

No. 08-1198

In the Supreme Court of the United States

STOLT-NIELSEN N.A.; STOLT-NIELSEN TRANSPORTA-
TION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM
AS; ODFJELL US, INC.; JO TANKERS B.V.; JO TANKERS,
INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

**BRIEF OF CTIA—THE WIRELESS
ASSOCIATION® AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

MICHAEL F. ALTSCHUL
*CTIA—The Wireless
Association®*
1400 16th Street, NW
Washington, DC 20036
(202) 785-0081

EVAN M. TAGER
Counsel of Record
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. In Determining Whether A “Silent” Arbitration Agreement Permits Class Arbitration, Courts May Not Adopt In- terpretive Rules That Would Frustrate The Federal Policy Favoring Arbitration	5
B. The History Of Class Arbitration Dem- onstrates That Parties To Arbitration Agreements Never Intended Their Si- lence On The Subject To Be Construed As Consent To This Radical New Hybrid	9
C. The Traditional Benefits Of Arbitration Are Lost In Class Arbitration	13
D. Class Arbitration Lacks The Safeguards Of Class-Action Litigation.....	15
CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>14 Penn Plaza LLC v. Pyett</i> , 129 S. Ct. 1456 (2009).....	6
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995).....	7, 13
<i>Boomer v. AT&T Corp.</i> , 309 F.3d 404 (7th Cir. 2002).....	13
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006).....	7
<i>Dealer Computer Servs., Inc. v. Fox Valley Ford</i> , 310 F. App'x 749 (6th Cir. 2009).....	17
<i>Dealer Computer Servs., Inc. v. Randall Ford, Inc.</i> , 2009 WL 277557 (S.D. Tex. Feb. 4, 2009)	16, 17
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985).....	5
<i>Doctors' Assocs., Inc. v. Casarotto</i> , 517 U.S. 681 (1996).....	7
<i>Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.</i> , 430 F.3d 1269 (10th Cir. 2005)	16
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938 (1995).....	6
<i>Fortuna v. Snap-on Tools Co., LLC</i> , AAA Case No. 11 114 01818 04, http://www.adr.org/si.asp?id=3858 (Aug. 12, 2005)	12
<i>Genus Credit Mgmt. Corp. v. Jones</i> , 2006 WL 905936 (D. Md. Apr. 6, 2006).....	11
<i>Gov't of India v. Cargill Inc.</i> , 867 F.2d 130 (2d Cir. 1989)	16

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Green Tree Fin. Corp. v. Bazzle</i> , 539 U.S. 444 (2003).....	11
<i>Hall St. Assocs., L.L.C. v. Mattel, Inc.</i> , 128 S. Ct. 1396 (2008).....	1, 16
<i>Hobby v. Snap-on Tools Co., LLC</i> , AAA Case No. 11 114 01884 04, http://www.adr.org/si.asp?id=3695 (June 8, 2005).....	12
<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004)	7
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir. 1995).....	15
<i>Jones v. Genus Credit Mgmt. Corp.</i> , AAA Case No. 11 181 00295 05, http://www.adr.org/si.asp?id=3792 (Oct. 13, 2005)	11
<i>JSC Surgutneftegaz v. President & Fellows of Harvard Coll.</i> , 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007)	16, 17
<i>Long John Silver's Rests., Inc. v. Cole</i> , 514 F.3d 345 (4th Cir.), <i>cert. denied</i> , 129 S. Ct. 58 (2008)	17
<i>Mitsubishi Motors Corp. v. Soler Chrysler- Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	6, 13
<i>Moody v. Sears, Roebuck & Co.</i> , 2007 WL 2582193 (N.C. Super. Ct. 2007), <i>rev'd</i> , 664 S.E.2d 569 (N.C. Ct. App. 2008)	20
<i>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	5, 6

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	19
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	7
<i>Preston v. Ferrer</i> , 128 S. Ct. 978 (2008).....	1, 7
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	7
<i>Vaden v. Discover Bank</i> , 129 S. Ct. 1262 (2009).....	1
<i>Veliz v. Cintas Corp.</i> , 2009 WL 1766691 (N.D. Cal. June 22, 2009).....	16, 17
<i>Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.</i> , 489 U.S. 468 (1989).....	5, 6, 18
<i>Wallace v. Buttar</i> , 378 F.3d 182 (2d Cir. 2004).....	16
 STATUTES AND RULES	
9 U.S.C. §§ 1-16	2
9 U.S.C. § 10	16
Class Action Fairness Act of 2005, PUB. L. NO. 109-2, 119 Stat 4	20
Y2K Act of 1999, PUB. L. NO. 106-37, 106 Stat. 185	13
Fed. R. Civ. P. 23(f)	17

TABLE OF AUTHORITIES—continued

	Page(s)
 OTHER AUTHORITIES	
Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures, <i>at</i> http://www.adr.org/sp.asp?id=22440 (effective June 1, 2009)	19
Am. Arbitration Ass'n, Supplementary Rules for Class Arbitrations, <i>at</i> http://www.adr.org/sp.asp?id=21936 (effective Oct. 8, 2003)	14, 19
John Bronsteen, <i>Class Action Settlements: An Opt-In Proposal</i> , 2005 U. ILL. L. REV. 903.....	20
Jonathan R. Bunch, Note, <i>To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration</i> , 2004 J. DISP. RESOL. 259	15
Todd B. Carver & Albert A. Vondra, <i>Alternative Dispute Resolution: Why It Doesn't Work and Why It Does</i> , HARV. BUS. REV. 120 (May 1994).....	15
David S. Clancy & Matthew M.K. Stein, <i>An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History</i> , 63 BUS. LAW. 55 (2007)	10, 17
Christopher R. Drahozal, <i>Federal Arbitration Act Preemption</i> , 79 IND. L.J. 393 (2004).....	8
Jill E. Fisch, <i>Class Action Reform, Qui Tam, and the Role of the Plaintiff</i> , 60 L. & CONTEMP. PROBS. 167 (1997)	20

TABLE OF AUTHORITIES—continued

	Page(s)
Richard D. Freer, <i>Interlocutory Review of Class Certification Decisions: A Preliminary Study of Federal and State Experience</i> , 35 W. ST. U. L. REV. 13 (2007).....	18
H.R. Rep. No. 542, 97th Cong., 2d Sess. (1982)	13
Samuel Issacharoff, <i>Class Action Conflicts</i> , 30 U.C. DAVIS L. REV. 805 (1997)	20
Susan P. Koniak & George M. Cohen, <i>Under Cloak of Settlement</i> , 82 VA. L. REV. 1051 (1996).....	20
Christopher R. Leslie, <i>The Significance of Silence: Collective Action Problems and Class Action Settlements</i> , 59 FLA. L. REV. 71 (2007).....	20
Jean R. Sternlight, <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> , 42 WM. & MARY L. REV. 1 (2000)	9, 20
Barry Sullivan & Amy Kobelski Trueblood, <i>Rule 23(f): A Note on Law and Discretion in the Courts of Appeals</i> , 778 PLI/LIT 117 (2008).....	18
Tr. of Oral Argument, <i>Green Tree Fin. Corp. v. Bazzle</i> , 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562.....	17
Stephen J. Ware, <i>The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees</i> , 5 J. AM. ARB. 251 (2006).....	13

