No. ________

Supreme Court of the United States

STOLT-NIELSEN S.A., STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS B.V., JO TANKERS, INC., AND TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Application To Stay The Mandate Of The United States Court Of Appeals For The Second Circuit Pending Consideration Of Petition For A Writ Of Certiorari

APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Christopher M. Curran
Counsel of Record
J. Mark Gidley
Peter J. Carney
Charles C. Moore
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 626-3600

Counsel for Petitioners Stolt-Nielsen S.A. and Stolt-Nielsen Transportation Group Ltd.

Edward C. DuMont
Steven F. Cherry
Leon B. Greenfield
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Counsel for Petitioners, Odfjell ASA, Odfjell Seachem AS, and Odfjell USA, Inc.

Richard C. Siefert
GARVEY SCHUBERT BARER
1191 Second Avenue, 18th Floor
Seattle, WA 98101-2939
Phone: (206) 464-3939

Counsel for Petitioner Tokyo Marine Co., Ltd.

Richard J. Rappaport
Amy B. Manning
Tammy L. Adkins
MCGUIRE WOODS LLP
77 West Wacker Drive
Suite 4100
Chicago, IL 60601-1815
(312) 849-8100

Richard L. Jarashow
MCGUIRE WOODS LLP
1345 Avenue of the Americas
7th Floor
New York, NY 10105-0106
(212) 548-2100

Counsel for Petitioners Jo Tankers B.V. and Jo Tankers, Inc.

February 13, 2009

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, JLM Europe B.V., JLM International, Inc., KP Chemical Corp., and Nizhnekamskneftekhim USA, Inc. initially were parties to the underlying arbitration but have since resolved all of their claims. Of these additional parties, only KP Chemical Corp. was a party to the district court and court of appeals proceedings. KP Chemical Corp. resolved its claims prior to the court of appeals decision at issue in this application.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioners state as follows:

Petitioner Stolt-Nielsen Transportation Group Ltd. states that all of its stock is owned by its parent corporation, Petitioner Stolt-Nielsen S.A., a publicly held corporation traded on the Oslo Stock Exchange. Petitioner Stolt-Nielsen S.A. states that it has no parent corporation and that no publicly held company owns more than 10% of its stock.

Petitioner Odfjell ASA states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock. Petitioner Odfjell Seachem AS and Odfjell USA, Inc. state that they are wholly owned subsidiaries of Odfjell ASA, which is a publicly traded corporation.

Petitioners Jo Tankers B.V. states that it has one parent corporation, Jo Tankers (Bermuda) Limited, and no publicly held corporation owns 10% or more of the stock of Jo Tankers B.V. or Jo Tankers (Bermuda) Limited. Petitioner Jo Tankers, Inc. states that it is a wholly owned subsidiary of Jo Tankers B.V., which is not a publicly traded corporation.

Petitioner Tokyo Marine Co., Ltd. states that Mitsui O.S.K. Lines, Ltd. owns 10% or more of the stock of Tokyo Marine Co., Ltd. Mitsui O.S.K. Lines, Ltd. is a publicly traded corporation.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDINGS BELOW i

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REASONS FOR GRANTING A STAY 2

I. There Is A Reasonable Probability That The Court Will Grant Certiorari And A Fair Prospect That Petitioners Would Prevail On The Merits 3

  A. The Court Has Twice Deemed The Issue Here Certworthy But Has Not Resolved It 3

  B. This Court Should Resolve The Circuit Conflict On The Issue Presented Here 4

  C. There Is A Fair Prospect That Petitioners Would Prevail On The Merits Because The Second Circuit Misstated The Rule Of Law Under *Bazzle* 8

II. Petitioners Would Be Irreparably Harmed Absent A Stay, And A Balance Of Equities Demonstrates That A Stay Is In The Public Interest 10

  A. Petitioners Face Irreparable Injury, While Respondent Has No Basis To Complain About A Brief Delay 10

  B. There Is A Compelling Public Interest In Staying The Mandate To Permit This Court To Resolve The Circuit Conflict Here 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page(s)**

Bazzle v. Green Tree Fin. Corp.,
569 S.E.2d 349 (S.C. 2002) 4

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 127 S. Ct. 1955 (2007) 10

Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.,
489 F.3d 580 (3d Cir. 2007) 6, 7

Champ v. Siegel Trading Co.,
55 F.3d 269 (7th Cir. 1995) 4, 7, 8

Del E. Webb Constr. v. Richardson Hosp. Auth.,
823 F.2d 145 (5th Cir. 1987) 7

Dickler v. Shearson Lehman Hutton, Inc.,
596 A.2d 860 (Pa. Super. Ct. 1991) 4, 5

Dominium Austin Partners, L.L.C. v. Emerson,
248 F.3d 720 (8th Cir. 2001) 4

Employers Ins. Co. of Wausau v. Century Indem. Co.,
443 F.3d 573 (7th Cir. 2006) 6, 9

Glencore, Ltd. v. Schnitzer Steel Prods. Co.,
189 F.3d 264 (2d Cir. 1999) 4, 7, 8

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 1, 5, 8

JLM Indus., Inc. v. Stolt-Nielsen SA,
387 F.3d 163 (2d Cir. 2004) 10, 11

Johnson v. W. Suburban Bank,
225 F.3d 366 (3d Cir. 2000) 7

Keating v. Super. Court,
645 P.2d 1192 (Cal. 1982) 5

Marks v. United States,
430 U.S. 188 (1977) 8, 9

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995)....................9

Meacham v. Knolls Atomic Power Lab.,
128 S. Ct. 2395 (2008)....................3, 4

Medhekar v. U.S. Dist. Court,
99 F.3d 325 (9th Cir. 1996)....................10

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983)....................9

Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.,
343 F.3d 355 (5th Cir. 2003)....................6

Rostker v. Goldberg,
448 U.S. 1306 (1980)....................2

Southland Corp. v. Keating,
465 U.S. 1 (1984)....................1, 3

Sprague v. Quality Rests. N.W., Inc.,
162 P.3d 331 (Or. Ct. App. 2007)....................6

Stolt-Nielsen SA v. Animalfeeds Int'l Corp.,
548 F.3d 85 (2d Cir. 2008)....................3, 7, 8

Thornton v. United States,
541 U.S. 615 (2004)....................4

United Kingdom v. Boeing Co.,
998 F.2d 68 (2d Cir. 1993)....................4, 7, 8

United States v. Balsys,
524 U.S. 666 (1998)....................4

Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,
489 U.S. 468 (1989)....................9

TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Petitioners, four international shipping companies that are parties to an international maritime arbitration brought by a sophisticated business claimant that alleges injuries from antitrust violations, respectfully request a stay of the mandate of a recent decision by the U.S. Court of Appeals for the Second Circuit. That decision would permit the arbitration to proceed as a class arbitration, even though the parties' arbitration clause is silent on the issue of class arbitration. The Second Circuit reversed the district court's vacatur of the arbitrators' award. In the Second Circuit's view, the arbitration panel's determination that class arbitration is permitted when the arbitration agreement is silent did not contravene the Federal Arbitration Act ("FAA").

On February 2, 2009, the Second Circuit panel that issued the decision granted Petitioners' motion to stay the mandate, but only for two weeks, to allow Petitioners to seek a further stay in this Court. (Ex. A.) Accordingly, Petitioners now request a stay of the mandate until this Court can consider and resolve a petition for a writ of certiorari, which Petitioners intend to file expeditiously.

The Petitioners' petition here will present the same issue on which this Court has twice granted certiorari but never resolved: whether imposing a class arbitration on parties whose arbitration clause is silent as to class arbitration is consistent with the FAA. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (granting certiorari to determine whether imposition of class arbitration on agreements silent as to that issue was consistent with the FAA); *Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984) (granting certiorari to decide "whether arbitration under the federal Act is impaired when a class-action structure is imposed" where arbitration clauses do not provide for class arbitration).

Threshold issues prevented the Court from reaching this FAA issue in *Bazzle* and *Southland*, but there are no obstacles to the Court resolving the question in this case. Indeed, conflict among the circuit courts concerning the implications of the Court's four disparate opinions in *Bazzle* makes it particularly important for the Court to grant certiorari in this case finally to resolve the question whether imposing class arbitration on parties that did not consent thereto is consistent with the FAA.

A stay is warranted here. Given the importance of the unsettled question raised here and this Court's repeated interest in granting certiorari to resolve the issue, there is at least a reasonable probability that certiorari will be granted and a fair prospect of reversal. Further, the balance of equities weighs heavily in favor of a stay because a modest delay in the underlying arbitration proceedings will cause no irreparable harm to Respondent, while allowing class proceedings to commence will impose immediate, substantial, and irreparable burdens on Petitioners and third parties.

REASONS FOR GRANTING A STAY

A stay pending resolution of a petition for a writ of certiorari is appropriate when, as here, the petitioner can demonstrate a reasonable probability that this Court will grant certiorari, a fair prospect of reversal on the merits, that denial of the stay will cause irreparable harm, and that the equities weigh in favor of temporary relief. *E.g.*, *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

I. There Is A Reasonable Probability That The Court Will Grant Certiorari And A Fair Prospect That Petitioners Would Prevail On The Merits

A. The Court Has Twice Deemed The Issue Here Certworthy But Has Not Resolved It

This Court has twice granted certiorari to resolve the issue presented in this case: whether the FAA permits the imposition of class arbitration on parties whose arbitration clause is silent as to class arbitration. Both times, the Court was unable to resolve the question due to threshold issues. In *Southland*, the Court could not reach the issue because it turned on a question of state law. *Southland*, 465 U.S. at 9, 17. Here, it is undisputed that the case turns on federal law under the FAA. *See Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 87 (2d Cir. 2008) (Ex. B).

More recently, in *Bazzle*, the Court likewise never reached the issue. Instead, the Court fractured, with no majority opinion. Justice Breyer's plurality determined that the Court could not reach the issue whether class arbitration can be imposed on clauses silent as to class arbitration because the arbitrators first had to resolve a threshold dispute whether the clause in question was in fact silent, and Justice Thomas declined to reach the merits because the case arose from state court. Here, the arbitrators squarely determined that the clause in question is silent as to class arbitration, *see Stolt-Nielsen SA*, 548 F.3d at 87, 89-90 (Ex. B), and it is undisputed that the case has arisen from federal court.

Thus, this case does not suffer from any of the procedural complications of *Bazzle* or *Southland*, making it an ideal vehicle to finally resolve an issue the Court has twice deemed certworthy. Indeed, this Court has often granted certiorari on questions that have eluded resolution in prior grants of certiorari. *E.g.*, *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2400 (2008) (noting that certiorari was granted to resolve a question on which the Court

had previously granted certiorari but was unable to reach); *Thornton v. United States*, 541 U.S. 615, 617 (2004) (same); *United States v. Balsys*, 524 U.S. 666, 670-71 & n.2 (1998) (same).

B. This Court Should Resolve The Circuit Conflict On The Issue Presented Here

The importance of granting certiorari on the recurring issue presented here is only heightened now that the circuits are in conflict about the precedential effect of the fragmented opinions in *Bazzle* itself. As discussed below, at least three circuits have determined that *Bazzle* holds, at most, only that it is for the arbitrator (not the court) to determine whether an arbitration agreement is in fact silent on the issue of class arbitration. In doing so, those circuits have kept intact their precedent prohibiting consolidated or class arbitration under the FAA absent the parties' express consent thereto. In conflict with each of those circuits, the Second Circuit has now held that *Bazzle* abrogated that federal precedent, and that the FAA should no longer be construed to prohibit arbitrators from imposing consolidated or class arbitration on parties that did not expressly consent thereto.

Prior to *Bazzle*, the uniform rule among the circuits was that the FAA prohibited the imposition of consolidated or class arbitration absent parties' express consent. *E.g.*, *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001) (denying class arbitration under the FAA absent express consent); *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266-67 (2d Cir. 1999) (holding that the FAA prohibits consolidated arbitration absent express consent); *United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993) (same); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (holding that FAA does not permit class arbitration absent express consent).

Only state courts had held prior to *Bazzle* that class arbitration could be imposed on silent clauses. *E.g.*, *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002); *Dickler v. Shearson*

Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991); *Keating v. Super. Court*, 645 P.2d 1192 (Cal. 1982).

The *Bazzle* Court granted certiorari to decide whether the FAA permits class arbitration to be imposed based on silent clauses, and presumably to resolve the federal-state conflict on the question. *See Bazzle*, 539 U.S. at 447; *see also* Petition for a Writ of Certiorari at 12, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634) (Ex. C) (requesting certiorari on the question "whether the FAA permits class-action procedures to be imposed on an arbitration agreement that is 'silent' as to class-action arbitration," an unresolved issue that has "generated a substantial conflict among federal courts of appeals and state appellate courts and courts of last resort").

Bazzle did not produce a majority opinion from the Court at all, but rather four separate opinions. Justice Breyer's plurality opinion announced the judgment of the Court, vacating the state court's imposition of class arbitration and remanding for the arbitrators to resolve a threshold dispute whether the clause in question was in fact silent as to class arbitration. *Id.* at 454. Justice Stevens authored a separate opinion in which he expressly disagreed with vacating and remanding for an arbitrator's decision, and Justice Stevens concurred in the judgment only so that there would be a "controlling judgment of the Court." *Id.* at 455. Chief Justice Rehnquist authored a dissenting opinion, in which Justices O'Connor and Kennedy joined, stating that the contract interpretation was for courts to determine and under the circumstances the FAA barred class arbitration. *Id.* at 455. Justice Thomas authored a separate dissenting opinion stating that the FAA did not apply to state law proceedings. *Id.* at 460.

Now, the unclear effect of the *Bazzle* opinions and the divergent interpretations of those opinions by the circuits has led to an intolerable circuit conflict on whether imposing class

arbitration based on silent clauses is consistent with the FAA and the pre-*Bazzle*, federal-state conflict persists.[†]

The Seventh Circuit holds that *Bazzle* has no precedential effect whatsoever. Referring to *Bazzle*'s plurality opinion and the concurrence by Justice Stevens, the Seventh Circuit held: "[W]e cannot identify a single rationale endorsed by a majority of the Court. . . . The Justices' rationales do not overlap." *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 580 (7th Cir. 2006).

In taking that position, the Seventh Circuit expressly declined to follow the Fifth Circuit's position on *Bazzle*: "We are aware that the Fifth Circuit has reached a different conclusion regarding the precedential value of [*Bazzle*]. . . . We cannot conclude, as the Fifth Circuit did, that Justice Stevens agreed that the arbitrator should be the first to interpret the parties' agreements to determine if they allow class arbitration." *Id.* at 580-81 (discussing and declining to follow *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355, 358-59 (5th Cir. 2003)).

In *Pedcor*, the Fifth Circuit had held that the fractured *Bazzle* opinions stand for the limited principle that the "arbitrators should be the first ones to interpret the parties' agreement." *Pedcor*, 343 F.3d at 359; *see also id.* (expressly holding, contrary to the Seventh Circuit, that in *Bazzle* "the plurality, plus Justice Stevens" yielded a majority holding).

Subsequently, the Third Circuit took the same view of *Bazzle* as the Fifth Circuit had. *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3d Cir.

