ No
☒ Commercial/ Liberty Network at the rates shown in Attachment A-2.	☐ Yes ☐ No
☐ Primary Care Physician elects to participate in Oxford's Medicare program at the rates shown in Attachment A-3.	☐ Yes ☐ No

PRIMARY CARE PHYSICIAN
Signed: /s/ John Ivan Sutter
Print Name: John Ivan Sutter
Date: 9/14/98

OXFORD HEALTH PLANS (NJ), INC.
Signed: /s/ Judith A. Norman
Print Name: Judy Roman
Title: Regional Vice President
Medical Delivery Systems
Date: 9/30/98

For administrative ease and efficiency, Oxford has placed the Signature Page of this PRIMARY CARE PHYSICIAN AGREEMENT at the front rather than at the back page of this document.

OXFORD HEALTH PLANS (NJ), INC.

PRIMARY CARE PHYSICIAN AGREEMENT

This agreement ("Agreement") sets forth the terms whereby Primary Care Physician will treat members of Oxford's medical plans ("Members").

1. Health Services. Primary Care Physician agrees to provide to Oxford Members("Members") who select Primary Care Physician all medically necessary primary care health services which Members are entitled to receive under their Oxford Certificate of Coverage or Member Handbook ("Covered Services"), which Primary Care Physician is qualified to provide. Primary Care Physician shall have the primary responsibility for providing and coordinating the overall health care of each of his/her Members, including appropriate referrals to Consultant Physicians, Hospitals and other providers in Oxford's network. Primary Care Physician agrees to comply with all Oxford's credentializing/recredentializing, administrative, patient referral, utilization review, quality assurance and reimbursement procedures as may be adopted by Oxford from time to time. Primary Care Physician shall make arrangements to assure the availability of coverage for physician services to his/her Members on 24 hours per day, 7 days per week basis. Primary Care Physician agrees not to differentiate or discriminate in the treatment of his/her patients on the basis of race, sex, age, religion, place of residence health status or source of payment, including Medicare and Medicaid, and to observe, protect and promote the rights of Members as patients.

* * *

9. Interpretation. This Agreement shall be governed in all respects by New Jersey law. Oxford may modify any provision of this Agreement upon written notice to Primary Care Physician. Oxford may assign this Agreement, in whole or in part, without notice. The invalidity or unenforceability of any term or condition of this Agreement shall not affect the validity or enforceability of any other term or provision. The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as or be construed to be a waiver of any subsequent breach hereof. All material changes to this agreement must receive prior approval from the New Jersey Departments of Health and Senior Services and Banking and Insurance, and, with regard to the Hold Harmless and the Post-Termination provisions, must receive the additional prior approval of the Health Care Financing Administration.

* * *

11. Arbitration. No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator. All costs and expenses of the arbitration, including actual attorney's fees, shall be allocated among the parties to this Agreement according to the arbitrator's discretion. The arbitrator's award may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly. Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution

of a civil action to maintain the status quo during the pendency of any arbitration proceeding.

* * *

14. Defined Terms. The term "Oxford" as used herein shall mean Oxford Health Plans (NJ), Inc. or any affiliate or subsidiary of Oxford Health Plans, Inc., including but not limited to Oxford Health Insurance Inc., which offers, administers or provides health services. The term "Member" shall mean any individual who has entered into, or for whom an employer or other entity has entered into on his/her behalf, a contractual relationship with Oxford to receive "Covered Services." "Covered Services" shall mean health care services and supplies within the scope of a Member's plan of benefits, subject, in some cases, to precertification and other medical management protocols. "Approved Charges" are the amounts due to Primary Care Physician from Oxford for the provision of covered Services which have been delivered in compliance with all required precertifications and medical management protocols.

* * *

APPENDIX J

American Arbitration Association
Supplementary Rules for Class Arbitrations

Rules Effective October 8, 2003
Fees Effective January 1, 2010

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

* * *

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class

arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. * * *

* * *

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

* * *

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay

further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

* * *