TABLE OF AUTHORITIES—continued

	Page(s)
James Tharin & Brian Blockovich, <i>Coupons and the Class Action Fairness Act</i> , 18 GEO J. LEGAL ETHICS 1443 (2006)	20

**BRIEF OF CTIA—THE
WIRELESS ASSOCIATION® AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

INTEREST OF THE *AMICUS CURIAE*

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association, represents all sectors of the wireless communications industry.¹ Members of CTIA include service providers, manufacturers, wireless data and Internet companies, as well as other contributors to the wireless industry. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless industry issues. CTIA has regularly participated as *amicus curiae* in cases before this Court addressing arbitration issues, including, most recently, *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); and *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

Many members of CTIA have adopted as standard features of their business contracts provisions that require the parties to pursue disputes in arbitration rather than in courts of general jurisdiction. CTIA members use arbitration because—in its traditional, individual form—it is a quick, fair, inexpensive, and non-adversarial method of resolving dis-

¹ Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

putes. Those advantages, however, would be forfeited if class-action procedures were superimposed on arbitration. In fact, in the experience of CTIA’s members, class arbitration is a nightmarish procedure that combines class-action litigation’s expense, delay, and enormous stakes with arbitration’s exceptionally narrow standard of review. Unsurprisingly, there are precious few examples of arbitration agreements that expressly authorize arbitrators to conduct class-wide proceedings. Instead, class arbitration has come about effectively by accident. Specifically, in recent years some courts and arbitrators have concluded that contracts that are “silent” on the subject of class arbitration—as are the many agreements that failed to anticipate this recent judicial innovation—should be construed to permit class arbitration. Because CTIA members are parties to arbitration agreements that do not specifically prohibit class arbitration, CTIA has a strong interest in explaining why, under the Federal Arbitration Act, silence about this departure from traditional arbitration procedures may never be deemed to constitute consent.

INTRODUCTION AND SUMMARY OF ARGUMENT

CTIA concurs in petitioners’ argument that the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, precludes courts from imposing class-wide arbitration on parties that did not expressly agree to such a procedure. This brief provides additional context for understanding why the reasonable expectations of parties to such “silent” arbitration agreements do not include the possibility of class arbitration.

Arbitration has long been understood to be a simpler, faster, and cheaper method of resolving individual disputes between contractual parties than going to court. Until recently, class arbitration was more of an exercise in imagination than a real-world means of dispute resolution. But in recent years, class-action lawyers seeking to expand their turf to the arbitral forum have persuaded some courts and arbitrators that silence on the subject of class arbitration is the equivalent of consent to the arbitrator's authority to conduct such a proceeding. In fact, however, the available empirical evidence confirms that the opposite is the case—*i.e.*, that businesses recognize that class arbitration is a Frankenstein's monster to which the only reasonable response is running in the opposite direction as fast as possible.

Class arbitration offers none of the benefits of traditional arbitration—namely, dispute resolution that is swifter, simpler, less expensive, and less adversarial than litigation. At the same time, this hybrid procedure remains subject to the FAA, meaning that arbitrators' decisions on both class certification and the merits are reviewable only for bias, corruption, and the like—cold comfort when, as in class arbitration, the stakes are multiplied to bet-the-company levels. That extraordinarily deferential approach to arbitration makes sense in an individual proceeding because the speed and cost savings compared with litigation more than compensate for the absence of robust judicial review. But that trade-off makes no sense in a class arbitration. Class-arbitration proceedings are just as burdensome as class-action litigation—if not more so—and few businesses would be willing to put their fates in the hands of a single decisionmaker unconstrained by meaningful review.

Class arbitration also deprives the parties of the finality afforded by judicial class actions. Even if the business wins the arbitration or the parties reach a class-wide settlement, there is no guarantee that any of the absent class members would be bound. The major arbitration providers that have agreed in the last few years to administer class arbitrations have sought to duplicate the due process protections afforded to absent class members by courts. But especially when the arbitration agreement does not expressly authorize class arbitration, absent class members may understandably object that they did not agree to be subject to an arbitral award issued in their absence by an arbitrator in whose selection they had no input. And given courts' near-powerlessness to review arbitrators' decisions on such issues as class certification, the merits of a class-wide claim, and the amount of damages, the prospect of judicial oversight of class arbitrations is a mirage.

In sum, an agreement to arbitrate disputes that permits class arbitration presents businesses with a lose-lose proposition. It therefore defies common sense to suppose that rational parties to an arbitration agreement would have wanted to authorize class arbitration. The FAA instructs courts to give effect to the parties' agreements to arbitrate, not to impose additional procedures to which the parties did not agree and to which no rational potential defendant would agree.

ARGUMENT

Under the FAA, the mere fact that an arbitration agreement does not expressly bar class arbitration cannot justify interpreting the agreement as being

ambiguous on the subject, much less as reflecting consent to such a procedure. Although in theory parties may agree to class arbitration, any holding that silence on the subject may be deemed to be consent would deter defendants from invoking their contractual right to arbitrate whenever there is a risk that the claim against them could be converted into a class claim. That in turn would frustrate the federal policy favoring arbitration.

A. In Determining Whether A “Silent” Arbitration Agreement Permits Class Arbitration, Courts May Not Adopt Interpretive Rules That Would Frustrate The Federal Policy Favoring Arbitration.

This Court has recognized that “[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements” to arbitrate disputes. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Accordingly, the Court has directed lower courts to “‘rigorously enforce’ [arbitration] agreements according to their terms.” *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (quoting *Byrd*, 470 U.S. at 221). That is so even when requiring arbitration would result in inefficiencies. Indeed, the FAA “requires piecemeal resolution when necessary to give effect to an arbitration agreement” that applies to only some claims or some parties to a dispute. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis in original). That is because “the basic objective in this area 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 ac-

ording to the intentions of the parties.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (internal quotation marks and citations omitted).