[†] Since *Bazzle*, additional state courts have imposed class arbitration on silent clauses. *E.g.*, *Sprague v. Quality Rests. N.W., Inc.*, 162 P.3d 331, 335-36 (Or. Ct. App. 2007) (holding class arbitration may be imposed on silent arbitration agreements).

2007). In doing so, the Third Circuit expressly "decline[d] to adopt [the] conclusion" of the Seventh Circuit that *Bazzle* lacked any precedential effect at all. *Id.* at 586 n.2.

Now, deepening the conflict, the Second Circuit has interpreted *Bazzle* as abrogating the Second Circuit's own and other courts-of-appeals' holdings that the FAA does not permit consolidated or class arbitration to be imposed on parties absent express consent:

> *Boeing*, *Glencore*, and *Champ* had been grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause. ***Bazzle abrogated those decisions to the extent that they read the FAA to prohibit such proceedings***.

Stolt-Nielsen, 548 F.3d at 100 (emphasis added) (discussing as examples *Boeing*, 998 F.2d 68 (2d Cir. 1993), *Glencore*, 189 F.3d 264 (2d Cir. 1999), and *Champ*, 55 F.3d 269 (7th Cir. 1995)).

The immediate practical effect of this circuit conflict is that the imposition of class arbitration on silent clauses under the FAA now depends entirely on the geographic location of the arbitration. Because the Seventh Circuit held that *Bazzle* has no precedential effect, the prohibition on class arbitration absent authorization remains the law in that circuit. *See Champ*, 55 F.3d at 274-75 (7th Cir. 1995) (holding that the imposition of class arbitration upon parties without authorization is inconsistent with the FAA). The Third and Fifth Circuits' interpretation of *Bazzle*, i.e., that *Bazzle* merely determined that arbitrators must interpret parties' arbitration clauses in the first instance, similarly means that the precedents in those circuits holding that the FAA prohibits consolidated and class arbitration absent express consent remain the law. *See Johnson v. W. Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (class arbitration "appears impossible . . . unless the arbitration agreement contemplates such a procedure"); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (consolidated arbitration proceedings not permitted absent express consent).

In contrast, the innumerable parties throughout the United States and abroad whose arbitration agreements designate New York (or any other Second Circuit situs) for their arbitrations are now subject to involuntary class arbitration. Taken together, this conflict on a question of compelling practical significance, and this Court's demonstrable interest in resolving this issue in prior grants, satisfy the "reasonable probability" standard for predicting whether the Court will grant certiorari here.

C. There Is A Fair Prospect That Petitioners Would Prevail On The Merits Because The Second Circuit Misstated The Rule Of Law Under *Bazzle*

In this case, the Second Circuit reversed the district court's finding that the arbitration panel had manifestly disregarded the law by imposing class arbitration absent express consent. The Second Circuit's reversal hinged on its holding that *Bazzle* "abrogated" several federal circuit precedents "to the extent that [those precedents] read the FAA to prohibit" consolidated or class arbitration absent express consent. *Stolt-Nielsen SA*, 548 F.3d at 100 (Ex. B) (citing as examples *Glencore*, 189 F.3d at 267 (2d Cir. 1999), *Boeing*, 998 F.2d at 71 (2d Cir. 1993), and *Champ*, 55 F.3d at 275 (7th Cir. 1995)).

The Second Circuit's holding on the meaning of *Bazzle* is incorrect for two basic reasons: (i) the *Bazzle* plurality expressly stated that it could not reach the FAA issue because the arbitrator had not yet determined the threshold issue whether the relevant arbitration clauses were in fact silent on the issue of class arbitration, *see Bazzle*, 539 U.S. at 447, and (ii) no principle garnered the support of five Justices, so *Bazzle* necessarily lacked the precedential weight to "abrogate" the federal circuit cases holding that the FAA does not permit consolidated or class arbitration absent express consent, *see Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those

members who concurred in the judgments on the narrowest grounds."); *see also, e.g.*, *Employers Ins. Co. of Wausau*, 443 F.3d at 580 (7th Cir. 2006) ("[W]e cannot identify a single rationale endorsed by a majority of the [*Bazzle*] Court. . . . The Justices' rationales do not overlap.").

The Second Circuit's decision is also irreconcilable with first principles of this Court's FAA precedents, which demonstrate that involuntary class arbitration is inconsistent with the FAA's emphasis on parties' consent. As this Court has recognized, "arbitration under the [FAA] is a matter of consent, not coercion." *Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Indeed, "[t]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479). Critically, this Court has made clear that it is the intent of the parties, not efficiency, that governs the enforcement of an arbitration agreement under the FAA. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (holding that the FAA mandates "piecemeal resolution when necessary to give effect to an arbitration agreement" even where there are "other persons who are parties to the underlying dispute but not to the arbitration agreement").

For these reasons, if the Court were to determine the merits of the issue here, there is at least a fair prospect this Court would hold that the FAA prohibits class arbitration absent the parties' authorization in the relevant arbitration agreement. Indeed, every federal circuit court to decide the issue had held precisely that — until the Second Circuit misconstrued the import of *Bazzle* here.

II. Petitioners Would Be Irreparably Harmed Absent A Stay, And A Balance Of Equities Demonstrates That A Stay Is In The Public Interest

A. Petitioners Face Irreparable Injury, While Respondent Has No Basis To Complain About A Brief Delay

Absent a temporary stay, Petitioners will be forced to begin class-arbitration proceedings in a complex antitrust case that will impose immediate, substantial, and irretrievable costs and burdens, even though the parties never agreed to class arbitration. Those costs and burdens will have been unnecessarily and irreparably incurred if this Court grants certiorari and reverses the Second Circuit. As this Court recently recognized in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), an antitrust class action, discovery in such cases is an exceedingly expensive undertaking that should not be imposed on the parties lightly. 127 S. Ct. at 1967 & n.6. Lower courts have similarly recognized that irrevocable discovery expenses can constitute irreparable harm. *E.g.*, *Medhekar v. U.S. Dist. Court*, 99 F.3d 325, 326-27 (9th Cir. 1996) (granting mandamus relief from a discovery order because the costs of compliance would be irrevocable even after a successful appeal).

Moreover, beyond the sheer expense of these unanticipated class proceedings, a class arbitration would require notification to absent class members, which would transform this private international maritime arbitration into a collective action beyond anything that the parties ever contemplated. The harm to Petitioners if they must move forward with class arbitration before this Court resolves the question in conflict is palpable and irreparable.

In contrast, Respondent will not suffer harm from a brief stay. Respondent itself delayed arbitration for well over a year by first seeking to litigate in federal court despite the plain terms of the parties' arbitration agreements. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004) (compelling arbitration and rejecting the attempt to bring the same claims

here in a federal-court class action). Furthermore, the time needed to resolve this issue through the court system was specifically contemplated by the parties when they expressly agreed to an appeals process from the arbitrators' determination whether class arbitration would be possible. On these facts, Respondent cannot complain of delay.

B. There Is A Compelling Public Interest In Staying The Mandate To Permit This Court To Resolve The Circuit Conflict Here

A temporary stay here will visit no harm on the public interest. Unlike in some cases, there is no continuing public harm that might continue absent a stay of the mandate. To the contrary, a stay will benefit third party witnesses by preventing them from being subject unnecessarily to discovery-related burdens and expenses associated with the commencement of class arbitration proceedings. More broadly, it would bring great public benefit for this Court finally to resolve the issue here.

Finally, to the extent that the Court considers the public interest in evaluating the propriety of staying the mandate, the public interest strongly favors a stay here. The Second Circuit's decision implicates all U.S. and international arbitration agreements that designate a situs within the Second Circuit, and New York is one of the most frequently used situses for arbitration in the world. Many industries beyond the maritime industry, including financial institutions, real estate, and construction, for example, rely on arbitration in New York. Potentially hundreds of thousands of arbitration agreements that are silent as to class arbitration now may be held under the FAA to permit that procedure without any evidence that the parties agreed to class arbitration. The Second Circuit's ruling upends the settled expectations of parties around the world.

Furthermore, there is a compelling public interest in having a uniform, national rule regarding the imposition of class arbitration absent express consent. Given that the Court

already has twice deemed the issue worthy of certiorari, it would be inequitable to subject *some* parties to the irrevocable burdens and costs of involuntary class arbitration while this Court decides whether to take up and resolve the important question presented in this case.

CONCLUSION

For the foregoing reasons, Petitioners request that an order be entered staying the issuance of the Second Circuit's mandate pending the completion of certiorari proceedings before this Court.

Dated: 13 February, 2009

Respectfully submitted,

Christopher M. Curran
Counsel of Record
J. Mark Gidley
Peter J. Carney
Charles C. Moore
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600

Counsel for Petitioners Stolt-Nielsen S.A. and Stolt-Nielsen Transportation Group Ltd.

Edward C. DuMont
Steven F. Cherry
Leon B. Greenfield
WILMER CUTLER PICKERING HALE
AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Phone: (202) 663-6000

Counsel for Petitioners Odfjell ASA, Odfjell Seachem AS, and Odfjell USA, Inc.

Richard J. Rappaport
Amy B. Manning
Tammy L. Adkins
MCGUIREWOODS LLP
77 West Wacker Drive, Ste. 4100
Chicago, IL 60601-1815
Phone: (312) 849-8100

Richard L. Jarashow
MCGUIREWOODS LLP
1345 Avenue of the Americas
7th Floor
New York, NY 10105-0106
Phone: (212) 548-2100

Counsel for Petitioners Jo Tankers B.V. and Jo Tankers, Inc.

Richard C. Siefert
GARVEY SCHUBERT BARER
1191 Second Avenue
18th Floor, Second & Seneca Building
Seattle, WA 98101-2939
Phone: (206) 464-3939

Counsel for Petitioner Tokyo Marine Co., Ltd.

No. ________

Supreme Court of the United States

STOLT-NIELSEN S.A., STOLT-NIELSEN TRANSPORTATION GROUP LTD., ODFJELL ASA, ODFJELL SEACHEM AS, ODFJELL USA, INC., JO TANKERS B.V., JO TANKERS, INC., AND TOKYO MARINE CO., LTD.,

Petitioners,

v.

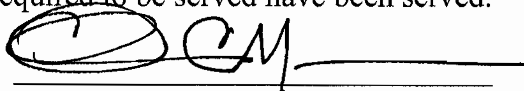
ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Application To Stay The Mandate Of The United States Court Of Appeals For The Second Circuit Pending Consideration Of Petition For A Writ Of Certiorari

DECLARATION OF SERVICE

Pursuant to Rules 22.2, 29.3, and 29.5 of the Rules of the Supreme Court of the United States, I, Charles C. Moore, hereby declare that on this 13th day of February, 2009, I caused to be served the Application to Stay the Mandate of the United States Court of Appeals for the Second Circuit Pending Consideration of Petition for a Writ of Certiorari in the above-entitled case, dated February 13, 2009, upon counsel for Respondent, listed on the attached document, via third-party commercial carrier. I further declare that all parties required to be served have been served.



Charles C. Moore
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600

Counsel for Petitioners Stolt-Nielsen S.A. and Stolt-Nielsen Transportation Group, Ltd.

DISTRICT OF COLUMBIA) ss

Subscribed and sworn to before me

this 13th day of February, the year 2009.

Signature [signature]

My Commission expires ________

Cynthia W. Coleman
Notary Public, District of Columbia
My Commission Expires 08-31-2011

SERVICE LIST

J. Douglas Richards
POMERANTZ HAUDEK BLOCK
GROSSMAN & GROSS LLP
100 Park Avenue
New York, NY 10017-5516
(212) 661-1100

Steven A. Kanner
FREED KANNER LONDON &
MILLEN LLC
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
(224) 632-4500

Solomon B. Cera
GOLD BENNETT CERA & SIDENER LLP
595 Market Street, Suite 2300
San Francisco, CA 94105-2835
(415) 777-2230

Bernard Persky
LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
(212) 907-0700

Michael D. Hausfeld
HAUSFELD LLP
1146 19th Street, N.W., 5th Floor
Washington, D.C. 20005
(202) 579-1089

Aaron F. Biber
GRAY, PLANT, MOOTY, MOOTY
& BENNETT, P.A.
500 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 632-3000

W. Joseph Bruckner
LOCKRIDGE GRINDAL
NAUEN P.L.L.P.
100 Washington Ave. South
Suite 2200
Minneapolis, MN 55401
(612) 339-6900

Benjamin D. Brown
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, D.C. 20005
(202) 408-4600

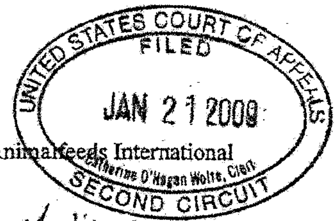
Counsel for Respondent Animalfeeds International Corp.

Exhibit A

SDNY | NYNY
06-cv-420
Rakoff

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500



MOTION INFORMATION STATEMENT

Docket Number(s): No. 06-3474-CV

Caption [use short title]

Stolt-Nielsen SA, et al. v. Animalfeeds International Corp., et al.

Motion for: ~~Stay the Mandate of the Court~~ to recall the Mandate and to accept the motion to stay the mandate as filed out of time

Set forth below precise, complete statement of relief sought:

On November 4, 2008, this Court reversed and remanded the judgment of the United States District Court for the Southern District of New York vacating a partial final arbitration award. Appellees move for an Order staying the issuance of the mandate pending the filing of a petition for writ of certiorari in the Supreme Court of the United States.

MOVING PARTY: All Appellees

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner **X** Appellee/Respondent

OPPOSING PARTY: Appellant

MOVING ATTORNEY: Peter J. Carney

[name of attorney, with firm, address, phone number and e-mail]

WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600 E-mail: pcarney@whitecase.com
See attached list of additional counsel

OPPOSING ATTORNEY [Name]: Bernard Persky

[name of attorney, with firm, address, phone number and e-mail]

LABATON SUCHAROW LLP
140 Broadway
New York, NY 10005
Phone: (212) 907-0700
See attached list of additional counsel

Court-Judge/Agency appealed from: District Court for the Southern District of New York (Jed S. Rakoff, Judge)

Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? ☐ Yes **X** No

B. been obtained? ☐ Yes **X** No

Has service been effected? **X** Yes ☐ No
[Attach proof of service]

Is oral argument requested? ☐ Yes **X** No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? **X** Yes ☐ No
If yes, enter date: Argued May 30, 2008

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes **X** No

Has this relief been previously sought in this Court? ☐ Yes **X** No

Requested return date and explanation of emergency:

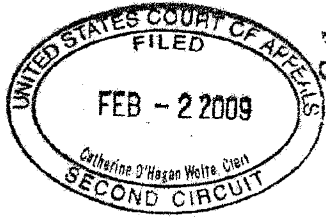
Signature of Moving Attorney:

ORDER

Before: Hon. Amalya L. Kearse, Hon. Robert D. Sack, Hon. Debra Ann Livingston, *Circuit Judges*

IT IS HEREBY ORDERED that the motion by Appellees to recall the mandate in light of the reason for late filing of the motion for a stay is GRANTED. IT IS FURTHER ORDERED that the motion for stay is GRANTED for **two weeks** from the date of this order and to permit movant to seek a further stay in the United States Supreme Court.

