

No. 08-1198

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IN THE  
*Supreme Court of the United States*

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STOLT-NIELSEN S.A. ET AL.

*Petitioner,*

v.

ANIMALFEEDS INTERNATIONAL CORP.,

*Respondent.*

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*On Writ of Certiorari  
To the United States Court of Appeals  
For the Second Circuit*

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**BRIEF OF AMERICAN ARBITRATION  
ASSOCIATION AS AMICUS CURIAE IN  
SUPPORT OF NEITHER PARTY**

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The American Arbitration Association (“AAA”), a non-profit public service organization, is the largest provider of alternative dispute resolution services in the world. Founded in 1926, the AAA has administered over 2 million domestic and

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<sup>1</sup> Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

international disputes arising out of a wide variety of contracts and collective bargaining agreements. The AAA also conducts comprehensive training for arbitrators and mediators and provides programs and publications to educate the public and potential users of its services about various forms of alternative dispute resolution. The AAA has offices located throughout the United States, as well as in Ireland, Singapore, and Mexico. The AAA will open an office in Bahrain in the near future.

In response to this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the AAA developed and implemented a set of rules to govern class action arbitrations, known as the Supplementary Rules for Class Arbitration (the "Rules" or "Class Rules"). See Addendum A. The parties in this case agreed that the Rules would, in part, apply to their arbitration.<sup>2</sup>

The extensive use of the AAA's Class Rules in proceedings in which parties have sought class arbitration has given the AAA substantial experience with, and insight into, the conduct of class arbitrations. The AAA is thus singularly situated to offer this Court a perspective on the manner in which class arbitrations have evolved, how proceedings that are brought as class arbitrations are administered,

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<sup>2</sup> The AAA's various rules, including the Supplementary Rules for Class Arbitrations, are drafted in a manner that contemplates the AAA's active administration of the underlying arbitration. The arbitration proceedings in this case, however, proceeded *ad hoc*, without the supervision of the AAA or any arbitral institution.

and how the AAA and arbitrators administer and decide class action arbitrations. However, as a matter of policy, the AAA takes no position on the question whether an arbitration agreement that is silent on the availability of class arbitration should be interpreted to permit such arbitration.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

While the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et. seq.*, is now over 80 years old, issues concerning the availability and administration of class action arbitrations under that statute came to the fore only in the past two decades, following a series of decisions from this Court enforcing the FAA’s national policy in favor of arbitration. Of most relevance here, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), marked the first time that this Court addressed the intersection of class actions and arbitration. In *Bazzle*, a majority of the Court concluded that whether an arbitration agreement permits or prohibits class arbitration should be decided by an arbitrator in the first instance as an issue of contract interpretation.

The AAA anticipated that some parties would likely view the Court’s decision in *Bazzle* as an implicit endorsement of class arbitrations under the FAA when permitted by the parties’ contract. The AAA therefore responded by developing a set of procedures to help arbitrators make the types of determinations that would be required in class action arbitrations. The AAA’s first step was to assemble a committee of experts knowledgeable both about

arbitration and class actions to draft class arbitration rules for use in proceedings brought to the AAA as class arbitrations. The committee was balanced and diverse, and included individuals who represented both plaintiffs and defendants in class action proceedings. The Rules were the result of the committee's effort.

The Rules went into effect in October 2003. The goals of the Rules are (i) to provide a roadmap for the conduct of class action arbitrations where the underlying contract either expressly or as a matter of contract interpretation authorizes class arbitration (or where class arbitration is ordered by a court); (ii) to address significant fairness and due process concerns applicable to all sides, especially absent class members; and (iii) to balance the efficiencies and cost savings of arbitration with the need for an appropriate level of judicial oversight. The AAA's six years of experience with its Class Rules have given the AAA confidence that it has been successful in accomplishing those goals.

In adopting the Rules, the AAA's sole interest was to provide a fair, efficient, and effective mechanism for the resolution of class action arbitrations, to the extent that such arbitrations are permitted by the underlying contract. The AAA thus offers this *amicus curiae* brief to provide the Court an overview of its Class Rules and how class arbitrations are conducted under them. While the AAA takes no position on the question presented in this case, the AAA believes that this brief may help inform the Court's resolution of the question presented by providing background information

about the administration of class arbitrations generally and the processes that are available for resolving disputes pertaining to class issues.

## ARGUMENT

### I. THE AAA SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS PROVIDE A FRAMEWORK FOR THE RESOLUTION OF CLASS ACTION ARBITRATIONS.