As this Court has explained, “[w]hen deciding whether the parties agreed to arbitrate a certain matter * * *, courts generally * * * should apply ordinary state-law principles that govern the formation of contracts.” *Id.* at 944. But in interpreting an arbitration agreement governed by the FAA, “due regard must be given to the federal policy favoring arbitration.” *Volt*, 489 U.S. at 476. Thus, for example, when “the problem at hand is the construction of the contract language itself,” the FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone*, 460 U.S. at 24-25; see also, e.g., *First Options*, 514 U.S. at 944 (same); *Volt*, 489 U.S. at 476 (same). Nor may courts invoke some other “judicial policy concern” as a ground for declining to enforce an arbitration agreement altogether. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1472 (2009). Similarly, courts may not allow such external variables to “distort the process of contract interpretation.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). For example, a court’s “concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read.” *Id.* at 628.

This principle applies with special force when it is urged that state law requires refusal to enforce an arbitration provision as written. As this Court has reiterated time and again, the FAA’s “‘national policy favoring arbitration’ * * * ‘appl[ies] in state as well as federal courts’ and ‘foreclose[s] state legislative at-

tempts to undercut the enforceability of arbitration agreements.” *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984) (alterations by the Court); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006); *Doctors’ Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-685 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Perry v. Thomas*, 482 U.S. 483, 489 (1987). Thus, “[a] court may not * * *, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.” *Perry*, 482 U.S. at 492 n.9. See also *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (“Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.”).

Under these principles, a court should first look to state law in determining whether an implied term should be inserted into the gap of a purportedly incomplete arbitration agreement. But the FAA would displace any interpretive rule that would lead to a result that is hostile to the federal policy favoring arbitration. For example, as Justice Breyer has observed, an arbitration agreement that does not specify the location of the arbitration hearing cannot be construed to require arbitration “at the bottom of a coal mine with no air.” Tr. of Oral Argument, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562, at *34. To impose such an impossible condition on enforcement of an arbitration agreement would effectively nullify it.

Nor may courts accomplish the same forbidden goal indirectly by adopting interpretive rules that undermine the essence of the parties' arbitration agreement, thereby making arbitration substantially less attractive to the parties. For example, courts may not further a state policy favoring trial by jury by construing an arbitration agreement that is silent on the subject to require the arbitrator to convene a jury to resolve all factual issues in the arbitration: That would eviscerate one of the fundamental characteristics of arbitration. *Cf.* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 410 (2004) (“[A] state law that invalidated all pre-dispute waivers of the right to jury trial * * * would make arbitration agreements wholly unenforceable in the state, because by definition arbitration clauses provide for an arbitrator, rather than a jury, to resolve the parties' dispute.”). For similar reasons, an arbitration agreement that does not spell out the procedural rules that apply to an arbitration cannot—consistently with the FAA—be interpreted to require the arbitrator to apply every last jot and tittle of the Federal Rules of Evidence and Federal Rules of Civil Procedure. To construe silence to require the convening of a jury or the strict application of courtroom procedures would undermine the point of agreeing to arbitration—which is to resolve disputes more simply and cheaply than judicial litigation. Such interpretive rules thus would deter parties from invoking their arbitration rights whenever their agreements are silent on these issues.

The exact same logic applies to the issue here: whether silence as to class arbitration may be construed as tacit consent to it. As we next explain, class arbitration is a recent innovation that parties

to arbitration agreements almost never consciously choose because it offers none of the benefits of arbitration and cannot replicate some of the critical judicial safeguards that make it possible to entertain a class action consistent with the Due Process Clause. If silent arbitration agreements can be interpreted to permit class arbitration—whether by purportedly construing the agreement against the drafter or in furtherance of a state policy favoring class actions—defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. That result would be inimical to the federal policy favoring arbitration.

B. The History Of Class Arbitration Demonstrates That Parties To Arbitration Agreements Never Intended Their Silence On The Subject To Be Construed As Consent To This Radical New Hybrid.

The history of arbitration agreements over the past eight decades since the FAA was enacted confirms that silence on the subject of class arbitration cannot, consistent with the FAA, be interpreted as consent to this novel procedure.

Class arbitration is a new invention. For almost all of the 20th century, arbitration was understood to be an individualized proceeding. One academic reported in 2000 that, despite “an extensive effort” to locate attorneys who had participated in class arbitrations, her research “found just a handful,” indicating that “very few arbitrations have been handled as class actions.” Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 38-

41 & n.148 (2000). Indeed, it was not until 2003, in the wake of the plurality decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), that the major arbitration providers first set forth rules under which they would conduct class arbitrations. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitrations and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 56 & n.1 (2007).

The available empirical evidence confirms that parties almost never affirmatively agree to permit class arbitration. A review of the class-arbitration docket of the American Arbitration Association—the largest arbitration provider in the Nation—reveals that, in the overwhelming majority of class arbitrations in which a Clause Construction Award is reported, the applicable arbitration provision was silent as to the availability of class arbitration. See AAA, Searchable Class Arbitration Docket, <http://www.adr.org/sp.asp?id=25562> (last visited Sept. 3, 2009). A list of those class arbitrations is attached as an appendix to this brief.² Of the 111 reported Clause Construction Awards, only four—or about 3.6 percent—are known to have involved arbitration agreements that expressly authorized that procedure.³ Stated another way, over 96 percent of AAA class arbitrations with reported Clause Construction Awards resulted from arbitration clauses that did not expressly permit class arbitration.

² The list in the appendix is not a comprehensive list of all AAA class arbitrations because the AAA has not published the Clause Construction Awards in all cases.

³ Three of those four awards appear to involve the same employer's arbitration provision.

Many arbitrators appear to have taken the wrong lesson from *Bazzle*. Rather than treating it as a simple direction to discern the contracting parties' intent, many arbitrators seem to believe that it puts a thumb on the scale in favor of class arbitration. Of the 81 reported AAA Clause Construction Awards in which the meaning of "silent" arbitration provisions was contested, arbitrators concluded that all but 3 of them permitted class arbitration. See Appendix.