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by [signature]
DEPUTY CLERK



FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
by [signature]
Pisnanont, Motions Staff Attorney

FEB - 2 2009

CERTIFIED: FEB - 2 2009

Exhibit B

United States Court of Appeals, Second Circuit.
STOLT-NIELSEN SA, Stolt-Nielsen Transportation Group Ltd., a Odfjell ASA, Odfjell Seachem AS, Odfjell USA, Inc., Jo Tankers BV, Jo Tankers, Inc., and Tokyo Marine Co. Ltd., Petitioners-Appellees,
v.
ANIMALFEEDS INTERNATIONAL CORP., Respondent-Appellant,
KP Chemical Corp., Respondent.FN*

FN* The Clerk of Court is directed to amend the official caption as set forth above.

Docket No. 06-3474-cv.

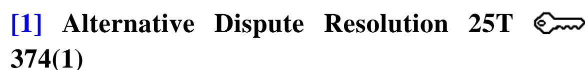
Argued: May 30, 2008.
Decided: Nov. 4, 2008.

Background: Owners of parcel tankers moved to vacate arbitration award in favor of charterers on their class antitrust claims. The United States District Court for the Southern District of New York, Jed S. Rakoff, J., 435 F.Supp.2d 382, vacated the arbitration award, and charterer appealed.

Holding: The Court of Appeals, Sack, Circuit Judge, held that arbitral panel, which determined that silent charter agreements did not preclude class arbitration, did not "manifestly disregard" the law by not engaging in a choice-of-law analysis and by expressly identifying federal maritime law as governing the interpretation of charter party language.

Reversed and remanded with instructions.

West Headnotes


[1] Alternative Dispute Resolution 25T 374(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) k. In General. Most Cited Cases
Court review de novo a district court's order vacating an arbitration award for manifest disregard of the law.

[2] Alternative Dispute Resolution 25T 324

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk324 k. Consistency and Reasonableness; Lack of Evidence. Most Cited Cases
Manifest disregard of the evidence is not a proper ground for vacating an arbitrator's award. 9 U.S.C.A. § 1 et seq.

[3] Alternative Dispute Resolution 25T 329

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk329 k. Error of Judgment or Mistake of Law. Most Cited Cases
"Manifest disregard" doctrine allows a reviewing court to vacate an arbitral award only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent; if the arbitrator's decision strains credulity or does not rise to the standard of barely colorable, a court may conclude that the arbitrator willfully flouted the governing law by refusing to apply it.

[4] Alternative Dispute Resolution 25T 329

25T Alternative Dispute Resolution
25TII Arbitration

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

25TII(G) Award
25Tk327 Mistake or Error
25Tk329 k. Error of Judgment or Mistake of Law. Most Cited Cases
Application of the manifest disregard standard to arbitral award involves three components: (1) court must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators, (2) court must find that the law was in fact improperly applied, leading to an erroneous outcome, and (3) court must determine arbitrator's awareness of the law.

[5] Alternative Dispute Resolution 25T ⚷329

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk327 Mistake or Error
25Tk329 k. Error of Judgment or Mistake of Law. Most Cited Cases
Arbitral panel, which determined that silent charter agreements did not preclude class arbitration, did not “manifestly disregard” the law by not engaging in a choice-of-law analysis and by expressly identifying federal maritime law as governing the interpretation of charter party language; furthermore, because no state-law rule of construction clearly governed the question of whether class arbitration was permitted by an arbitration clause that was silent on the subject, the arbitrators' decision construing such silence to permit class arbitration in was not in manifest disregard of New York law.

[6] Alternative Dispute Resolution 25T ⚷307

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk302 Making and Formal Requisites
25Tk307 k. Findings, Conclusions, and Reasons for Decision. Most Cited Cases
Even where an arbitrator's explanation for an award is deficient, court must confirm it if a justifiable ground for the decision can be inferred from the record.

[7] Shipping 354 ⚷39(7)

354 Shipping
354III Charters
354k39 Construction and Operation in General
354k39(7) k. Arbitration of Controversies. Most Cited Cases
Because the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses in charter agreements permitted class arbitration, the arbitration panel did not exceed its authority in deciding that issue, irrespective of whether it decided the issue correctly. 9 U.S.C.A. § 10(a)(4).

***86** Steven F. Cherry, Wilmer Cutler Pickering Hale and Dorr LLP (William J. Kolasky, Leon B. Greenfield, and David F. Olsky, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, of counsel), McLean, VA, for Petitioners-Appellees ***87** Odfjell ASA, Odfjell Seachem AS, and Odfjell USA, Inc.
Christopher Curran, White & Case LLP (Francis A. Vasquez, Jr., Peter J. Carney, Eric Grannon, Kristen McAhren, and Charles C. Moore, of counsel), Washington, DC, for Petitioners-Appellees Stolt-Nielsen SA and Stolt-Nielsen Transportation Group Ltd.
Richard J. Rappaport, Amy B. Manning, and Tammy L. Adkins, McGuireWoods LLP, Chicago, IL; and Richard J. Jarashow, McGuireWoods LLP, New York, NY, for Petitioners-Appellees Jo Tankers BV and Jo Tankers, Inc.
Keith S. Dubanevich, Garvey Schubert Barer, Portland, OR, for Petitioner-Appellee Tokyo Marine Co. Ltd.
Bernard Persky, Labaton Sucharow LLP (Steven A. Kanner, Much Shelist Freed Denenberg Ament & Rubenstein, P.C., Chicago, IL; Michael D. Hausfeld, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, DC; Solomon B. Cera, Gold Bennet Cera & Sidener LLP, San Francisco, CA; J. Douglas Richards, Milberg Weiss Bershad & Schulman LLP, New York, NY; W. Joseph Bruck-

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

ner, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; and Aaron F. Biber, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN, of counsel), New York, NY, for Respondent-Appellant.

Before: KEARSE, SACK, and LIVINGSTON, Circuit Judges.

SACK, Circuit Judge:
The parties to this litigation are also parties to international maritime contracts that contain arbitration clauses. The contracts are silent as to whether arbitration is permissible on behalf of a class of contracting parties. The question presented on this appeal is whether the arbitration panel, in issuing a clause construction award construing that silence to permit class arbitration, acted in manifest disregard of the law. The United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*) answered that question in the affirmative and therefore vacated the award. We conclude to the contrary that the demanding "manifest disregard" standard has not been met. The judgment of the district court is therefore reversed and the cause remanded with instructions to deny the petition to vacate.

BACKGROUND

Respondent-Appellant AnimalFeeds International Corp. ("AnimalFeeds") alleges that Petitioners-Appellees Stolt-Nielsen SA, Stolt-Nielsen Transportation Group Ltd., Odfjell ASA, Odfjell Seachem AS, Odfjell USA, Inc., Jo Tankers BV, Jo Tankers, Inc., and Tokyo Marine Co. Ltd. (collectively "Stolt-Nielsen") are engaged in a "global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws." Appellant's Br. 4. AnimalFeeds seeks to proceed on behalf of a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [Stolt-Nielsen] at any time during the period from August 1, 1998, to November 30, 2002." Claimants' Consolidated Demand for Class Arbitration, May 19, 2005, at 4.

AnimalFeeds initially filed suit in the United States District Court for the Eastern District of Pennsylvania on September 4, 2003. That action was transferred to the District of Connecticut pursuant to an order of the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407 (2000), consolidating "actions shar[ing] factual questions relating to the existence, scope and effect of an alleged conspiracy ***88** to fix the price of international shipments of liquid chemicals in the United States," *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 296 F.Supp.2d 1370, 1371 (2003). In the District of Connecticut, Stolt-Nielsen moved to compel arbitration. The district court denied the motion but we reversed, holding that the parties' transactions were governed by contracts with enforceable agreements to arbitrate and that the antitrust claims were arbitrable. *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir.2004).[FN1]

FN1. AnimalFeeds was not a named party in *JLM Industries,* which reversed a decision that had been entered by the District of Connecticut prior to *In re Parcel Tanker Shipping Services Antitrust Litigation*'s transfer and consolidation order. It is undisputed, however, that our decision in *JLM Industries* had the effect of requiring arbitration of AnimalFeeds's claims.

The parties then entered into an agreement stating, among other things, that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)." Agreement Regarding New York Arbitration Procedures for Putative Class Action Plaintiffs in Parcel Tanker Services Antitrust Matter ("Class Arbitration Agreement") 3.

Rule 3 provides:

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

> 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 16 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....
>
> 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.[FN2]

FN2. The Supplementary Rules were issued following the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452-53, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), which held that when parties agree to arbitrate, the question of whether the agreement permits class arbitration is one of contract interpretation to be determined by the arbitrators, not by a court.

American Arbitration Ass'n, Supplementary Rules for Class Arbitrations (2003) ("Supplementary Rules"), *available at* http:// www. adr. org/ sp. asp? id= 21936 (last visited October 17, 2008). Pursuant to the Class Arbitration Agreement, AnimalFeeds, together with several co-plaintiffs not parties to this appeal, filed a demand for class arbitration. An arbitration panel was appointed to decide the Clause Construction Award.

The arbitration panel was required to consider the arbitration clauses in two standard-form agreements known as the Vegoilvoy charter party and the Asbatankvoy charter party.[FN3] The Vegoilvoy ***89** agreement, which governs all transactions between AnimalFeeds and Stolt-Nielsen relevant to this appeal, contains the following broadly worded arbitration clause:

FN3. "A charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his." *Asoma Corp. v. SK Shipping Co.,* 467 F.3d 817, 823 (2d Cir.2006) (citations and internal quotation marks omitted); *see also* 2 Thomas J. Schoenbaum, Admiralty & Maritime Law § 11-1, at 2 (4th ed. 2004) ("The charter party is ... a specialized form of contract for the hire of an entire ship, specified by name."(footnote omitted)).

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

The Asbatankvoy agreement, which governs some relevant transactions between Stolt-Nielsen and other putative class members not parties to this appeal, contains a similar broadly worded arbitration clause.[FN4] Both agreements unambiguously mandate arbitration but are silent as to whether arbitration may proceed on behalf of a class.

FN4. The Asbatankvoy arbitration clause is reproduced in the district court's opin-

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

ion. *See* *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.,* 435 F.Supp.2d 382, 384 n. 1 (S.D.N.Y.2006).

The arbitration panel, tasked with deciding whether that silence permitted or precluded class arbitration, received evidence and briefing from both sides. AnimalFeeds and its co-plaintiffs argued that because the arbitration clauses were silent, arbitration on behalf of a class could proceed. They cited published clause construction awards under Rule 3 of the Supplementary Rules permitting class arbitration awards where the arbitration clause was silent. They also argued that public policy favored class arbitration and that the contracts' arbitration clauses would be unconscionable and unenforceable if they forbade class arbitration.

Stolt-Nielsen's position was that because the arbitration clauses were silent, the parties intended not to permit class arbitration. It cited several federal cases and arbitration decisions denying consolidation and class treatment of claims where the arbitration clause was silent. Stolt-Nielsen also argued that arbitration decisions cited by AnimalFeeds were inapposite because they were not made in the context of international maritime agreements, where parties have no expectation that arbitration will proceed on behalf of a class. In addition, Stolt-Nielsen offered extrinsic evidence regarding "the negotiating history and the context" of the arbitration agreements to "reinforce the conclusion that the parties did not intend ... to authorize class arbitration." Respondents' Opposition to Claimants' Motion for Clause Construction Award Permitting Class Arbitration ("Stolt-Nielsen's Arbitration Br.") 16. At oral argument before the arbitration panel, Stolt-Nielsen acknowledged that the interpretation of the contracts at issue here was a question of first impression.

On December 20, 2005, the arbitration panel issued a Clause Construction Award deciding that the agreements permit class arbitration.[FN5] The panel based its decision largely on the fact that in all twenty-one ***90** published clause construction awards issued under Rule 3 of the Supplementary Rules, the arbitrators had interpreted silent arbitration clauses to permit class arbitration. The panel acknowledged that none of those cases was decided in the context of an international maritime contract. It said that it was nonetheless persuaded to follow those clause construction awards because the contract language in the cited cases was similar to the language used in the charter parties, the arbitrators in those cases had rejected contract-interpretation arguments similar to the ones made by Stolt-Nielsen in this case, and Stolt-Nielsen had been unable to cite any arbitration decision under Rule 3 in which contractual silence had been construed to prohibit class arbitration.

> FN5. The panel did not certify a class or otherwise decide whether the arbitration would actually proceed as a class action. The panel's decision was limited to deciding a question of contract interpretation: whether the arbitration agreements permit class arbitration.

In addition, the panel distinguished Second Circuit case law prohibiting consolidation of claims when an arbitration agreement is silent, *see, e.g., United Kingdom v. Boeing Co.,* 998 F.2d 68, 74 (2d Cir.1993), reasoning that "consolidation of two distinct arbitrations under two distinct arbitration clauses raises a different situation from a class action." Clause Construction Award 6.

Lastly, the panel acknowledged that the arbitration clauses under consideration "are part of a long tradition of maritime arbitration peculiar to the international shipping industry." *Id.* It concluded nonetheless that Stolt-Nielsen's arguments regarding the negotiating history and context of the agreements did not establish that the parties intended to preclude class arbitration.

Stolt-Nielsen petitioned the district court to vacate the Clause Construction Award. The court granted the petition, concluding that the award was made in manifest disregard of the law. *Stolt-Nielsen SA v.*

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Animalfeeds Int'l Corp., 435 F.Supp.2d 382, 387 (S.D.N.Y.2006). According to the district court, the arbitrators "failed to make any meaningful choice-of-law analysis." *Id.* at 385. They therefore failed to recognize that the dispute was governed by federal maritime law, that federal maritime law requires that the interpretation of charter parties be dictated by custom and usage, and that Stolt-Nielsen had demonstrated that maritime arbitration clauses are never subject to class arbitration. *Id.* at 385-86. Even under state law, the district court said, the panel was required to interpret contracts in light of industry custom and practice. *Id.* at 386. Because these clearly established rules of law were presented to the panel and the panel failed to apply them, the district court held, the Clause Construction Award must be, and was, vacated. *Id.* at 387.

AnimalFeeds appeals.

DISCUSSION

I. Standard of Review

[1] We review *de novo* a district court's order vacating an arbitration award for manifest disregard of the law. *Hoeft v. MVL Group, Inc.,* 343 F.3d 57, 69 (2d Cir.2003).

II. Grounds for Vacating an Arbitration Award

[2] "It is well established that courts must grant an arbitration panel's decision great deference." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S,* 333 F.3d 383, 388 (2d Cir.2003). The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* (2006), allows vacatur of an arbitral award:

> (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;
>
> ***91** (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.

Id.§ 10(a).[FN6] We have also recognized that the district court may vacate an arbitral award that exhibits a "manifest disregard" of the law. *Duferco,* 333 F.3d at 388 (citing *Goldman v. Architectural Iron. Co.,* 306 F.3d 1214, 1216 (2d Cir.2002)); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.,* 304 F.3d 200, 208 (2d Cir.2002). We do not, however, "recognize manifest disregard of the *evidence* as proper ground for vacating an arbitrator's award." *Wallace v. Buttar,* 378 F.3d 182, 193 (2d Cir.2004) (citation and internal quotation marks omitted; emphasis added).