#### A. The Emergence of Class Arbitration Issues Prior to *Bazzle*.

Class action arbitrations are a relatively recent phenomenon in the history of the FAA. Their roots are traceable to a line of decisions from this Court in the 1980s that gave effect to and invigorated the national policy, embodied in the FAA favoring arbitration and honoring private agreements to arbitrate rather than litigate disputes.

Of particular relevance to the development of class arbitrations was this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In *Keating*, this Court held that a state law prohibiting arbitration under franchise agreements was preempted by the FAA, even in state court. *Id.* at 16. More broadly, the Court's decision underscored that courts would respect and enforce arbitration provisions in agreements. "Contracts to arbitrate," the Court emphasized, "are not to be avoided by allowing one party to ignore the contract and resort

to the courts [because] “[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.” *Id.* at 7.

While the Court declined to address the propriety of the class arbitration ordered by the lower court, 465 U.S. at 9, *Keating* was part of a series of cases interpreting the FAA that unequivocally signaled judicial respect for, and deference to, contractual agreements to arbitrate. Other cases included *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-637 (1985); and *Perry v. Thomas*, 482 U.S. 483, 490 (1987). Collectively, those precedents underscored that “Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it.” *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (internal quotations omitted).

In response to these decisions, businesses began to incorporate arbitration clauses into their form contracts with other businesses and consumers. The increasing use of those clauses reflected, at least in part, an effort to obtain the benefits of arbitration that this Court had identified in its decisions giving an expansive interpretation to the FAA: avoiding costly and time-consuming litigation in the court system, and resolving disputes in an efficient and streamlined process. *Mitsubishi*, 473 U.S. at 628.

The greater prevalence of arbitration clauses in form contracts with large numbers of counterparties led, in turn, to the emergence of issues concerning the permissibility of class arbitrations. Because the FAA states that arbitrations must be conducted “in accordance with the terms of the agreement,” 9 U.S.C. § 4, requests for class arbitration necessarily required resolution of a threshold question: whether the arbitration agreement even permitted class arbitration. If it did, then numerous secondary questions arose: how the class certification determination should be made, who should make it, and what tools are available to guide the decisionmaker in rendering such determinations within an arbitration proceeding. All of these questions were presented to judges and arbitrators with increasing frequency in the 1990s and the early part of this decade. *See, generally*, Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will The Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 12 (2000); Allen S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Current Trends And Developments*, 53 Bus. Lawyer 1075, 1080-81 (1998).<sup>3</sup>

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<sup>3</sup> A related issue that courts have addressed in the past decade, and which is the subject of continuing litigation and substantial controversy, is the enforceability of clauses in standard form agreements expressly prohibiting class action proceedings of any type. *See* note 8, *supra*.

## **B. Bazzle and the AAA's Response.**

### *1. The Bazzle Decision*

The only decision of this Court thus far to confront class arbitration issues is *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The question presented to this Court in *Bazzle* was whether the FAA “prohibits class-action procedures from being superimposed on to an arbitration agreement that does not provide for class-action arbitration.” *Bazzle* Cert. Pet. at i. The parties in *Bazzle*, however, disputed whether the arbitration agreement actually prohibited class arbitration or was simply silent on the point. *Bazzle*, 539 U.S. at 447 (plurality opinion).

As a result, the Court in *Bazzle* found it necessary to resolve, instead of the question presented, the predicate question of who should decide whether an agreement permits or prohibits class arbitration – an arbitrator or a court? A four-Justice plurality concluded that “whether [an arbitration agreement] forbids class arbitration . . . is for the arbitrator to decide” in the first instance, because that question relates to “what kind of arbitration proceeding the parties agreed to.” 539 U.S. at 451-452. The plurality explained that ascertaining what kind of arbitration proceeding the parties agreed to “concerns contract interpretation and arbitration procedures[, which] [a]rbitrators are well situated to answer.” *Id.* at 453. Because the lower court in *Bazzle*, rather than an arbitrator, had determined whether the agreement permitted or precluded class arbitration, the plurality voted to

remand the matter to permit the South Carolina Supreme Court to submit that determination to the arbitrator. *Id.* at 447, 454.

Justice Stevens stated that he would have affirmed the lower court decision holding that the agreement permitted class arbitration, but he joined the plurality's disposition in order to produce a majority judgment that the question of contract construction be remanded to the arbitrator. 539 U.S. at 455 (Stevens, J., concurring).

## 2. AAA's Response

Some lower courts (including the Second Circuit in this case) interpreted the Court's judgment in *Bazzle* as an implicit endorsement of the concept of class arbitrations, at least when the arbitration agreement does not expressly prohibit them. See *Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 991 (9th Cir. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006).

The AAA understood *Bazzle* to endorse the proposition that, under the FAA, class arbitrations are permissible where the parties' arbitration agreement is construed to permit class arbitration. Accordingly, to prepare for an anticipated increase in demand for the administration of class arbitrations, the AAA began shortly after *Bazzle* to develop new procedures designed specifically for such proceedings.