Some arbitrators have gone to great lengths to interpret arbitration agreements as "silent" on the question of class arbitration in the first place. For example, one arbitrator deemed a lender's arbitration agreement to be "silent" even though the agreement stated that the customer "will not participate in any class action lawsuit in connection with any such dispute, claim, or controversy, either as a representative plaintiff or as a member of a putative class." See Partial Final Clause Construction Award, *Jones v. Genus Credit Mgmt. Corp.*, AAA Case No. 11 181 00295 05, <http://www.adr.org/si.asp?id=3792> at 2 (Oct. 13, 2005).⁴ Another arbitrator reached the same interpretation of an agreement that specified that "no arbitration * * * shall include, by consolida-

⁴ When the defendant moved to vacate the arbitrator's clause construction award, the district court held that the arbitrator's interpretation did not constitute "manifest disregard of the law," because the arbitration agreement's express prohibition of "class action lawsuit[s]" * * * does not clearly encompass arbitration claims because lawsuit normally means a case before a court." *Genus Credit Mgmt. Corp. v. Jones*, 2006 WL 905936, at *3 (D. Md. Apr. 6, 2006). Because the arbitrator arguably had "applied the language of the parties' contract" rather than deliberately "ignore it in propounding his decision," the court concluded that the narrow standard of review of arbitral awards precluded it from vacating the clause construction award. *Id.*

tion, joinder, or in any other manner, any person other than [claimant] and [respondent] and any other person in privity with or claiming through, in the right of or on behalf of [claimant] or [respondent] * * *.” Preliminary Award on Hobby’s Request to Allow Class Action (Clause Construction Award), *Hobby v. Snap-on Tools Co., LLC*, AAA Case No. 11 114 01884 04, <http://www.adr.org/si.asp?id=3695> at 4 (June 8, 2005). *See also* Partial Final Clause Construction Award of Arbitrator, *Fortuna v. Snap-on Tools Co., LLC*, AAA Case No. 11 114 01818 04, <http://www.adr.org/si.asp?id=3858> (Aug. 12, 2005) (examining same clause).

Given the novelty of class arbitration and the rarity of an agreement that affirmatively permits it, a claim that a silent arbitration agreement should be interpreted to authorize class arbitration should be viewed with great skepticism—and for good reason. As we explain in the next two sections, class arbitration is a worst-of-both-worlds hybrid of arbitration and litigation. On one hand, it eliminates all of the benefits of traditional, individual arbitration—speed, simplicity, cost savings, and reduced adversariality. On the other hand, it does not allow for comprehensive judicial review of class certification decisions, evidentiary rulings, sufficiency of the evidence, or the amount of damages in what easily could morph into a multi-billion-dollar case. Moreover, it does not ensure defendants finality because absent class members can be expected to contend that they were not afforded the due process protections necessary to make a class-wide award binding on them.

C. The Traditional Benefits Of Arbitration Are Lost In Class Arbitration.

Parties enter into arbitration agreements because, as Congress has repeatedly found, arbitration avoids the “delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation.” Y2K Act of 1999, PUB. L. NO. 106-37 § 2(a)(3)(B)(iv), 106 Stat. 185, 186; *see also* H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982) (arbitration is “cheaper and faster than litigation,” has “simpler procedural and evidentiary rules,” “minimizes hostility,” and is “more flexible in regard to scheduling”). This Court, too, has recognized the “simplicity, informality, and expedition of arbitration.” *Mitsubishi*, 473 U.S. at 628.

For these reasons, businesses that use standard form contracts with their customers and employees often include an arbitration provision among the terms. The customers and employees benefit from this practice. As this Court has recognized, “arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.” *Allied-Bruce*, 513 U.S. at 280. Without arbitration, “the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.” *Id.* at 281. Moreover, to the extent that arbitration permits a business to resolve disputes more cheaply, those “cost-saving benefits * * * in competition are passed along to customers.” *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (internal quotation marks omitted); *see also* Stephen J.

Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-255 (2006) (arbitration “lower[s] [businesses’] dispute-resolution costs,” and this “benefit to business is also a benefit to consumers” because “whatever lowers costs to businesses tends over time to lower prices to consumers”).

When class-action procedures are superimposed upon arbitration, however, the expedition, informality, and cost-savings of traditional, individual arbitration are lost. For example, the AAA’s rules for class arbitrations largely parrot the Federal Rules of Civil Procedure. *See generally* AAA, Supplementary Rules for Class Arbitrations (“AAA Class Arbitration Rules”), at <http://www.adr.org/sp.asp?id=21936> (effective Oct. 8, 2003). Hence, a class arbitration entails (i) substantial discovery for purposes of determining such prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and (v) a motion to vacate the class determination award by whichever party lost before the arbitrator. If, after all of that, a class is certified, the AAA rules require full and adequate notice to class members and an opportunity to opt out.⁵ Discovery commensurate with the now-increased stakes of the arbitration would then begin and likely continue for years. Should the defendant yield to the hydraulic pressure to settle that class

⁵ That’s not to say that a court necessarily will deem any such notice to be adequate to defeat a subsequent collateral attack by an absent class member. *See* pages 18-21, *infra*.

certification creates (*see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-1299 (7th Cir. 1995)), efforts to satisfy the due process rights of absent class members would necessitate another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide arbitration on the merits of the underlying claim. As one commentator has observed, class arbitration “brings the burdens of litigation into the arbitral forum” and “lessens the distinction between the two processes.” Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 272.

In short, class arbitration is the quintessential example of alternative dispute resolution “mutat[ing] into a private judicial system that looks and costs like the litigation it’s supposed to prevent.” Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does*, HARV. BUS. REV. 120, 120 (May 1994).

D. Class Arbitration Lacks The Safeguards Of Class-Action Litigation.

Engrafting class-action procedures upon arbitration does more than merely forfeit the traditional benefits of arbitration. At the same time, it fails to provide many of the key protections offered to defendants litigating a class action in court.

1. To begin with, unlike in court, where appellate review of class-certification and merits determinations is robust, the standard for vacating an arbitrator’s decision on such issues is “among the nar-

rowest known to law.” *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). Although the FAA authorizes courts to vacate arbitral awards for such reasons as fraud or bias (9 U.S.C. § 10), parties may not agree by contract to expand those very limited grounds for review. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403-1404 (2008) (citing 9 U.S.C. § 10). In *Hall Street*, this Court noted that, under its prior precedent, the substance of an arbitral award may be reviewed for “manifest disregard of law,” and continued to “tak[e] that] language as we found it, without embellishment.” *Id.* at 1404. But most courts have construed the “manifest disregard” standard to be “a ‘severely limited’ doctrine.” *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (quoting *Gov’t of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989)). Accordingly, an arbitrator’s decisions regarding class certification; the scope of any class; the admissibility of expert testimony or other important evidence; whether or not the claim was proven; and the amount of damages can be disturbed by a court only if so egregiously wrong as to constitute a manifest disregard of the law. And, indeed, many courts have mistakenly extended that principle of narrow review to apply even to decisions that go to the heart of the arbitral bargain and what powers—such as transforming individual arbitration into class arbitration—the parties intended to confer on private decision-makers through their agreement. *See, e.g., Veliz v. Cintas Corp.*, 2009 WL 1766691 (N.D. Cal. June 22, 2009) (confirming award construing agreement as permitting class arbitration); *Dealer Computer Servs., Inc. v. Randall Ford, Inc.*, 2009 WL 277557 (S.D. Tex. Feb. 4, 2009) (same); *JSC Surgutneftegaz v. Presi-*

dent & Fellows of Harvard Coll., 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007) (same).