> FN6. Section 11 of the FAA, moreover, enumerates various circumstances in which the district court may "modify[ ] or correct[ ]" an arbitration award. 9 U.S.C. § 11.

III. Stolt-Nielsen's "Manifest Disregard" Claim

A. Legal Standards

[3] The party seeking to vacate an award on the basis of the arbitrator's alleged "manifest disregard" of the law bears a "heavy burden." *GMS Group, LLC v. Benderson,* 326 F.3d 75, 81 (2d Cir.2003). "Our review under the [judicially constructed] doctrine of manifest disregard is 'severely limited.' " *Duferco,* 333 F.3d at 389 (quoting *India v. Cargill Inc.,* 867 F.2d 130, 133 (2d Cir.1989)). "It is highly deferential to the arbitral award and obtaining judicial relief for arbitrators' manifest disregard of the law is rare." *Id.*[FN7] The "manifest disregard" doctrine allows a reviewing court to vacate an arbitral award only in "those exceedingly rare instances

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

where some egregious impropriety***92** on the part of the arbitrators is apparent." *Id.*

FN7. The *Duferco* court made this point in quantitative terms, noting that between "1960 [and the 2003 *Duferco* decision] we have vacated some part or all of an arbitral award for manifest disregard in ... four out of at least 48 cases where we applied the standard." *Duferco,* 333 F.3d at 389 (collecting cases). The fact that a finding of manifest disregard is "exceedingly rare," *id.,* does not, of course, mean that this appeal does not provide us with just such a case. But to update the observation made by the *Duferco* court, since *Duferco,* we have vacated one award, and remanded two others for clarification. See *Rich v. Spartis,* 516 F.3d 75 (2d Cir.2008); *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC,* 497 F.3d 133 (2d Cir.2007); *Hardy v. Walsh Manning Sec., L.L.C.,* 341 F.3d 126 (2d Cir.2003). We count fifteen instances during the same period in which we have declined to do either. *See Parnell v. Tremont Capital Mgmt. Corp.,* 280 Fed.Appx. 76 (2d Cir.2008) (summary order); *Metlife Sec., Inc. v. Bedford,* 254 Fed.Appx. 77 (2d Cir.2007) (summary order); *Appel Corp. v. Katz,* 217 Fed.Appx. 3 (2d Cir.2007) (summary order); *Nicholls v. Brookdale Univ. Hosp. & Med. Ctr.,* 204 Fed.Appx. 40 (2d Cir.2006) (summary order); *D.H. Blair & Co. v. Gottdiener,* 462 F.3d 95 (2d Cir.2006); *IMC Mar. Group, Inc. v. Russian Farm Cmty. Project,* 167 Fed.Appx. 845 (2d Cir.2006) (summary order); *Nutrition 21, Inc. v. Wertheim,* 150 Fed.Appx. 108 (2d Cir.2005) (summary order); *Bear, Stearns & Co. v. 1109580 Ontario, Inc.,* 409 F.3d 87 (2d Cir.2005); *Stone & Webster, Inc. v. Triplefine Int'l Corp.,* 118 Fed.Appx. 546 (2d Cir.2004) (summary order); *Tobjy v. Citicorp/Inv. Servs.,* 111 Fed.Appx. 640 (2d Cir.2004) (summary order); *Wallace v. Buttar,* 378 F.3d 182 (2d Cir.2004); *Ibar Ltd. v. Am. Bureau of Shipping,* 92 Fed.Appx. 820 (2d Cir.2004) (summary order); *Carpenter v. Potter,* 91 Fed.Appx. 705 (2d Cir.2003) (summary order); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.,* 344 F.3d 255 (2d Cir.2003); *Hoeft v. MVL Group, Inc.,* 343 F.3d 57 (2d Cir.2003).

Vacatur of an arbitral award is unusual for good reason: The parties agreed to submit their dispute to arbitration, more likely than not to enhance efficiency, to reduce costs, or to maintain control over who would settle their disputes and how-or some combination thereof. *See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC,* 497 F.3d 133, 138-39 (2d Cir.2007); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.,* 103 F.3d 9, 12 (2d Cir.1997); *see also* Note, *Judicial Review of Arbitration Awards on the Merits,* 63 Harv. L.Rev. 681, 681-82 (1950). "To interfere with this process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it 'the commencement, not the end, of litigation.' " *Duferco,* 333 F.3d at 389 (quoting *Burchell v. Marsh,* 58 U.S. (17 How.) 344, 349, 15 L.Ed. 96 (1854)). It would fail to "maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assocs., L.L.C. v. Mattel, Inc.,* --- U.S. ----, 128 S.Ct. 1396, 1405, 170 L.Ed.2d 254 (2008).

In this light, "manifest disregard" has been interpreted "clearly [to] mean[ ] more than error or misunderstanding with respect to the law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 808 F.2d 930, 933 (2d Cir.1986). "We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." *Id.* at 934.

> A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award should be 13 enforced, des-

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

> pite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.

Wallace, 378 F.3d at 190 (2d Cir.2004) (citation and internal quotation marks omitted; emphasis added in *Wallace*).

In the context of contract interpretation, we are required to confirm arbitration awards despite "serious reservations about the soundness of the arbitrator's reading of th[e] contract." *Westerbeke Corp.,* 304 F.3d at 216 n. 10 (2d Cir.2002). "Whether the arbitrators misconstrued a contract is not open to judicial review." *Bernhardt v. Polygraphic Co. of Am.,* 350 U.S. 198, 203 n. 4, 76 S.Ct. 273, 100 L.Ed. 199 (1956). "Whatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contracts do not appear one of them." *I/S Stavborg v. Nat'l Metal Converters, Inc.,* 500 F.2d 424, 432 (2d Cir.1974).

The concept of "manifest disregard" is well illustrated by *New York Telephone Co. v. Communications Workers of America Local 1100,* 256 F.3d 89 (2d Cir.2001) (per curiam). There the arbitrator recognized binding Second Circuit case law but deliberately refused to apply it, saying-no doubt to the astonishment of the parties-" 'Perhaps it is time for a new court decision.' " *Id.* at 91. Because the arbitrator explicitly rejected controlling precedent, we concluded that the arbitral decision was rendered in manifest disregard of the law. *Id.* at 93.

"The manifest disregard doctrine is not confined to that rare case in which the arbitrator provides us with explicit acknowledgment of wrongful conduct, however." *Westerbeke,* 304 F.3d at 218 (citing *Halligan v. Piper Jaffray, Inc.,* 148 F.3d 197, 204 (2d Cir.1998) ("[W]e doubt whether even under a strict construction of the meaning of manifest disregard, it is necessary for arbitrators to state that they are deliberately ignoring the law."), *cert. denied,* 526 U.S. 1034, 119 S.Ct. 1286, 143 L.Ed.2d 378 (1999)). If the arbitrator's ***93** decision "strains credulity" or "does not rise to the standard of barely colorable," *id.*(citations, internal quotation marks, and brackets omitted), a court may conclude that the arbitrator "willfully flouted the governing law by refusing to apply it," *id.* at 217.

[4] There are three components to our application of the "manifest disregard" standard.

> First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard.
>
> Second, once it is determined that the law is clear and plainly applicable, we must find that the law was in fact improperly applied, leading to an erroneous outcome. We will, of course, not vacate an arbitral award for an erroneous application of the law if a proper application of law would have yielded the same result. In the same vein, where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome. Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case.
>
> Third, once the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him. In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration. Absent this, we will infer knowledge and intentionality on the part of the arbitrator only if we find an error that is so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator.

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Duferco, 333 F.3d at 389-90 (citations omitted).

B. The Effect of Hall Street on the "Manifest Disregard" Doctrine

We pause to consider whether a recent Supreme Court decision, *Hall Street Associates, L.L.C. v. Mattel, Inc.,* --- U.S. ----, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), affects the scope or vitality of the "manifest disregard" doctrine. See Thomas E.L. Dewey & Kara Siegel, *Room for Error: 'Hall Street' and the Shrinking Scope of Judicial Review of Arbitral Awards,* N.Y.L.J., May 15, 2008, at 24 (commenting that *Hall Street* "appeared to question the validity" of the manifest disregard doctrine).

There, the parties had entered into an arbitration agreement that, unlike the FAA, provided for a federal court's *de novo* review of the arbitrator's conclusions of law. *Hall Street,* 128 S.Ct. at 1400-01. The Court rejected the parties' attempt to contract around the FAA for expanded judicial review of arbitration awards, concluding that the grounds for vacatur of an arbitration award set forth in the FAA, 9 U.S.C. § 10, are "exclusive." *Hall Street,* 128 S.Ct. at 1401, 1403. Although the "manifest disregard" doctrine was not itself at issue, the *Hall Street* Court nonetheless commented on its origins:

> The *Wilko* Court ... remarked (citing FAA § 10) that "[p]ower to vacate an [arbitration] award is limited," and went on to say that "the interpretations of the ***94** law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation."

Hall Street, 128 S.Ct. at 1403 (quoting *Wilko,* 346 U.S. at 436-37, 74 S.Ct. 182) (citations omitted) (second, third, and fourth alterations in *Hall Street*).

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."

Id. at 1404 (citations omitted). The Court declined to resolve that question explicitly, noting instead that it had never indicated, in *Wilko* or elsewhere, that "manifest disregard" was an independent basis for vacatur outside the grounds provided in section 10 of the FAA. *See id.*

In the short time since *Hall Street* was decided, courts have begun to grapple with its implications for the "manifest disregard" doctrine. Some have concluded or suggested that the doctrine simply does not survive. *See Ramos-Santiago v. United Parcel Service,* 524 F.3d 120, 124 n. 3 (1st Cir.2008) (dicta); *Robert Lewis Rosen Assocs., Ltd. v. Webb,* 566 F.Supp.2d 228, 233 (S.D.N.Y.2008); *Prime Therapeutics LLC v. Omnicare, Inc.,* 555 F.Supp.2d 993, 999 (D.Minn.2008); *Hereford v. D.R. Horton, Inc.,* ---So.2d ----, No. 1070396, 2008 WL 4097594, *5, 2008 Ala. LEXIS 186, *12-*13 (Ala. Sept. 5, 2008). Others think that "manifest disregard," reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards. *See Mastec N. Am., Inc. v. MSE Power Sys., Inc.,* No. 1:08-cv-168, 2008 WL 2704912, at *3, 2008 U.S. Dist. LEXIS 52205, at *8-9 (N.D.N.Y. July 8, 2008); *Chase Bank USA, N.A. v. Hale,* 19 Misc.3d 975, 859 N.Y.S.2d 342, 349 (2008).

We agree with those courts that take the latter approach. The *Hall Street* Court held that the FAA sets forth the "exclusive" grounds for vacating an arbitration award. *Hall Street,* 128 S.Ct. at 1403. That holding is undeniably inconsistent with some dicta by this Court treating the "manifest disregard" standard as a ground for vacatur entirely separate from those enumerated in the FAA. *See, e.g., Hoeft,* 343 F.3d at 64 (describing manifest disregard as "an additional ground not prescribed in the [FAA]"); *Duferco,* 333 F.3d at 389 (observing that

the doctrine's use is limited to instances "where none of the provisions of the FAA apply"); *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 821 (2d Cir.1997) (referring to the doctrine as "judicially-created"), *cert. denied,* 522 U.S. 1049, 118 S.Ct. 695, 139 L.Ed.2d 639 (1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 808 F.2d at 933 (same).[FN8] But the *Hall Street* Court also speculated that "the term 'manifest ***95** disregard' ... merely referred to the § 10 grounds collectively, rather than adding to them"-or as "shorthand for § 10(a)(3) or § 10(a)(4)." *Hall Street,* 128 S.Ct. at 1404. It did not, we think, abrogate the "manifest disregard" doctrine altogether.[FN9]

FN8. *But see* *I/S Stavborg,* 500 F.2d at 431 (2d Cir.1974) ("But perhaps the rubric 'manifest disregard' is after all not to be given independent significance; rather it is to be interpreted only in the context of the specific narrow provisions of 9 U.S.C. §§ 10 & 11...." (footnote omitted)); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 808 (2d Cir.) ("It is true that an award may be vacated where the arbitrators have 'exceeded their powers.' 9 U.S.C. § 10(d). Apparently relying upon this phrase, the Supreme Court in *Wilko v. Swan* suggested that an award may be vacated if in 'manifest disregard' of the law."), *cert. denied,* 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960) (internal citation omitted).

FN9. *Cf.* *State Employees Bargaining Agent Coal. v. Rowland,* 494 F.3d 71, 84, 86 (2d Cir.2007) (adhering to Circuit precedent despite the Supreme Court having "cryptically cast doubt" on prior holdings, noting that "[w]e are bound by our own precedent unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc* " (citation and internal quotation marks omitted)).

We agree with the Seventh Circuit's view expressed before *Hall Street* was decided:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.-conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration ... the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause.

Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir.) (citations omitted), *cert. denied,* 549 U.S. 1047, 127 S.Ct. 582, 166 L.Ed.2d 458 (2006). This observation is entirely consistent with *Hall Street.* And it reinforces our own pre- *Hall Street* statements that our review for manifest disregard is "severely limited," "highly deferential," and confined to "those exceedingly rare instances" of "egregious impropriety on the part of the arbitrators." *Duferco,* 333 F.3d at 389.

Like the Seventh Circuit, we view the "manifest disregard" doctrine, and the FAA itself, as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrators' decision. We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which "the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

refusing to apply it." *Westerbeke,* 304 F.3d at 217. At that point the arbitrators have "failed to interpret the contract at all," *Wise,* 450 F.3d at 269, for parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby "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)(4).

C. Analysis of Stolt-Nielsen's "Manifest Disregard" Claim

[5] If we were of the view that *Hall Street,* decided after the district court granted the petition in this case, eliminated "manifest disregard" review altogether, our inquiry would be at an end. We would be required to send this matter back to the district court for it to dismiss the petition on that ground. But in light of our conclusion that the "manifest disregard" doctrine survives *Hall Street,* we must instead decide***96** whether the district court's finding of "manifest disregard" was correct.FN10

> FN10. We undertake this task cognizant of the fact that the district court did not have the benefit of the *Hall Street* decision and its requirement that courts adhere scrupulously to a narrow, FAA-tethered view of their authority to vacate arbitration awards based on manifest disregard of the law.

1. Review of the District Court's Opinion. According to the district court, the arbitration panel went astray when it "failed to make any meaningful choice-of-law analysis." *Stolt-Nielsen,* 435 F.Supp.2d at 385.

> In actuality, the choice of law rules in this situation are well established and clear cut. Because the arbitration clauses here in issue are part of maritime contracts, they are controlled in the first instance by federal maritime law.

Id. Because the arbitrators failed to recognize that the dispute was governed by federal maritime law, the district court reasoned, they ignored the "established rule of maritime law" that the interpretation of contracts "is ... dictated by custom and usage." *Id.* at 385-86. Even under state law, the arbitral panel was required to interpret contracts in light of "industry custom and practice." *Id.* at 386 (citation and internal quotation marks omitted). The district court concluded that, had the arbitration panel followed these well-established canons,

> the [p]anel would necessarily have found for Stolt, since, as the [p]anel itself noted, Stolt presented uncontested evidence that the clauses here in question had *never* been the subject of class action arbitration.

Id. (emphasis in original).

Had the district court been charged with reviewing the arbitration panel's decision *de novo,* we might well find its analysis persuasive. *See Westerbeke,* 304 F.3d at 216 n. 10. But the errors it identified do not, in our view, rise to the level of manifest disregard of the law.

a. Choice of Law

First, the arbitral panel did not "manifestly disregard" the law in engaging in its choice-of-law analysis. *See Stolt-Nielsen,* 435 F.Supp.2d at 385-86.

The "manifest disregard" standard requires that the arbitrators be "fully aware of the existence of a clearly defined governing legal principle, but refuse[ ] to apply it, in effect, ignoring it." *Duferco,* 333 F.3d at 389. "In determining an arbitrator's awareness of the law, we impute only knowledge of governing law identified by the parties to the arbitration." *Id.* at 390.

Stolt-Nielsen's brief to the arbitration panel referred to choice-of-law principles in a single footnote without citing supporting case law. It then assured the panel that the issue was immaterial:

> Claimants argue that the law of New York gov-

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

> erns these contracts.... We believe, to the contrary, that because these are federal maritime contracts, federal maritime law should govern. The Tribunal need not decide this issue, however, because the analysis is the same under either.

Stolt-Nielsen's Arbitration Br. 7 n. 13. This concession bars us from concluding that the panel manifestly disregarded the law by not engaging in a choice-of-law analysis and expressly identifying federal maritime law as governing the interpretation of the charter party language.[FN11]

> FN11. Had the arbitrators looked to the charter parties themselves for a choice-of-law provision, as of course they may have, they would have found none. *See* *Stolt-Nielsen,* 435 F.Supp.2d at 385 n. 2.

[6] We are not convinced that the arbitral panel, in any event, "failed to make ***97** any meaningful choice-of-law analysis." Even where an arbitrator's explanation for an award is deficient, we must confirm it if a justifiable ground for the decision can be inferred from the record. *See* *Bear, Stearns & Co. v. 1109580 Ontario, Inc.,* 409 F.3d 87, 91 (2d Cir.2005); *Duferco,* 333 F.3d at 390; *see also* *Wallace,* 378 F.3d at 190 (2d Cir.2004) ("[A] court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney."). The first paragraph of the arbitrators' discussion of the law states that they "must look to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or to preclude class action. This is ... consistent with New York law ... and with federal maritime law." Clause Construction Award 4. Although the panel did not use the term "choice of law," it is a plausible reading 16 of the award decision that the panel intended to interpret the charter parties according to the rules of both New York State law and federal maritime law-each of which, the panel thought, would render the same result.[FN12] That is what Stolt-Nielsen had asked it to do.

> FN12. We find it instructive that under New York choice-of-law principles,
>
> > the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws. It is only when it can be said that there is no actual conflict that New York will dispense with a choice of law analysis.
>
> *Fieger v. Pitney Bowes Credit Corp.,* 251 F.3d 386, 393 (2d Cir.2001) (citations and internal quotation marks omitted). Another plausible reading of the arbitration award, then, is that the panel concluded there was no need to make a "choice of law" between federal maritime law and New York law because there was no actual conflict of laws in the case before it.

b. Federal Maritime Rule of Construction

Second, the arbitration panel did not manifestly disregard the law with respect to an established "rule" of federal maritime law. *See* *Stolt-Nielsen,* 435 F.Supp.2d at 386.

Although the district court's opinion states that the interpretation of maritime contracts "is very much dictated by custom and usage," *id.* at 385-86, custom and usage is more of a guide than a rule, *see* *Great Circle Lines, Ltd. v. Matheson & Co.,* 681 F.2d 121, 125 (2d Cir.1982) ("Certain long-standing customs of the shipping industry are crucial factors to be considered when deciding whether there has been a meeting of the minds on a maritime contract."); *Schoonmaker-Conners Co. v. Lambert Transp. Co.,* 269 F. 583, 585 (2d Cir.1920) ("While maritime contracts or their interpretation are probably more subject to the influence of usage or general custom than most other agreements, yet they are and a charter is a contract like another, subject to the same general rules and leading to the same liabilities."); *Samsun Corp. v. Khozestan*

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Mashine Kar Co., 926 F.Supp. 436, 439 (S.D.N.Y.1996) ("[E]stablished practices and customs of the shipping industry inform the court's analysis of what the parties agreed to.").FN13 Thus, although the custom and usage rule is "clear and plainly applicable" as a general matter in disputes over the meaning of charter parties, *Duferco,* 333 F.3d at 390, it should "be considered," "influence" interpretation,***98** and "inform the court's analysis." It does not govern the outcome of each case.

> FN13. According to Stolt-Nielsen's submission to the arbitration panel, "both New York state law and federal maritime law *allow* a court or arbitrator to examine the negotiating history and the context in which the contract was executed in order to ascertain the parties' intent." Stolt-Nielsen's Arbitration Br. 15 (emphasis added).

Indeed, Stolt-Nielsen cites no decision holding that a federal maritime rule of construction specifically precludes class arbitration where a charter party's arbitration clause is silent. *Cf. Bazzle v. Green Tree Fin. Corp.* ("*Bazzle I* "), 351 S.C. 244, 569 S.E.2d 349, 360 (2002) (holding as a matter of state law that "class-wide arbitration may be ordered when the arbitration agreement is silent"), *vacated on other grounds,* 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). To the contrary, during oral argument before the arbitration panel, counsel for Stolt-Nielsen conceded that the interpretation of the charter parties in this case was an issue of first impression.

Stolt-Nielsen's challenge to the Clause Construction Award therefore boils down to an argument that the arbitration panel misinterpreted the arbitration clauses before it because the panel misapplied the "custom and usage" rule. But we have identified an arbitrator's interpretation of a contract's terms as an area we are particularly loath to disturb. *See Westerbeke,* 304 F.3d at 214 ("The arbitrator's factual findings and contractual interpretation are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law."); *id.* at 222 (holding that "vacatur for manifest disregard of a commercial contract is appropriate only if the arbitral award contradicts an *express* and *unambiguous* term of the contract or if the award so far departs from the terms of the agreement that it is not even arguably derived from the contract" (emphases added)); *John T. Brady & Co. v. Form-Eze Sys., Inc.,* 623 F.2d 261, 264 (2d Cir.) ("This court has generally refused to second guess an arbitrator's resolution of a contract dispute."), *cert. denied,* 449 U.S. 1062, 101 S.Ct. 786, 66 L.Ed.2d 605 (1980).

As for whether the panel misapplied the "custom and usage" rule, we have held that "the misapplication ... of ... rules of contract interpretation does not rise to the stature of a 'manifest disregard' of law." *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 808 (2d Cir.), *cert. denied,* 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960). And determinations of custom and usage are findings of fact, *Mentor Ins. Co. (U.K.) v. Brannkasse,* 996 F.2d 506, 513 (2d Cir.1993), which federal courts may not review even for manifest disregard, *Wallace,* 378 F.3d at 193.

The arbitration panel, after summarizing Stolt-Nielsen's argument with respect to custom and usage, "acknowledge[d] the forcefulness with which [it was] presented," but concluded that it failed to "establish that the parties to the charter agreements intended to preclude class arbitration." Clause Construction Award 7. The panel thus considered Stolt-Nielsen's arguments and found them unpersuasive. Its conclusion does not "contradict[ ] an express and unambiguous term of the contract or ... so far depart[ ] from the terms of the agreement that it is not even arguably derived from the contract." *Westerbeke,* 304 F.3d at 222. It therefore did not evidence manifest disregard of the law.

c. State Law

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Third, the arbitration panel did not manifestly disregard New York State law. *See* *Stolt-Nielsen,* 435 F.Supp.2d at 387.

The district court noted that New York State law, much like federal maritime law, requires courts to interpret ambiguous contracts by reference to “industry custom and practice,” *id.*(citation and internal quotation marks omitted); it takes a ***99** “narrow view of what can be read into a contract by implication,” *id.* at 387. The district court concluded that to whatever extent state law applied, it would require the arbitration panel to construe the arbitration clauses not to permit arbitration on behalf of a class. *Id.*

We agree with the district court's observation that state law follows a “custom and practice” canon of construction where the terms of a contract are ambiguous. *See* *Evans v. Famous Music Corp.,* 1 N.Y.3d 452, 459-60, 775 N.Y.S.2d 757, 762, 807 N.E.2d 869, 873 (2004).[FN14] But it is also state law that the courts'

FN14. *Evans* was cited in AnimalFeeds's arbitration brief, in the Clause Construction Award, and in the district court's opinion. *See* *Stolt-Nielsen,* 435 F.Supp.2d at 386.

> role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further. This may be so even if the contract is silent on the disputed issue. *Id.* at 458, 775 N.Y.S.2d 757, 807 N.E.2d 869.

> Here, the arbitration panel may have concluded that even though the arbitration clauses are silent on the disputed issue of whether class arbitration is permitted, their silence bespeaks an intent not to preclude class arbitration. That reading, which is at least “colorable,” is consistent with *Evans.*

The district court also cited myriad New York cases that take a narrow view of what can be read into a contract or arbitration clause by implication. *See* *Stolt-Nielsen,* 435 F.Supp.2d at 386-87. But none of these cases purports to establish a *rule* regarding the interpretation of an arbitration clause that is silent on the issue of class arbitration. Indeed, the cases largely beg the question whether contractual silence means that the parties did not intend to allow class actions or did not intend to bar them. Because no state-law rule of construction clearly governs the question of whether class arbitration is permitted by an arbitration clause that is silent on the subject, the arbitrators' decision construing such silence to permit class arbitration in this case is not in manifest disregard of the law. *See* *Cheng v. Oxford Health Plans, Inc.,* 45 A.D.3d 356, 357, 846 N.Y.S.2d 16, 17-18 (1st Dep't 2007) (per curiam) (determining arbitration panel did not exhibit manifest disregard of law when it concluded that “defendants could not successfully demonstrate that New York law prohibited class arbitrations”).

2. *Stolt-Nielsen's* Glencore/Boeing *Argument.* The district court did not reach another argument made by Stolt-Nielsen in support of vacating the Clause Construction Award for manifest disregard of the law. According to Stolt-Nielsen, this court's decisions in *Glencore, Ltd. v. Schnitzer Steel Products,* 189 F.3d 264 (2d Cir.1999), and *United Kingdom v. Boeing Co.,* 998 F.2d 68 (2d Cir.1993), along with the Seventh Circuit's decision in *Champ v. Siegel Trading Co.,* 55 F.3d 269 (7th Cir.1995), prohibit class arbitration unless expressly provided for in an arbitration agreement. These cases do lend support to Stolt-Nielsen's underlying argument regarding the correct interpretation of the arbitration clauses at issue. We do not think, however, that they establish law that is so clearly and plainly applicable that we are compelled to conclude that the arbitration panel willfully ignored it, thereby manifestly disregarding the law.

In *Boeing,* the United Kingdom was a party to two distinct contracts with two different parties giving rise to two separate arbitration proceedings. *Boeing,* 998 F.2d at 69. Because the two disputes***100**

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

arose from a single incident, the district court, on the motion of the United Kingdom, ordered consolidation of the arbitration proceedings even though neither arbitration clause expressly permitted consolidation. *Id.* We reversed, because "a district court cannot order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such arbitration." *Id.*

The facts of *Glencore* are similar. The petitioner was involved in two separate arbitration proceedings arising from separate contracts with two different parties. *Glencore,* 189 F.3d at 265-66. The district court in that case refused to consolidate the arbitration proceedings but ordered a joint hearing. *Id.* at 266. Again we reversed, because " *Boeing*'s conclusion that there is no source of authority in either the FAA or the Federal Rules of Civil Procedure for the district court to order consolidation absent authority granted by the contracts giving rise to the arbitrations applies with equal force to a court's order of joint hearing." *Id.* at 267.

In *Champ,* the Seventh Circuit affirmed a district court's order denying class arbitration where the arbitration agreements were silent on that issue. *Champ,* 55 F.3d at 277. The court relied in large part on our decision in *Boeing* prohibiting consolidation under such circumstances; it "f[ou]nd no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275.

These decisions are not binding in this case. After they were decided, the Supreme Court ruled in *Green Tree Financial Corp. v. Bazzle* (" *Bazzle II* "), 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), that when the parties agree to arbitrate, the question whether the agreement permits class arbitration is generally one of contract interpretation to be determined by the arbitrators, not by the court. *Id.* at 452-53, 123 S.Ct. 2402. *Boeing, Glencore*, and *Champ* had been grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause. *See Glencore,* 189 F.3d at 267; *Champ,* 55 F.3d at 275; *Boeing,* 998 F.2d at 71. *Bazzle II* abrogated those decisions to the extent that they read the FAA to prohibit such proceedings. *See Bazzle II,* 539 U.S. at 454-55 (Stevens, J., concurring) ("[t]here is nothing in the Federal Arbitration Act that precludes ... the Supreme Court of South Carolina" from determining "as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement"). After *Bazzle II,* arbitrators must approach such questions as issues of contract interpretation to be decided under the relevant substantive contract law. *See id.* at 450, 123 S.Ct. 2402 (noting that state law normally governs contract interpretation).

Boeing, Glencore, and *Champ* are instructive insofar as they view the silence of an arbitration clause regarding consolidation, joint hearings, and class arbitration as disclosing the parties' intent not to permit such proceedings. *See Glencore,* 189 F.3d at 267 ("There is nothing in the terms of the agreements before the district court that provided for joint hearing the standard of barely colorable."); *Champ,* 55 F.3d at 275 ("The parties' arbitration agreement makes no mention of class arbitration."); *Boeing,* 998 F.2d at 74 ("If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are ***101** a party."). But they do not represent a governing rule of contract interpretation under federal maritime law or the law of New York. And it is the governing rules of contract interpretation that arbitrators must consult according to *Bazzle II.*

As noted, Stolt-Nielsen has cited no federal maritime law or New York State law establishing a rule of construction prohibiting class arbitration where the arbitration clause is silent on that issue.[FN15] The arbitration panel's decision to construe the contract language at issue here to permit class arbitra-

tion was therefore not in manifest disregard of the law.

> FN15. Nor is *Champ* adhered to in every jurisdiction. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?,* 42 Wm. & Mary L.Rev. 1, 67-69 & n. 260 (2000)(noting that state courts in California and Pennsylvania have allowed class arbitration "even though the arbitration clause is silent"); *see also* *Keating v. Superior Court,* 31 Cal.3d 584, 613, 183 Cal.Rptr. 360, 378, 645 P.2d 1192, 1210 (1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc.,* 408 Pa.Super. 286, 296, 596 A.2d 860, 864-65 (1991).