For example, the Fair Labor Standards Act (“FSLA”) requires that classes be limited to individuals who affirmatively have opted in, as opposed to the typical Rule 23 procedure under which individuals are members of the class unless they opt out. Nevertheless, in a case in which the arbitration provision was silent on the subject of class arbitration, an arbitrator first found class arbitration to be permissible and then ruled that all employees within the scope of the class definition who did not opt out would be included in the class. The district court and court of appeals refused to disturb either ruling. *See Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir.), *cert. denied*, 129 S. Ct. 58 (2008). In fact, to our knowledge, no court has vacated an arbitrator’s class-certification award. *See* Clancy & Stein, 63 BUS. LAW at 70 n.80 (reporting that “through September 28, 2007, no court has reversed an arbitrator’s decision to certify a class”); *see also, e.g., Dealer Computer Servs., Inc. v. Fox Valley Ford*, 310 F. App’x 749 (6th Cir. 2009) (rejecting appeal of award construing arbitration agreement as permitting class arbitration); *Veliz*, 2009 WL 1766691 (confirming award construing agreement as permitting class arbitration); *Randall Ford*, 2009 WL 277557 (same); *JSC Surgutneftegaz*, 2007 WL 3019234 (same). That record stands in stark contrast to that of the federal courts of appeals, which have exercised their power under Federal Rule of Civil Procedure

23(f) to reverse class-certification orders with some frequency.⁶

Many businesses are willing to forgo meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. The risk calculus changes dramatically, however, in the context of class arbitration. The stakes of a class arbitration are exponentially higher than those of an individual arbitration. No business would rationally expose itself to the possibility of ruinous liability without the availability of robust judicial review.

2. Beyond the lack of effective judicial review, defendants in a class arbitration also are deprived of the certainty that, if they win or settle the case, all (or substantially all) of the absent class members would be bound by the result. That is because the *res judicata* effect of class arbitration is unsettled at best.

Arbitration “is a matter of consent, not coercion.” *Volt*, 489 U.S. at 479. Particularly when an arbitration agreement does not expressly authorize class arbitration, the absent class members would have a powerful argument that they did not agree to be bound by an award resulting from an arbitration

⁶ A study of Rule 23(f) petitions between December 1, 1998 and October 30, 2006 found that courts granted interlocutory review 36 percent of the time. Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 778 PLI/LIT 117, 128 (2008). Another study of Rule 23(f) petitions granted between 1998 and December 2007 found that courts of appeals reversed the class-certification order 52.5 percent of the time. Richard D. Freer, *Interlocutory Review of Class Certification Decisions: A Preliminary Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 19 (2007).

proceeding in which they did not participate. As this Court has explained, class actions “implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (internal quotation marks omitted).

Judicial class actions are able to comport with due process because the court ensures that the named plaintiff serves as a fiduciary for the members of the class whom he or she represents. True, the major arbitration providers’ rules for class arbitrations purport to require the arbitrator to inquire into the adequacy of the claimant as a representative of the class, to probe the eventual settlement for fairness to absent class members, and to ensure the efficacy of notice to the class. *See, e.g.*, AAA Class Arbitration Rules 4-8. But those procedures do not hold the same promise in class arbitration as they do in a judicial class action. Unlike in court, in a class arbitration, the parties select the arbitrator. That distinction makes no difference when arbitration involves a small number of parties—as it traditionally always has—because, under the rules of leading arbitration providers, each party may veto the selection of an undesirable arbitrator, and arbitrators are subject to strict requirements to disclose potential conflicts of interest to the parties.⁷ But this distinction may make a difference in a class arbitration because the absent class members have no say in the selec-

⁷ *See, e.g.*, AAA, Commercial Arbitration Rules and Mediation Procedures, Rules 11 and 16, *at* <http://www.adr.org/sp.asp?id=22440> (effective June 1, 2009).

tion of the arbitrator. As one commentator has observed, “it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing.” Sternlight, 42 WM. & MARY L. REV. at 113.

Criticism of judicial class actions for the treatment of absent class members is widespread. In the consumer context, for example, class members often are consigned to receiving only coupons or pennies on the dollar for their claims, while class counsel recovers millions (and sometimes far more than the class itself).⁸ In fact, Congress has found that “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed.” Class Action Fairness Act of 2005, PUB. L. NO. 109-2 § 2(a)(3), 119

⁸ See, e.g., Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443 (2006); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167 (1997); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996). This criticism is well founded. For example, in one recent class-action settlement, class counsel received \$1,050,000 in cash and \$50,000 in coupons, while the entire nationwide class received only \$2,402 in cash and coupons. See *Moody v. Sears, Roebuck & Co.*, 2007 WL 2582193 (N.C. Super. Ct. 2007), *rev'd*, 664 S.E.2d 569, 582 (N.C. Ct. App. 2008) (reinstating settlement because although “we share the trial court’s serious concerns regarding the final accounting in the * * * settlement, we are constrained to hold that the trial court erred by refusing to accord full faith and credit to the” Illinois judgment approving it).

Stat 4. These criticisms apply with even greater force to class arbitration. Given the lack of effective judicial review of class arbitration, any class settlement that inadequately addresses the rights of absent class members, or any defects in the notice provided to the class, may escape correction.

Whether or not it is theoretically possible to overcome these concerns and for a defendant to obtain true finality after a class arbitration, the risk that a court or arbitrator will refuse to give a class-wide arbitral award or settlement *res judicata* effect would remain real. No matter how conscientious the arbitrator may be, a defendant can legitimately worry that a court will be sympathetic to an absent class member's entreaty to be given a chance to control his or her own destiny. After all, the court is unlikely to have the same comfort level with the decision of an arbitrator than with either its own decision or that of a colleague on the bench. And in this instance, the court probably would not be bound by the FAA's narrow standard of review given that the party before the court was not party to the arbitration.