IV. Stolt-Nielsen's Claim That the Arbitrators Exceeded Their Authority

[7] In addition to asserting that the arbitration panel acted in manifest disregard of the law, Stolt-Nielsen contends that the arbitration panel "exceeded its authority." Appellees' Br. 18. Although the district court did not reach this claim, it was preserved for appeal.FN16

> FN16. We perceive no need to remand for the district court to consider this claim in the first instance, as it has been briefed, entails no findings of fact, and is a pure question of law we review *de novo*. *See* *Ohio Bureau of Employment Servs. v. Hodory,* 431 U.S. 471, 482, 97 S.Ct. 1898, 52 L.Ed.2d 513 (1977); *United States v. Canfield,* 212 F.3d 713, 721 (2d Cir.2000).

The FAA provides for vacatur of arbitration awards "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). We may disregard, in this instance, the post- *Hall Street* view that arbitrators may "exceed their powers" when they manifestly disregard the law; we have rejected Stolt-Nielsen's "manifest disregard" claim. The remainder of "[o]ur inquiry under § 10(a)(4)... focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa,* 121 F.3d at 824; *see also* *Hoeft,* 343 F.3d at 71; *Westerbeke,* 304 F.3d at 219-20.

Here, the arbitration panel clearly had the power to *reach* the issue of whether the Vegoilvoy agreement permitted class arbitration. The parties expressly agreed that the arbitration panel "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations," Class Arbitration Agreement 3. Rule 3 of the Supplementary Rules provides that "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." Because the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses permitted class arbitration, the arbitration panel did not exceed its authority in deciding that issue-irrespective of whether it decided the issue correctly.

***102 CONCLUSION**

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded to the district court with instructions to deny the petition to vacate.FN17

> FN17. Because we reverse the district court's "manifest disregard" holding and reject Stolt-Nielsen's claim that the arbitrators exceeded their authority, we need not and do not consider AnimalFeeds's assertion that denial of the petition is required on public policy grounds, *viz.,* that

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

class arbitration is necessary to vindicate important statutory rights under the Sherman Antitrust Act.

C.A.2 (N.Y.),2008.
Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.
548 F.3d 85, 2008-2 Trade Cases P 76,355

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Exhibit C

Supreme Court, U.S.
FILED

No. 02-634 OCT 23 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS & POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

October 23, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings are listed in the caption of the decision of the Supreme Court of South Carolina. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioner is a wholly-owned subsidiary of Conseco, Inc., an Indiana corporation whose stock is publicly traded. No publicly owned company owns ten percent or more of the stock of Conseco, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON AN ARBITRATION AGREEMENT THAT DOES NOT PROVIDE FOR CLASS-ACTION ARBITRATION	14
A. Courts Adopting The Majority Approach Have Held That The FAA Prohibits Class-Action Or Consolidated Arbitration Where The Individual Arbitration Agreement Does Not Provide For Either	15

TABLE OF CONTENTS—continued

Page

B. Courts Applying The Minority Approach, Including The Court Below, Have Held That The FAA Permits Discretionary Judgments To Justify Class-Wide Or Consolidated Arbitration Even When An Arbitration Agreement Does Not Provide For Such Procedures 20

C. This Case Presents An Appropriate Vehicle For Resolving This Conflict Among The Federal And State Courts 23

II. THE ISSUE WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON A "SILENT" ARBITRATION AGREEMENT PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. 265 (1995)........ 4, 5
American Centennial Ins. Co. v. *National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991)........ 16
Baesler v. *Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990)........ 16, 18
Bischoff v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002)........ 28
Blue Cross of Cal. v. *Superior Court*, 67 Cal. App. 4th 42 (1998)........ 12, 21, 22, 27
Champ v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995)........ 12, 15, 16, 17, 26
Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975)........ 25
Connecticut Gen. Life Ins. Co. v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771 (7th Cir. 2000)........ 17
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985)........ 4, 5, 26
Del E. Webb Constr. v. *Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987)........ 16
Dickler v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992)........ 23
Doctor's Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996)........ 5, 24, 29
Dominium Austin Partners, LLC v. *Emerson*, 248 F.3d 720 (8th Cir. 2001)........ 18, 24
E.E.O.C. v. *Waffle House, Inc.*, 122 S. Ct. 754 (2002)........ 5
Eastman v. *Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856 (Wis. Ct. App. May 29, 2002)........ 27
Episcopal Hous. Corp. v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979)........ 25

TABLE OF AUTHORITIES—continued

Page

First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995) ... 5, 26, 29

Gammaro v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 95 (8th Cir. 1994) ... 18

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ... 4

Glencore, Ltd. v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264 (2d Cir. 1999) ... 17

Government of U.K. v. *Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) ... 16, 17, 25

Gray v. *Conseco, Inc.*, No. SACV000322, 2001 WL 1081347 (C.D. Cal. Sept. 6, 2001) ... 28

Herrington v. *Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) ... 18

Howard v. *KPMG*, 977 F. Supp. 654 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 844 (2d Cir. 1999), *available at* 1999 WL 265022 ... 18

Iowa Grain Co. v. *Brown*, 171 F.3d 504 (7th Cir. 1999) ... 16

Johnson v. *West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) ... 18

Keating v. *Superior Ct.*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984) ... 12, 21

Lackey v. *Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998) ... 9

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) ... 5, 29

McCarthy v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852 (N.D. Cal., July 19, 1994) ... 28

TABLE OF AUTHORITIES—continued

Page

Med Ctr. Cars, Inc. v. *Smith*, 727 So. 2d 9 (Ala. 1998) 18, 19

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 5, 26

New England Energy Inc. v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) 22, 23, 29

Perry v. *Thomas*, 482 U.S. 483 (1987) 24

Powertel, Inc. v. *Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) 19

Protective Life Ins. Corp. v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989) 16

Salvano v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298 (N.Y. 1995) 17

Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 4, 14, 28

Stein v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) 19

Volt Info. Scis. Inc. v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) 4, 5, 12, 24, 29

Weyerhauser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984) 16

STATUTES

9 U.S.C. §§ 1-16 2

§ 2 ..... 2, 4

§ 4 30

S.C. Code Ann. § 37-10-102(a) 7

§ 37-10-105 7

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES Page

Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, & Clarifying Arbitration Law*, 2001 J. Disp. Resol. 1 27

Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695 27

IN THE

Supreme Court of the United States

No. 02-

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

Petitioner Green Tree Financial Corp. ("Green Tree") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision and judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is published at 569 S.E.2d 349 (S.C. 2002) and appears in the Appendix of this Petition ("Pet. App.") at 1a-26a. The South Carolina Court of Common Pleas' Order confirming the arbitral award and denying Green Tree's motion to vacate in *Bazzle* v. *Green Tree Financial Corp.* is unpublished and

appears at Pet. App. 27a-35a. The South Carolina Court of Common Pleas' Order confirming the final award in arbitration and denying Green Tree's motion to vacate in *Lackey* v. *Green Tree Financial Corp.* is unpublished and appears at Pet. App. 36a-54a. The final order and award in arbitration in *Bazzle* appears at Pet. App. 55a-81a, and the final order and award in arbitration in *Lackey* appears at Pet. App. 82a-109a.

JURISDICTION

The Supreme Court of South Carolina entered its final judgment on August 26, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. In particular, Section 2 of the FAA, 9 U.S.C. § 2, provides that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

STATEMENT OF THE CASE

In its decision below, the Supreme Court of South Carolina rejected Green Tree's challenge under the FAA to two interrelated class-action arbitration awards. Those two awards require Green Tree to pay nearly $27 million in statutory damages, attorney's fees and costs to two classes consisting of a total of more than 3,700 individuals. Green Tree challenged those arbitral awards in the Supreme Court of South Carolina because the arbitration agreement underlying them does not provide for class-action arbitration, and the FAA does not permit class-action procedures to be superimposed onto that arbitration agreement. In affirming these awards, the Supreme Court of South Carolina rejected that showing and issued a decision that deepened an already

mature judicial conflict on the question whether the FAA permits class-action procedures to be engrafted onto an arbitration agreement that does not, by its terms, provide for class-action arbitration.

The Supreme Court of South Carolina acknowledged that, on one side of this conflict, a majority of the federal courts of appeals have held that class-wide or consolidated arbitration proceedings cannot be imposed on an arbitration agreement that is "silent" as to those issues. Pet. App. 12a-13a (analyzing *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995)). The decision below also recognized that, on the other side of the conflict, the California Supreme Court and its appellate courts have ruled that class-action procedures can be imposed on arbitration agreements that are "silent" regarding the availability of class-action arbitration. Pet. App. 13a-16a (discussing *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-09 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998)). After analyzing these competing lines of precedent, the Supreme Court of South Carolina highlighted that "[t]he United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 22a.

Thereafter, the court rejected the approach taken by the *Champ* line of cases, adopted the "approach taken by the California courts in *Keating* and *Blue Cross*," and held that "class-wide arbitration may be ordered when the arbitration agreement is silent *if* it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a (emphasis added) (footnote omitted). The South Carolina Supreme Court's holding was based expressly upon its prior determination that "a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual . . . directive to do so." Pet. App. 21a. Because it had permitted "consolidation of appropriate claims where the

arbitration agreement is silent," the court held that it "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." Pet. App. 21a (internal quotation marks omitted).

As shown below, this case squarely presents a recurring issue of paramount importance to the congressional scheme governing arbitration under the FAA that has generated a substantial conflict among the federal courts of appeals and state appellate courts and courts of last resort. As a result, Green Tree respectfully submits that its petition for a writ of certiorari should be granted to allow this Court to address and resolve this important decisional conflict.

Statutory Background

Section 2 of the FAA provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, *e.g.*, *Volt Info. Scis. Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded almost 20 years ago, and more recently has reaffirmed, that § 2 of the FAA applies both in state and federal courts. *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix*

Cos. v. *Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*).

Essential to Congress's goal of ensuring the enforcement of parties' agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479).[1]

Arbitration "'is usually cheaper and faster than litigation.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also *Dean Witter*, 470 U.S. at 220; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995). Nevertheless, the "basic objective" under the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." 514 U.S. at 947 (citations and internal quotation marks omitted). Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement . . . . notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.* v.

---

[1] *See also Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *see also E.E.O.C.* v. *Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (alteration in original) (quoting *Volt*, 489 U.S. at 479).

Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (footnote omitted).

Factual Background

A review of the proceedings leading to the two class-action arbitral awards and the decision of the Supreme Court of South Carolina is necessary to put this case in proper context.

The Bazzle Proceedings. In 1995, Lynn and Burt Bazzle executed a retail installment contract and security agreement with Green Tree to finance home improvements. The agreement entered into by the Bazzles contained an arbitration clause which provided, in pertinent part:

> ARBITRATION – All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration . . . .

Pet. App. 110a. The agreement, by its terms, dictates that it will be governed "by the Federal Arbitration Act," *id.*, and limits its scope to "disputes, claims, or controversies arising from or relating to *this* contract or the relationships which result from *this* contract." *Id.* (emphasis added). By limiting the arbitrator's authority to address claims or relationships that result from "*this* Contract," the agreement precludes consolidated or class-wide arbitration of disputes involving

other contracts. The arbitration agreement is reproduced in full at Pet. App. 110a-111a.

Notwithstanding their agreement to arbitrate, on March 25, 1997, the Bazzles filed an action against Green Tree in South Carolina state court alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. See S.C. Code Ann. §§ 37-10-102(a), -105. On April 21, 1997, the Bazzles filed an amended class-action complaint and, at the same time, a motion for class certification. In response to these pleadings, Green Tree sought a stay of the court proceedings (including the motion for class certification) and an order compelling arbitration. Green Tree explained that an order compelling arbitration, if granted, would preclude class-action treatment. On December 5, 1997, the trial court granted the Bazzles' motion for class certification (thereby denying Green Tree's motion for a stay of all proceedings) and entered an order compelling arbitration. Pet. App. 3a.[2]

After the trial court entered an order appointing an arbitrator, the class-action arbitration proceedings ordered by the trial court were administered solely by the arbitrator. On July 24, 2000, the arbitrator issued an award against Green Tree on behalf of a class of 1,899 individuals. The arbitrator acknowledged that "Plaintiffs as a class did not attempt to show actual damages," Pet. App. 69a, but he nevertheless imposed a class-wide "penalty" upon Green Tree of between $5,000 and $7,500 "per transaction," which resulted in a total award of $10,935,000 in statutory damages. *Id.* at 71a.

The arbitrator also awarded plaintiffs $3,645,500 in attorney's fees based upon not only their prosecution of the

---

[2] On March 17, 1998, the trial court denied Green Tree's motion to reconsider the order granting class certification. Green Tree filed an appeal challenging the trial court's order certifying a class for arbitration, but the appeal was dismissed by the court of appeals as interlocutory. Pet. App. 28a.

arbitration, but also, among other things, their lobbying efforts during the 1997 South Carolina legislative session. Pet. App. 77a, 79a. The arbitrator rejected Green Tree's showing that "if every hour submitted by Plaintiffs is allowed, a $3,000,000 attorney's fee award would result in an hourly rate exceeding $900.00 per hour." R. on Appeal at 2126. Moreover, the arbitrator ordered that funds awarded to class members that remained unclaimed would not be returned to Green Tree, but instead would be tendered to charitable groups chosen by plaintiffs' counsel: "75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach." Pet. App. 79a.

The Bazzles filed a motion to confirm the award in the state trial court, and Green Tree sought to vacate the award. Green Tree showed that class-action arbitration had been ordered by the trial court even though the arbitration agreement did not provide for class-action arbitration. On September 15, 2000, the trial court confirmed the arbitral award and denied Green Tree's motion to vacate. Pet. App. 34a. In its order, the trial court stated that it "previously ruled on Green Tree's motion for reconsideration of class certification" and saw "no basis to address the issue again." *Id.*

The Lackey Proceedings. Daniel Lackey (and his fellow class members) entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. These agreements contained an arbitration clause that is in all relevant respects identical to the arbitration agreement in the *Bazzle* proceeding. Pet. App. 19a n.18.

Notwithstanding their agreements to arbitrate, on May 28, 1996, Lackey and George and Florine Buggs commenced a class action against Green Tree in state court, also alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. Green Tree filed a motion seeking to compel arbitration, but the trial

court ruled that Green Tree's arbitration agreement was unenforceable. Pet. App. 5a-6a. Green Tree appealed, and the court of appeals reversed, holding that the arbitration agreement should be enforced. See *Lackey* v. *Green Tree Fin. Corp.*, 498 S.E.2d 898, 905 (S.C. Ct. App. 1998). Thereafter, the same arbitrator who was presiding over the *Bazzle* proceeding was appointed as arbitrator in the *Lackey* proceeding.

The *Lackey* plaintiffs expressly argued, based upon the decision of the trial court in the *Bazzle* proceeding, that the arbitration should proceed as a class-action arbitration. Pet. App. 5a-6a. Specifically, the *Lackey* plaintiffs contended that class-action arbitration should proceed because

> [i]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of class action proceeding in arbitration was thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration . . . .

R. on Appeal at 516. The arbitrator accepted this argument. As a result, the arbitrator followed the approach mandated by the trial court in *Bazzle*, certified a class-wide arbitration and approved a class notice that was sent to class members.

On the merits, the arbitrator concluded that Green Tree had violated the attorney and insurance-agent notice preference requirements of South Carolina law. Pet. App. 91a. As in *Bazzle*, the arbitrator acknowledged that "plaintiffs as a class did not attempt to show actual damages," *id.* at 96a, but he nevertheless imposed a "penalty" of "$5,000 per transaction," for a total of $9,200,000 in statutory damages to the 1,840 class members, *id.* at 98a. The arbitrator also required Green Tree to pay $3,066,666 in attorney's fees (and $18,252 in costs), and, as in *Bazzle*, relied upon plaintiffs' counsel's lobbying efforts to justify a fee award that would compensate

plaintiffs' counsel at a rate in excess of $900.00 per hour. *Id.* at 105a-106a. Finally, as in *Bazzle,* the arbitrator concluded that any unclaimed funds would not be returned to Green Tree, but instead would be distributed to charitable organizations chosen by plaintiffs' counsel. *Id.* at 107a.

The trial court confirmed the award and denied Green Tree's motion to vacate. Green Tree timely appealed. Pet. App. 8a.

Decision of the Supreme Court of South Carolina

The Supreme Court of South Carolina assumed jurisdiction over the *Bazzle* and *Lackey* appeals and consolidated the proceedings. Pet. App. 2a. The court below first ruled that both arbitration agreements were "governed by the FAA." *Id.* at 11a & n.9. The court then addressed "the FAA's impact on class-wide arbitration." *Id.* at 11a. It noted that the "United States Supreme Court has not addressed" that issue, and "[t]hus, there is no binding precedent that this Court is obligated [to] follow." *Id.* The Supreme Court of South Carolina recognized, however, that "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent," whereas "the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent." *Id.* at 11a, 12a.

Although the arbitration agreements in these cases, by their terms, limit arbitration to "'disputes, claims, or controversies arising from or relating to *this contract*, or relationships which result from *this contract*,'" the court below concluded that "this language does not limit the arbitration to non-class arbitration." Pet. App. 19a (emphasis added by court). Specifically, the court ruled that this language "creates an ambiguity" that the court would construe against Green Tree to conclude that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.*

Given its determination that the agreement was "silent" as to the availability of class-action arbitration, the court

recognized that this case implicated the conflict between the rule in the *Champ* line of cases decided by the federal courts of appeals and the rule adopted by the California state courts. The court below rejected the *Champ* line of cases, explaining that the "United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 19a-20a. The court below explained that it previously had "held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." *Id.* at 21a (relying upon *Episcopal Hous. Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979)); see *id.* at 18a-19a. The court reasoned that because it "permits consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—"it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." *Id.* at 21a (internal quotation marks omitted).

Based upon this reasoning, the court below "adopt[ed] the approach taken by the California courts" and held "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. Although the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus attorney's fees, the court suggested that absent class-wide arbitration, "parties with nominal individual claims . . . would be left with no avenue for relief." *Id.* The court further concluded that class-action arbitration was appropriate because "hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy." *Id.* Because the court concluded that the imposition of class-action procedures onto a "silent" arbitration agreement was a permissible, albeit

discretionary, option, it upheld the arbitral awards in both *Bazzle* and *Lackey*. *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

Further review by this Court of the decision of the Supreme Court of South Carolina is necessary to ensure the proper and uniform resolution of a recurring and important issue under the Federal Arbitration Act ("FAA") that has generated a substantial conflict among federal courts of appeals and state appellate courts and courts of last resort. Specifically, this case presents the question whether the FAA permits class-action procedures to be imposed on an arbitration agreement that is "silent" as to class-action arbitration.

The clear majority of courts that have addressed this question and the related issue of consolidation of arbitration proceedings have answered no. These courts have held that, under the FAA, the parties' silence on the question of class-action or consolidated arbitration precludes imposition of class-action or consolidated arbitration proceedings onto the parties' agreement. See, *e.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing cases). In doing so, these courts have relied upon this Court's decisions, which hold that the FAA was designed to overcome judicial hostility to arbitration by mandating that arbitration agreements be enforced rigorously in accordance with their terms. See, *e.g.*, *Volt*, 489 U.S. at 478.

The Supreme Court of South Carolina acknowledged the clear rule of these cases, which prohibit class-action procedures from being superimposed on a "silent" arbitration agreement, but expressly rejected that rule in favor of the minority approach first embraced by the California courts. See, *e.g.*, *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-10 (1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998) (following *Keating* and rejecting *Champ* line of cases).

This minority approach holds that the FAA does not prohibit a court from imposing class-action or other procedures onto an arbitration agreement; rather, class-action procedures may be imposed, in the court's discretion, if they further the court's notions of judicial efficiency and equity. Pet. App. 13a-16a. Put another way, the minority approach permits courts to frustrate private agreements to arbitrate by allowing those agreements to be modified whenever they do not unambiguously preclude a procedure or result that a court, in its discretion, believes will "serve efficiency and equity, and would not result in prejudice." *Id.* at 22a.

This minority approach ignores that the FAA is designed to allow parties to choose arbitration rather than litigation by mandating that courts enforce such agreements in accordance with their terms. Moreover, the minority approach cannot be reconciled with this Court's decisions which make clear that concerns regarding efficiency and economy are subsidiary to enforcement of the parties' agreement according to its terms. Indeed, under the minority approach adopted by the court below, parties' agreements to arbitrate would be subject to the same judicial hostility that the FAA was designed to combat when it was enacted more than 75 years ago. That result frustrates congressional intent that arbitration agreements must be enforced according to their terms. Further, adoption of this approach would increase the costs of private arbitration by obligating parties to draft long and unwieldy arbitration agreements that seek to anticipate and address every possible procedural contingency to prevent additional procedures from being imposed upon the parties' private agreement in the putative interests of judicial economy and efficiency.

Finally, the conflict implicated by the decision of the South Carolina Supreme Court is one of paramount importance because, without a uniform nationwide standard, the determination whether class-action arbitration can be compelled will turn on the happenstance of geography, rather

than the intent of parties as expressed in the terms of their arbitration agreements. A uniform national rule is vital because the same arbitration agreements often may apply to agreements entered across the country. Moreover, the absence of a uniform standard fosters not only geographic forum shopping but also forum shopping between federal and state courts. See *Southland*, 465 U.S. at 15 (rejecting interpretation of FAA that would "encourage and reward forum shopping").

In sum, certiorari should be granted to resolve this deep and recurring conflict and to adopt the majority view that the FAA mandates that arbitration agreements be enforced according to their terms and not on the basis of ambiguous policy choices of a court's making.

I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON AN ARBITRATION AGREEMENT THAT DOES NOT PROVIDE FOR CLASS-ACTION ARBITRATION.

The decision of the Supreme Court of South Carolina deepens a conflict among both state and federal courts on the recurring and important question whether the FAA permits class-wide arbitration where the parties' arbitration agreement is "silent," *i.e.*, it does not expressly provide for or against class-action arbitration. As shown below, the majority of courts, including the Seventh Circuit, Eighth Circuit and Alabama Supreme Court, have held that the FAA requires enforcement of private arbitration agreements according to their terms, and that courts therefore have no authority to order class-action arbitration where an arbitration agreement does not expressly provide for class-action arbitration. These decisions, in turn, are built on the decisions of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, which hold

that a court has no authority to order consolidated arbitration if the parties' agreement does not so provide.

In stark contrast, the minority position, adopted by the court below and other state courts, holds that if the parties' agreement is "silent" regarding class actions—because it does not expressly preclude them—a court may, in its discretion, superimpose class-action arbitration if consistent with its notions of efficiency and equity. The minority position relies, among other things, on a decision of the First Circuit that permits consolidated arbitration even if the parties' agreement does not provide for it. The minority courts invoke the proposition that the FAA leaves them free to order arbitration upon terms as they see fit, so long as they do not *directly* contravene any provision of an agreement and do not require resort to a judicial rather than arbitral forum.

A. Courts Adopting The Majority Approach Have Held That The FAA Prohibits Class-Action Or Consolidated Arbitration Where The Individual Arbitration Agreement Does Not Provide For Either.

In *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), the Seventh Circuit held that the FAA does not permit a court to order class-action arbitration where the arbitration agreement did not expressly provide for such a procedure. *Id.* at 275. Relying on this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone*, the *Champ* court rejected the argument that class-action arbitration was permissible so long as it "would not contradict" the terms of the agreement. *Id.* at 274-75. Rather, the Seventh Circuit concluded that the FAA reflects a responsibility "to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis." *Id.* at 277. In reaching that conclusion, the Seventh Circuit also rejected the argument that failure to certify a class would cause "various inefficiencies and inequities," explaining that "the Supreme Court has repeatedly emphasized that we must rigorously enforce the

parties' agreement as they wrote it, 'even if the result is "piece-meal" litigation.'" *Id.* (quoting *Dean Witter*, 470 U.S. at 221). Instead, the *Champ* Court explained that for the court to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." *Id.* at 275 (internal quotation marks omitted; alteration in original).

The *Champ* court followed the rationale underlying decisions of the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits.[3] The *Champ* court explained that these circuits have held that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements" according to their terms barred consolidated arbitration "even where consolidation would promote the expeditious resolution of related claims." *Id.* at 274-75. The Seventh Circuit agreed with and "adopt[ed]" the reasoning of these cases, concluding that there was "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275; see also *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 510 (7th

---

[3] *See Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) (holding that "'the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration'"); *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (same).

Cir. 1999) (explaining that "[b]ecause arbitration is based fundamentally on an agreement between the parties, the kind of class action contemplated by Fed. R. Civ. P. 23(b) is normally unavailable in arbitration") (citations omitted); *cf. Connecticut Gen. Life Ins. Co.* v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771, 774 (7th Cir. 2000) ("the court has no power to order consolidation if the parties' contract does not authorize it").

In particular, the Seventh Circuit relied on the Second Circuit's decision in *United Kingdom*. *Champ*, 55 F.3d at 275. In *United Kingdom*, the Second Circuit concluded that there was no authority to "order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation." *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993). The Second Circuit based that conclusion on "recent Supreme Court case law" that it determined had "undermined [its] previous conclusion that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." *Id.* at 71; see *id.* at 72. Specifically, the Second Circuit explained that this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone* confirmed that the FAA mandates the enforcement of arbitration agreements in accordance with their terms, regardless of any countervailing considerations such as the court's "'own view of speed and economy.'" *Id.* at 73.[4]

---

[4] *See also Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266 (2d Cir. 1999) (applying *United Kingdom*, and the "trio of 1980's Supreme Court decisions" on which it relied, to vacate order of joint arbitration hearing); *cf. Salvano* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1302 (N.Y. 1995) (holding that FAA barred a trial court's use of state law to order expedited arbitration where the parties' arbitration agreement did not provide for such procedures and rejecting argument that an order to expedite was justified because the FAA "contains no provision *precluding* expedited arbitration") (emphasis added).

The Eighth Circuit follows the same reasoning as *Champ* to bar class arbitrations where the parties have not provided for them. See *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d 720, 728 (8th Cir. 2001). In *Emerson*, the Eighth Circuit explained that "the goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims." *Id.* Because an arbitration agreement must be enforced "'in accordance with its terms,'" the Eighth Circuit held that the district court acted properly in "compelling appellants to submit their claims to arbitration as individuals" where their agreement made "no provision for arbitration as a class." *Id.* at 728, 729; see also *Baesler*, 900 F.2d at 1195 (holding that district court was without power to consolidate arbitration proceedings when arbitration agreements were silent on the issue); *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (holding that FAA required it to "give effect to the agreement of the parties," and therefore it had no authority to order class arbitration where the "arbitration agreement makes no provision for class treatment of disputes"), *appeal dismissed*, 15 F.3d 95 (8th Cir. 1994).[5]

Similarly, the Alabama Supreme Court expressly followed *Champ* in *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998). There, the Alabama Supreme Court applied the FAA,

---

[5] *See also Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (citing *Champ* for the proposition that "it appears impossible" to pursue a class action in an arbitral forum "unless the arbitration agreement contemplates such a procedure"), *cert. denied*, 531 U.S. 1145 (2001); *Howard* v. *KPMG*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (concluding that "a plaintiff . . . who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration"), *aff'd*, 173 F.3d 844 (2d Cir. 1999) (table), *available at* 1999 WL 265022; *Herrington* v. *Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1033-34 (S.D. Miss. 2000) (relying on *Del E. Webb*, *Champ*, and *American Centennial* to grant motion to dismiss class-action allegations and compel arbitration), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (table).

id. at 12-13, to reverse a trial court order permitting class arbitration. See *id.* at 20. The *Med Center* court concluded that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration." *Id.* at 20.

Finally, other state appellate courts have concluded that class-action procedures cannot be imposed where an arbitration agreement does not provide for them. For example, in *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001), the Washington court relied upon *Champ* to support its decision to refuse to "compel class arbitration" where "the arbitration clause . . . is silent on class action." *Id.* In doing so, the *Stein* court noted that the "Washington Supreme Court has ruled that when an arbitration agreement is silent on consolidation, a court may not compel consolidated arbitration." *Id.* (citing *Balfour, Guthrie & Co.* v. *Commercial Metals Co.*, 607 P.2d 856, 858 (Wash. 1980)).[6]

If this case had arisen in any of these jurisdictions, there would have been no order of class-action arbitration. The arbitration agreement in this case unquestionably does not provide for class-action arbitration. As a result, the courts in these jurisdictions would have concluded that, under the FAA, they had no authority to order class-action arbitration. The outcome-determinative ruling of the court below to the contrary warrants review by this Court.

---

[6] *Cf. Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 573-74, 576 (Fla. Dist. Ct. App. 1999) (relying upon *Champ* to rule that, under the FAA, court has no authority to compel class-action arbitration where the agreement did not provide for class arbitration).

B. Courts Applying The Minority Approach, Including The Court Below, Have Held That The FAA Permits Discretionary Judgments To Justify Class-Wide Or Consolidated Arbitration Even When An Arbitration Agreement Does Not Provide For Such Procedures.

As the Supreme Court of South Carolina acknowledged, there are "two different approaches" on the question presented here. Pet. App. at 11a. The court below expressly rejected the *Champ* line of cases, and instead adopted the minority position of the state courts in California and Pennsylvania (as supported by the First Circuit). Those courts hold that even if the parties to an arbitration agreement have not provided for class arbitration, the FAA does not prohibit such procedures from being superimposed on an arbitration agreement as a matter of "discretion." *Id.* at 15a.