* * * * *

In sum, given the risks entailed in class arbitration and the absence of any offsetting benefits, no reasonable defendant would willingly subject itself to this Frankenstein's monster. Instead, absent assurance that silence will not be taken to mean acquiescence, defendants whose arbitration agreements don't expressly rule out class arbitration will simply stop enforcing those agreements whenever there is any risk that the plaintiff will seek class-wide treatment. Nothing could more squarely conflict with the purposes of the FAA.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

MICHAEL F. ALTSCHUL
*CTIA—The Wireless
Association®
1400 16th Street, NW
Washington, DC 20036
(202) 785-0081*

EVAN M. TAGER
Counsel of Record
ARCHIS A. PARASHARAMI
KEVIN RANLETT
*Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000*

Counsel for Amicus Curiae

SEPTEMBER 2009

APPENDIX

**Reported Clause Construction Awards from
the American Arbitration Association's Class
Arbitration Docket (as of September 1, 2009)**

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Adame v. Fleetwood En- terps., Inc.</i>	11 181 01292 07	3/11/08	Silent arbitration provision construed to permit class arbitration.
<i>Addleman v. The Ryland Group, Inc.</i>	11 181 01524 05	9/15/05	Silent arbitration provision construed to permit class arbitration.
<i>Alexander v. GMRI, Inc.</i>	11 160 02018 05	4/24/06	Silent arbitration provision construed to permit class arbitration.
<i>Ali v. Morton's of Chicago/ Sacramento, Inc.</i>	11 160 02015 05	3/22/06	Silent arbitration provision construed to permit class arbitration.
<i>Allen v. Sports & Fitness Clubs of Am., Inc.</i>	11 160 03041 04	4/13/05	Arbitration provision that prohibited class arbitration construed to permit it.
<i>Anderson v. Check 'N Go of Cal. Inc.</i>	11 160 03021 04	6/20/05	Silent arbitration provision construed to permit class arbitration.
<i>Armstrong v. Ameriquest Mortgage Co.</i>	11 160 Y 01652 06	5/23/07	Silent arbitration provision construed to permit class arbitration.
<i>Associated Pa- thology Con- sultants, S.C. v. United Health- care of Ill., Inc.</i>	11 195 00971 06	12/18/06	Silent arbitration provision construed to permit class arbitration.
<i>Awe v. I & M Rail Link, LLC</i>	11 160 00026 05	5/24/05	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Bagped- dler.com v. U.S. Bancorp & Nova Info. Sys.</i>	11 181 00322 04 (consoli- dated with <i>Execu/Te ch Sys., Inc. v. U.S. Ban- corp, No. 11 181 00326 04)</i>	9/2/04	Silent arbitration provision construed to permit class arbitration.
<i>Bandler v. Charter One Bank, N.A.</i>	11 148 02801 04	9/3/06	Silent arbitration provision construed to permit class arbitration.
<i>Barmak v. Pas- quinelli-Heron Bay, LLC</i>	11 115 02642 07	3/20/08	Parties stipulated that si- lent arbitration provision permitted class arbitration.
<i>Barton v. Cot- tage Home- steads of Am., Inc.</i>	11 115 02967 04	5/11/05	Silent arbitration provision construed to permit class arbitration.
<i>Beazury v. Ar- bor Homes, LLC</i>	11 148 02161 04	1/31/05	Silent arbitration provision construed to permit class arbitration.
<i>Bennett v. TUV SUD Am., Inc.</i>	11 145 001543 08	4/17/09	Silent arbitration provision construed to permit class arbitration.
<i>Brown v. Celco P'ship</i>	11 494 01274 05	9/16/05	Respondent did not contest clause construction where arbitration provision was silent.
<i>Bryant v. Joel Antunes, LLC</i>	11 160 01783 05	4/21/06	Silent arbitration provision construed to permit class arbitration.
<i>Budner v. Ralph Oats</i>	11 181 00828 04	12/20/04	Agreement to arbitrate claims up to \$100,000 that was silent as to class arbi- tration construed to permit it. Because the damages sought exceeded \$100,000, the arbitrator held that class arbitration in this particular case was barred.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Cable Connection, Inc. v. DirecTV, Inc.</i>	11 145 00752 04	2/8/05	Silent arbitration provision construed to permit class arbitration.
<i>Champion Ford Lincoln Mercury, Inc. v. Dealer Computer Servs., Inc.</i>	11 117 01935 06	6/6/07	Silent arbitration provision construed to permit class arbitration.
<i>Chavez v. 3P Delivery, Inc.</i>	11 145 Y 1839 07	6/12/09	Parties stipulated that a silent arbitration provision permitted class arbitration, and respondent waived its right to seek enforcement of a prohibition of class actions that appeared in another arbitration provision.
<i>Cole v. Long John Silver's Rests., Inc.</i>	11 160 00194 04	6/15/04	Silent arbitration provision construed to permit class arbitration.
<i>Cook v. Rent-A-Center, Inc.</i>	11 160 01815 04	9/19/05	Arbitrator ruled that respondent was estopped from denying that silent arbitration provision permitted class arbitration.
<i>Cotton v. Rent-A-Center, Inc.</i>	11 160 01819 04	8/12/05	Court compelled class arbitration, and arbitrator independently confirmed that silent arbitration provision permitted class arbitration.
<i>Crawford v. Labor Ready Nw., Inc.</i>	11 160 02264 06	6/20/07	Arbitrator construed silent arbitration provision and arbitration provision that prohibited class arbitration to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Cummings v. AT&T Corp.</i>	11 181 02586 04	3/3/06	Arbitration provision that prohibited class arbitration was construed not to permit class arbitration. Arbitrator declined to consider claimant's argument that the class arbitration waiver was unconscionable, because a court had already rejected it.
<i>Dealer Computer Servs., Inc. v. Randall Ford, Inc.</i>	11 117 Y 002788 06	6/3/08	Silent arbitration provision construed to permit class arbitration.
<i>Depianti v. Bradley Mktg. Enterps., Inc.</i>	11 114 00838 07	8/1/08	Silent arbitration provision construed to permit class arbitration.
<i>Dub Herring Ford, Inc. v. Dealer Computer Servs., Inc.</i>	11 181 01119 06	11/21/06	Silent arbitration provision construed to permit class arbitration.
<i>Esposito v. Morton's of Chicago/Boston, Inc.</i>	11 160 02864 03	9/20/04	Arbitration provision that expressly permitted class arbitration construed to permit it.
<i>Fannan v. Technisource, Inc.</i>	11 160 01881 06	2/25/07	Silent arbitration provision construed to permit class arbitration.
<i>Flaxman v. Terminix, Inc.</i>	11 434 00701 07	1/14/08	Silent arbitration provision construed to permit class arbitration.
<i>Flores v. Arakeilian Enterps., Inc.</i>	11 160 02637 05	11/14/07	Parties stipulated that, pursuant to the arbitrator's award, silent arbitration provision permitted class arbitration.
<i>Fortuna v. Snap-on Tools Co., LLC</i>	11 114 01818 04	8/12/05	Arbitration provision that prohibited consolidation and joinder construed to permit class arbitration.

5a

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Fox Valley Ford v. Dealer Computer Servs., Inc.</i>	11 117 01929 06	11/9/07	Silent arbitration provision construed to permit class arbitration, based on both the doctrine of collateral estoppel and the panel's independent determination.
<i>Francis v. United El Segundo, Inc.</i>	11 160 00267 07	4/30/07	Arbitrator treated as law of the case a court ruling that the class action allegations should be resolved in arbitration.
<i>Garrett v. Rollins, Inc.</i>	11 181 01663 04	3/23/05	Silent arbitration provision construed to permit class arbitration.
<i>Garza v. Palm Harbor Homes, Inc.</i>	11 181 000972 07	6/27/08	Silent arbitration provision construed to permit class arbitration.
<i>Goldstein v. Ibase Consulting of Fairfield Cty., LLC</i>	11 160 02760 03	3/28/04	Silent arbitration provision construed to permit class arbitration.
<i>Grayson v. Rent-A-Center, Inc.</i>	11 160 01823 04	8/8/05	Silent arbitration provision construed to permit class arbitration.
<i>Groves v. Hemet Mfg Co., Inc.</i>	11 160 00194 05	11/8/05	Silent arbitration provision construed to permit class arbitration.
<i>Hamilton v. Rent-A-Center, Inc.</i>	11 160 01825 04	10/21/05	Silent arbitration provision construed to permit class arbitration.
<i>Haro v. NCR Corp.</i>	11 160 1962 05	3/6/06	Parties stipulated that silent arbitration provision permitted class arbitration.
<i>Harris v. TeleTech Holdings, Inc.</i>	11 160 02701 04	12/16/05	Silent arbitration provision and arbitration provision that expressly allowed class arbitration construed to permit class arbitration.
<i>Hausner v. United Healthcare of Tex., Inc.</i>	11 193 Y 00447 07	10/19/07	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Hayes v. M.S. Carriers, Inc.</i>	11 118 02907 04	6/15/05	Silent arbitration provision construed to permit class arbitration.
<i>Hearthside Rest., Inc. v. Qwest Dex, Inc.</i>	11 147 00357 04	9/2/04	Silent arbitration provision construed to permit class arbitration.
<i>Hernandez v. TeleTech Gov't Sol'ns, LLC</i>	11 160 01892 06	6/7/07	Silent arbitration provision construed to permit class arbitration.
<i>Hightower v. United Healthcare of La., Inc.</i>	11 193 02565 06	5/6/09	Silent arbitration provision construed to prohibit class arbitration.
<i>Hill v. iMergent, Inc.</i>	11 434 00318 08	2/23/09	Silent arbitration provision construed to permit class arbitration.
<i>Hlas v. Menard, Inc.</i>	11 160 00131 07	7/25/07	Silent arbitration provision construed to permit class arbitration.
<i>Hobby v. Snap-on Tools Co., LLC</i>	11 114 01884 04	6/8/05	Arbitration provision that prohibited consolidation and joinder construed to permit class arbitration.
<i>Hoffman v. Arthur Andersen LLP</i>	11 180 01410 05	3/23/06	Silent arbitration provision construed to permit class arbitration.
<i>Holland v. ECPI Coll. of Tech.</i>	11 434 001716 08	11/12/08	Parties stipulated that class waiver should be severed from arbitration provision and that remaining provision permitted class arbitration.
<i>Jock v. Sterling Jewelers, Inc.</i>	11 160 00655 08	6/1/09	Silent arbitration provision construed to permit class arbitration.
<i>Johnson v. Morton's Rest. Group, Inc.</i>	11 160 01513 05	5/22/06	Arbitration provision that expressly permitted class arbitration construed to permit it.
<i>Jones v. Genus Credit Mgmt. Corp.</i>	11 181 00295 05	10/13/05	Arbitration agreement that prohibited "class action lawsuit[s]" construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Jost v. Sizzler USA Rests., Inc.</i>	11 160 01721 05	10/25/06	Silent arbitration provision construed to permit class arbitration.
<i>Kaplan v. Citibank, N.A.</i>	11 148 1007 07	6/4/08	Class arbitration permitted pursuant to court order severing class waiver in arbitration provision.
<i>Kinkel v. Cingular Wireless, LLC</i>	11 494 02 646 06	10/12/07	Court held, and arbitrator independently determined, that class waiver was unconscionable and that remaining arbitration provision should be construed to permit class arbitration.
<i>Kirsh v. The Finova Group, Inc.</i>	11 148 Y 01381 07	9/29/08	Silent arbitration provision construed to permit class arbitration.
<i>Krastel v. TES Franchising, LLC</i>	11 114 00320 05	7/7/06	Silent arbitration provision construed to permit class arbitration.
<i>La. Health Serv. Indemnity Co. v. DVA Renal Healthcare, Inc.</i>	11 193 02297 06	10/5/07	Arbitration provision that prohibited joinder construed to permit class arbitration.
<i>Le v. Toshiba Am. Info. Sys., Inc.</i>	11 160 02033 04	3/7/05	Parties stipulated that arbitration provision permitted class arbitration. The docket does not disclose whether the arbitration provision was silent or not.
<i>Levitt v. Lipper Holding, LLC</i>	11 168 00663 04	5/23/05	Silent arbitration provision construed to permit class arbitration.
<i>Lichter v. Alarm One, Inc.</i>	11 180 00240 08	8/13/08	Silent arbitration provision construed to permit class arbitration.
<i>Lundy v. Blimpie Int'l, Inc.</i>	13 114 03098 02	4/26/07	Silent arbitration provision construed to permit class arbitration.
<i>Maslo v. Oak Pointe Country Club, Inc.</i>	11 181 02243 06	8/1/07	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>McCague v. Corinthian Colls., Inc.</i>	11 434 01278 08	5/11/09	Silent arbitration provision construed to permit class arbitration.
<i>McFann v. Volt Telecommc'ns Group, Inc.</i>	11 160 02592 07	4/15/08	Parties agreed that the arbitration provision did not preclude or prevent class arbitration and consented to forego the clause construction phase.
<i>McGraw v. Morton's Rest. Group, Inc.</i>	11 160 02171 06	7/3/07	Arbitration provision that expressly permitted class arbitration construed to permit class arbitration.
<i>Medina v. GMRI, Inc.</i>	11 160 02409 04	7/20/05	Silent arbitration provision construed to permit class arbitration.
<i>Milstein v. Protection One Alarm Servs., Inc.</i>	11 110 00270 04	10/11/04	Silent arbitration provision construed to permit class arbitration.
<i>Molfetas v. Stainsafe, Inc.</i>	11 181 00300 06	5/25/06	Parties stipulated that silent arbitration provision permitted class arbitration.
<i>Morgan v. Cintas Corp.</i>	11 160 00018 06 (consolidated with <i>Salcedo v. Cintas Corp.</i> , No. 11 160 01119 05)	8/16/06	Silent arbitration provision construed to permit class arbitration.
<i>Morton v. Championcomm.net of Tuscaloosa, Inc.</i>	11 199 00704 07	12/26/07	Silent arbitration provision construed to permit class arbitration.
<i>Murdock v. Thomas</i>	11 148 Y 01805 07	10/16/08	Respondent did not contest clause construction where arbitration provision was silent.