In the decision below, the Supreme Court of South Carolina criticized *Champ* and *United Kingdom* for making "strict enforcement of the terms of the agreement" the paramount policy under the FAA. Pet. App. 13a. Instead of implementing the parties' intentions as expressed in the terms of their agreement, the court adopted precisely the reasoning that *Champ, United Kingdom, Med Center*, and other courts expressly have rejected. It held that, faced with an arbitration agreement that is "silent" regarding class arbitrations, class arbitration could be ordered, as a matter of discretion, if doing so "would serve efficiency and equity, and would not result in prejudice." *Id.* at 22a. Although the class members in each of these arbitrations were awarded at least $5,000, plus attorneys' fees, the court below expressed concern that, under the majority position, "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief," and that arbitrating numerous identical cases in multiple arbitrations would not "serve the interest of judicial economy." *Id.*

The ruling of the court below is built directly and expressly on "the approach taken by the California courts," Pet. App. 22a, particularly *Keating* v. *Superior Court*, 645 P.2d 1192 (1982), and *Blue Cross of California* v. *Superior Court*, 67 Cal. App. 4th 42 (1998). In *Keating*, the California Supreme Court held, in a case under the FAA, that state law permitted a court to order class arbitration even where an arbitration agreement did not provide for it. 645 P.2d at 1209-10. The California Supreme Court acknowledged that "a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Id.* at 1209 (explaining that court "would have to make initial determinations regarding certification and notice to the class, and . . . . to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation"). Nevertheless, the California Supreme Court concluded that the availability of class arbitration must be determined not based solely with regard to the parties' intent, but rather on an analysis of which procedure offers "a better, more efficient, and fairer solution." *Id.*

California appellate courts have built upon the analysis in *Keating* to hold that the FAA does not prohibit class-action procedures from being superimposed on an arbitration agreement that does not provide for class-wide arbitration. Specifically, the court in *Blue Cross* squarely held that the FAA does not "preempt[] California decisional authority authorizing classwide arbitration." 67 Cal. App. 4th at 46. The *Blue Cross* court rejected the majority position, concluding that if an order of class arbitration would not expressly contradict any terms of the arbitration agreement, a court was free to issue such an order under state law authorizing it. See *id.* at 60, 65. Whether to do so was a question for the discretion of the trial court. *Id.* at 64. The *Blue Cross* court concluded that the purpose of the FAA was simply "to abolish antiarbitration laws and to make

agreements to arbitrate specifically enforceable." *Id.* at 63. Because imposition of class-wide arbitration did not *prevent* arbitration, the court in *Blue Cross* reasoned that this approach did not violate this narrow goal of the FAA and therefore was not pre-empted. *Id.* at 64 ("[E]ven if a conflict exists between the AAA rules and classwide arbitration, the trial court may resolve the conflict. It is unlikely the AAA would refuse to abide by a court order for classwide arbitration.") (citations omitted). Indeed, the *Blue Cross* court thought its rule furthered the purpose of the FAA because it would "facilitate the enforcement of arbitration agreements by making classwide arbitration available in appropriate cases." *Id.* at 65.

The *Blue Cross* court, in rejecting *Champ* and the numerous federal circuit courts and state courts that prohibit class-action and consolidated arbitrations absent an agreement by the parties, instead followed the First Circuit's decision in *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988). See *Blue Cross*, 67 Cal. App. 4th at 58-60. In *New England Energy*, the First Circuit held that consolidated arbitration is permissible even where the arbitration agreement does not provide for consolidation, so long as a state law authorizes it. 855 F.2d at 3. In the First Circuit's view, the question was not whether the parties had agreed or consented to arbitration, but instead was whether consolidation was proper under the considerations required by state law. *Id.* at 7. Unless consolidation would "contradict[ ] the contractual terms," *id.* at 5, the FAA did not pre-empt a state law authorizing it, regardless of the parties' intent. The court reasoned that so long as a court order did not actually "divert a case from arbitration to court," it did not violate the FAA's purpose of ensuring that parties who agree to arbitration get an arbitration. *Id.* at 6-7. Within that minimal restriction, the First Circuit concluded that States were free to impose procedures as they saw fit: "We fail to see why a state should be prevented from enhancing the efficiency of

the arbitral process, so long as the state procedure does not directly conflict with a contractual provision." *Id.* at 7.

Finally, *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied,* 616 A.2d 984 (Pa. 1992), also adopted the minority position. There, the appellate court held that a putative class-action litigation could be maintained as a class arbitration. *Id.* at 862. The court acknowledged that the FAA provided the applicable "standard for enforcing an arbitration agreement," *id.*, including the duty to enforce the parties' intentions, *id.* at 862-63, but it noted that the United States Supreme Court had not addressed the permissibility of "superimposing class-action procedures on the contract arbitration." *Id.* at 865. Like the other courts adopting the minority position, the Pennsylvania court did not limit itself to determining and applying the parties' intentions but rather invoked "the dual interest" of not only "respecting and advancing contractually agreed upon arbitration agreements," but also concerns of judicial efficiency and economy. *Id.* at 867.

C. This Case Presents An Appropriate Vehicle For Resolving This Conflict Among The Federal And State Courts.

This case presents a perfect vehicle for resolving the question whether class-action procedures may be superimposed upon an agreement that does not provide for class-action arbitration. The court below concluded that the arbitration agreements in the *Lackey* and *Bazzle* proceedings were "*silent* regarding class-wide arbitration," Pet. App. 19a, and recognized the conflicting lines of cases, *id.* It then expressly held that it would "adopt the approach taken by the California courts in *Keating* and *Blue Cross*, and hold that class-wide arbitration may be ordered when the arbitration agreement is silent *if it would serve efficiency and equity, and would not result in prejudice.*" *Id.* at 22a (emphasis added). That decision was essential to the holding below because there can be no question that the arbitral awards in this case

could not have been affirmed if the Supreme Court of South Carolina had followed the *Champ* line of cases and thus concluded that class-action arbitration cannot be imposed where an arbitration agreement is silent.

Nor can the court below avoid this Court's review by suggesting that it relied upon "independent state grounds to permit class-wide arbitration." Pet. App. 20a. That suggestion simply ignores that the issue in this case is whether the FAA preempts the South Carolina Supreme Court's application of state law. Put another way, this case presents the issue whether the FAA preempts state-law that might allow class-action procedures to be imposed on an arbitration agreement that does not provide for them. See *Volt*, 489 U.S. at 473 & n.4 (explaining that question whether FAA preempts state law is a federal question).[7] Indeed, this is a particularly good vehicle for resolving that dispute because, as the Supreme Court of South Carolina acknowledged, the arbitration agreement, by its terms, was governed by the FAA. Pet. App. 11a & n.9; compare *Dominium Partners*, 248 F.3d at 729 n.9 ("The construction of an agreement to arbitrate is governed by the FAA unless the agreement expressly provides that state law should govern."), with *Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . .").

---

[7] *See Volt*, 489 U.S. at 475-76 (reviewing whether state-court interpretation of contract subject to FAA was consistent with the "federal policy" embodied in the FAA of "enforceability, according to their terms, of private agreements to arbitrate"); *id.* at 489 U.S. at 473 n. 4 (holding that question whether state court's "interpretation of the contract" "conflicted with the FAA" conferred jurisdiction under 28 U.S.C. § 1257); *cf. Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law "that takes its meaning from the fact that a contract to arbitrate is at issue" is pre-empted by § 2 of FAA); *Doctor's Assocs.*, 517 U.S. at 685 (same).

Moreover, the court's own reasoning confirms that this case squarely presents a significant *federal* question. In reaching its decision, the court plainly did not conclude that the parties, through their agreement to arbitrate, actually intended to permit class-action arbitration. Instead, the Supreme Court of South Carolina relied upon its prior decisions that held that "a state court may order *consolidation* of claims subject to mandatory arbitration *without any contractual or statutory directive to do so*." Pet. App. 21a (second emphasis added).[8] The court below reasoned that because these prior decisions permit consolidation of claims "where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—it also "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less *intrusion upon the contractual aspects of the relationship*." *Id* (internal quotation marks omitted; emphasis added). In doing so, the court below explained that this "intrusion upon the contractual aspects of the relationship" was justified as a matter of state law "if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 21a, 22a (internal quotation marks omitted).

But that is precisely the reasoning and analysis that was rejected by decisions such as *Champ* when they held that to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the

---

[8] Specifically, the court's reliance on *Episcopal Housing Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979), confirms that this case directly implicates this substantial judicial conflict. In *Episcopal Housing*, the Supreme Court of South Carolina relied upon the Second Circuit's decision in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975) ("*Nereus*"), to hold that consolidated arbitration may be ordered even if the arbitration agreement does not provide for consolidation. 255 S.E.2d at 451. But, as shown in Part I.A, *supra.*, the Second Circuit has since held that its prior decision in *Nereus* has been "undermined" by "recent Supreme Court case law" and on the issue presented here "is no longer good law." *United Kingdom*, 998 F.2d at 71.

benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." 55 F.3d at 275 (internal quotation marks omitted; alteration in original); see also *supra* at 16 n.3 (collecting cases). In this regard, the South Carolina Supreme Court's reasoning and holding cannot be reconciled with the decisions of this Court which provide that the FAA leaves no room for judicial discretion in enforcement of agreements to arbitrate. See *Dean Witter*, 470 U.S. at 218-21; see *First Options*, 514 U.S. at 947; *Moses H. Cone*, 460 U.S. at 20.[9]

* * * *

There is a well developed and persistent conflict among the federal courts of appeals and state courts regarding the requirements of the FAA. On the one hand, the *Champ* line of cases makes clear that class-actions and consolidation cannot be imposed upon an arbitration agreement that does not expressly provide for them. Instead, these courts make clear that the FAA requires such agreements to be enforced rigorously in accordance with their terms. On the other hand, the *Keating* and *Blue Cross* line of cases (and the decision in this case) hold that the FAA requires only that arbitration agreements be enforced, but does not prohibit class-action or consolidation if such a process would, in the court's view, enhance the efficiency and economy of the arbitration. The decision below squarely presents this conflict, and it provides an ideal candidate for resolving this dispute among the lower federal courts and state courts.

---

[9] The Supreme Court of South Carolina simply was wrong in suggesting that a trial court's decision whether, and how, to enforce an arbitration agreement is "within the court's discretion." Pet. App. 22a. This Court's decision in *Dean Witter* explained that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which the arbitration agreement has been signed." 470 U.S. at 218.

II. THE ISSUE WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON A "SILENT" ARBITRATION AGREEMENT PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

The question presented here is one of great practical importance. The division of authority has created great uncertainty for parties subject to arbitration agreements. Indeed, as the court below recognized, arbitration agreements often appear in form contracts that are employed or apply in more than one State. As a result, a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside. Indeed, even cases that have adopted the minority approach recognize that the FAA is designed to "prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases." *Blue Cross*, 67 Cal. App. 4th at 52.

In addition to the decisions discussed above that have expressly recognized this conflict, other courts have recognized and acknowledged this division of authority and its importance. For example, the Wisconsin Court of Appeals recently certified to its Supreme Court the question of class arbitration under the FAA, noting that "other state and federal jurisdictions have come to opposite conclusions" and that the question is of "substantial importance." *Eastman* v. *Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856, at *3, *4 (Wis. Ct. App., May 29, 2002). Commentators agree that the availability of class-action and consolidated arbitration is "the subject of much litigation." Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, & Clarifying Arbitration Law*, 2001, J. Disp. Resol. 1, 15 (noting that issue of "class-action arbitration[]" is "hotly debated"); see also Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 711 nn.128,

129 (noting conflict among courts on availability of class-action arbitration and consolidated arbitration).

The importance of a uniform rule is magnified given the division of authority between forums in the same jurisdiction such as Pennsylvania and California. Pennsylvania state courts, relying on *Dickler*, permit class arbitration in the same circumstances in which Pennsylvania federal courts, relying on the Third Circuit's decision in *Johnson*, would prohibit it. Similarly, California state courts will permit both consolidated and class arbitration in the same circumstances in which California federal courts, following the Ninth Circuit's decision in *Weyerhauser*, would prohibit it. Indeed, although *Weyerhauser* involved consolidated arbitration, federal district courts in California rely on that case, *Champ*, and other cases in the majority to reject class-wide arbitration in circumstances where California state courts might permit it.[10]

This conflict is precisely what this Court sought to avoid in *Southland* because a lack of uniformity, particularly within the same State, "would encourage and reward forum shopping." 465 U.S. at 15. The Court rightly was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make that right dependent for its enforcement on the particular forum in which it is asserted." *Id.* For the same reason, review is necessary here.

Furthermore, the question presented implicates a broader, and equally critical, question whether it is permissible, absent the parties' expressed intent, to impose various procedures onto arbitration proceedings. The courts that have adopted

---

[10] *See Bischoff* v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002); *Gray* v. *Conseco, Inc.*, No. SACV000322, 2001 WL 1081347, at *2-*3 (C.D. Cal., Sept. 6, 2001); *McCarthy* v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal., July 19, 1994).

the minority view hold that, in the interests of judicial economy and efficiency, various procedures may be imposed upon the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement. This rule not only grants virtually free reign to tread on parties' intentions but also, as a result, impairs the ability of parties to enter into workable arbitration agreements, by requiring them to become voluminous to preclude every imaginable supplement. Indeed, the First Circuit in *New England Energy* reasoned that *any* procedures could be imposed on an arbitration agreement so long as they preserved the ill-defined "informal operational procedures" that, in that court's view, are the only goal of private arbitration. 855 F.2d at 6 n.5.

This Court has repeatedly acknowledged that the FAA's requirement that arbitration agreements be enforced according to their terms is at the core of the FAA. *Volt* itself is a prime example of the Court applying this core FAA requirement in reviewing a decision of the California Court of Appeal. Specifically, the Court in *Volt* explained that ensuring enforcement of arbitration agreements according to their terms was the "federal policy" of the FAA, 489 U.S. at 476, "Congress' principal purpose" in enacting the FAA, *id.* at 478, and "the FAA's primary purpose," *id.* at 479. Similarly, in *Doctor's Associates, Inc.* v. *Casarotto*, the Court reviewed a decision of the Montana Supreme Court and stated that "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. 681, 688 (1996) (alterations in original) (quoting *Volt*, 489 U.S. at 479). See also *Mastrobuono*, 514 U.S. at 53-54 ("[T]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms'") (quoting *Volt*, 489 U.S. at 479); *accord id.* at 57; *First Options*, 514 U.S. at 947 (same).[11]

---

[11] Because the parties' agreement in this case, by its terms, provided that it would be governed by the FAA, the Court need not determine

In short, there can be no doubt that the decision below presents a critical issue of great practical importance under the FAA, and that the acknowledged division on that question warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBURN BREWER, JR.
ROBERT C. BYRD
NEXSEN PRUET JACOBS &
POLLARD & ROBINSON, LLP
P.O. Box 486
Charleston, SC 29402
(843) 577-9440

HERBERT W. HAMILTON
KENNEDY COVINGTON
LOBDELL & HICKMAN, L.L.P.
P.O. Box 11429
Rock Hill, SC 29731-1429
(803) 329-7600

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
C. KEVIN MARSHALL
SIDLEY AUSTIN BROWN &
WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ALAN S. KAPLINSKY
MARK J. LEVIN
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Flr.
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioner

October 23, 2002

* Counsel of Record

---

whether the substantive law reflected most clearly in § 4 of the FAA, 9 U.S.C. § 4, would apply by force of law to state courts. *Cf.* Pet. App. 19a-20a. In any event, as discussed above, this Court's cases make clear that the obligation to enforce arbitration agreements in accordance with their terms is a core aspect of the FAA that applies in cases filed in both federal and state court.