9a

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Nasee v. Global Horizons Manpower, Inc.</i>	11 160 00167 07	9/26/07	Parties stipulated that silent arbitration provision permitted class arbitration.
<i>Nichols v. Fanfare Media Works, Inc.</i>	11 160 Y 01780 06	6/14/07	Silent arbitration provision construed to permit class arbitration.
<i>Olson v. Rent-A-Center, Inc.</i>	11 160 01831 04	10/21/05	Arbitrator ruled that respondent was estopped from denying that silent arbitration provision permitted class arbitration.
<i>Orea v. Tavistock Rests. LLC</i>	11 160 01982 06	3/2/07	Silent arbitration provision construed to permit class arbitration.
<i>Owens v. Auto. Protection Corp.</i>	30 459 00642 05 (consolidated with <i>Price v. Auto. Protection Corp.</i> , No. 11 188 01140 05)	11/23/05	Parties agreed to waive the clause construction phase where arbitration provision was silent.
<i>Parham v. Am. Bankers Ins. Co. of Fla.</i>	11 195 00157 07	7/30/07	Silent arbitration provision construed to permit class arbitration.
<i>Partners Two Inc. v. Adecco N. Am., LLC</i>	11 114 03042 04	4/17/05	Respondent did not object to having the matter proceed as a class arbitration. However, respondent did not concede that the arbitration provision allowed class arbitration, and the arbitrator ruled that respondent's lack of objection would not affect the construction of the arbitration provision in future proceedings. The docket does not disclose whether the arbitration provision was silent.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Passow v. The Smith & Wolensky Rest. Group, Inc.</i>	11 160 00357 08	7/2/08	Silent arbitration provision construed to permit class arbitration.
<i>Petsch v. Orkin Exterminating Co.</i>	11 181 02541 04	8/31/05	Silent arbitration provision construed to permit class arbitration.
<i>Pitcher v. All Nations Group</i>	70 460 00427 06	10/10/07	Notwithstanding the agreement of the parties, the arbitrator independently determined that silent arbitration provision permitted class arbitration.
<i>President and Fellows of Harvard Coll. v. JSC Surgutneftegaz</i>	11 168 T 01654 04	8/1/07	Arbitration provision that expressly permits claims involving more than two parties, but does not mention class arbitration, construed to permit class arbitration.
<i>Rhodes Colleges, Inc. v. Satz</i>	11 181 02217 04	6/23/05	Silent arbitration provision construed to permit class arbitration.
<i>Rich v. Rent-A-Center, Inc.</i>	11 160 01833 04	8/18/05	Silent arbitration provision construed to not permit class arbitration.
<i>Sanchez v. Corinthian Coll., Inc.</i>	11 181 00236 5	11/15/05	Arbitration provision that prohibited class arbitration and silent arbitration provision were construed to permit class arbitration.
<i>Scher v. Oxford Health Plans, Inc.</i>	11 193 00548 05	3/7/06	Silent arbitration provision construed to permit class arbitration.
<i>Se. Ga. Regional Med. Ctr., Inc. v. Humana Military Healthcare Servs., Inc.</i>	11 193 00446 09	8/19/09	Parties stipulated that matter could be heard as a class arbitration, where arbitration provision was silent.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Sidhu v. GMRI, Inc.</i>	11 160 02273 04 (consolidated with <i>Mitchell v. GMRI, Inc.</i> , No. 11 160 02939 03)	6/10/05	Silent arbitration provision construed to permit class arbitration.
<i>Silver v. Westin Realty Corp.</i>	11 180 Y 01333 05	10/26/05	Parties stipulated that silent arbitration provision permitted class arbitration.
<i>Smith v. TeleTech Holdings, Inc.</i>	11 160 02726 04	4/12/05	Silent arbitration provision construed to permit class arbitration.
<i>Stokes v. AWSM Tech., LLC</i>	11 147 02374 06	6/22/07	Silent arbitration provision construed to permit class arbitration.
<i>Sutter v. United Health-Care Ins. Co.</i>	11 195 02075 06	11/9/07	Silent arbitration provision construed not to permit class arbitration.
<i>Sutter v. Oxford Health Plans, Inc.</i>	18 193 20593 02	9/23/03	Silent arbitration provision construed to permit class arbitration.
<i>Tarek, LLC v. Kincade</i>	11 Y 114 00578 04	7/30/04	Parties stipulated that silent arbitration provision permitted class arbitration.
<i>Terrapin Express, Inc. v. Airborne Express, Inc.</i>	11 199 015326 05	5/9/06	Silent arbitration provision construed to permit class arbitration.
<i>Thomas v. S. Commc'ns Servs., Inc.</i>	11 494 01518 08	4/2/09	Silent arbitration provision construed to permit class arbitration.
<i>Tomeldon Co., Inc. v. Medco Health Sol'ns, Inc.</i>	11 193 00546 06	11/22/06	Silent arbitration provision construed to permit class arbitration.
<i>Travis v. Rhodes Colleges, Inc.</i>	11 199 01827 06	6/26/07	Silent arbitration provision construed to permit class arbitration.

Case Name	AAA Case No.	Date	Clause Construction Award
<i>Veliz v. Cintas Corp.</i>	11 160 01323 04	12/11/08	Silent arbitration provision construed to permit class arbitration.
<i>Walters v. Palm Harbor Homes, Inc.</i>	11 421 002782 06	1/17/08	Silent arbitration provision construed to permit class arbitration.
<i>Warrior Transp. v. FFE Transp. Servs. Inc.</i>	11 118 00365 05	8/18/05	Silent arbitration provision construed to permit class arbitration.
<i>Weller v. Sprint Commc'ns, L.P.</i>	11 181 00070 06	8/22/06	Silent arbitration provision construed to permit class arbitration.
<i>Wolf v. Lakewood Homes, Inc.</i>	11 181 Y 01244 06	9/29/06	Respondents waived clause-construction phase for silent arbitration provision.
<i>XM Satellite Radio Inc. v. Enderlin</i>	11 181 00989 06	8/13/08	Silent arbitration provision construed to permit class arbitration.
<i>Zacharias v. Cypress Commc'ns, Inc.</i>	11 181 00004 06	11/27/06	Silent arbitration provision construed to permit class arbitration.