At the same time, however, the AAA was sensitive to the controversies surrounding class actions, both inside and outside the arbitral setting.

As a result, the AAA labored to ensure that the procedures it developed would neither favor nor disfavor the use of class arbitration, and the AAA adopted a position of neutrality on whether class arbitrations were wise or not. The AAA's primary interest was to ensure, to the extent possible, the availability of effective, fair, and efficient class arbitration procedures for parties whose agreements were construed to permit class proceedings, and thereby to assist arbitrators in carrying out the class arbitration-related functions with which they were tasked by this Court in *Bazzle* and by parties seeking class arbitration.

The record of pre-*Bazzle* arbitrations on which the AAA could draw in developing class arbitration procedures was thin. Prior to *Bazzle*, the AAA had administered only a small number of class arbitrations, and typically did so only when a class action was referred by a court to arbitration. See, e.g., *Lewis v. Prudential-Bache Securities, Inc.*, 225 Cal. Rptr. 69 (Cal. Ct. App. 1986).

Judicial discussion of the contours of class arbitrations also was minimal before *Bazzle*. In *Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), an intermediate state court expressed the view that neither federal nor state law poses an “insurmountable obstacle to conducting an arbitration on a class-wide basis.” *Id.* at 492. That court posited, however, that class certification decisions should be made by a court, not an arbitrator, and that class arbitrations would require

a heightened level of judicial oversight to protect the rights of absent class members. *Ibid.*<sup>4</sup> A state appellate court in Pennsylvania also subscribed to that position, concluding that, while the arbitration at issue there could proceed on a class-wide basis, substantial judicial supervision would be necessary. See *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. 1991).

Accordingly, to assist in the development of class arbitration procedures after *Bazzle*, the AAA commissioned an expert drafting committee. The committee was well-balanced and reflected diverse perspectives. It was composed of representatives of the business community, as well representatives of the plaintiffs and the consumer litigation bar. A former judge and senior AAA officials also served on the committee.

Fairness, due process, and efficiency were the overriding objectives of the committee. The committee was acutely aware that the interests of absent class members had to be protected, as the state courts in *Keating* and *Dickler* had observed. The committee also was cognizant of the need for fairness to the respondent in the arbitration proceeding, given the costs of conducting a class arbitration and the large amounts of monetary

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<sup>4</sup> *Keating* eventually reached this Court as *Southland Corp. v. Keating*, *supra*, but (as indicated above) the Court did not reach the class arbitration issues on which the intermediate state court had opined. 465 U.S. at 9.

claims potentially at stake.<sup>5</sup> The committee concluded, however, that fairness to absent parties and the evenhanded protection of both sides could be achieved in the context of arbitration, while preserving many of the normal efficiencies and conveniences of that process. *Cf. Shroyer*, 498 F.3d at 991 (“There is no reason to believe that the principal consideration of judicial economy that underlies the class mechanism in Rule 23 would not operate similarly in the context of class arbitration.”). Thus, the committee sought to craft class arbitration rules that did not contemplate extensive judicial oversight of the arbitration proceeding, in contrast to the model advocated by the state courts in *Keating* and *Dickler*. Indeed, in the AAA’s view, that model had been cast into some doubt by this Court’s decision in *Bazzle*.

**C. The AAA Class Arbitration Rules Divide  
The Resolution Of Class Arbitration  
Issues Into Three Phases To Ensure  
Fairness And Efficiency.**

The result of the committee’s efforts was the adoption of the Class Rules, which became effective on October 8, 2003. The Rules divide the resolution of class arbitration issues into three distinct phases. The purpose of this structure is to ensure that the AAA’s foundational goals of fairness and efficiency are accomplished in class arbitrations by providing

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<sup>5</sup> In *Bazzle*, the class award against the respondent was nearly \$11 million. *Bazzle*, 539 U.S. at 449 (plurality opinion).

the parties the opportunity at stated intervals to seek judicial approval or disapproval of a decision by the arbitrator.<sup>6</sup>

In addition, the AAA believes that, to achieve the goals of fairness and efficiency, it is critical that arbitrators who preside over classwide arbitrations possess substantial experience with and an in-depth understanding of class action proceedings, as well as arbitration. Accordingly, arbitrators presiding over class arbitrations conducted under the Rules are appointed from a select national roster of experienced class action arbitrators. Rule 2(a), Addendum A at 2a.

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<sup>6</sup> The Class Rules apply when the parties' arbitration agreement provides for arbitration pursuant to any of the rules of the AAA, and when one of the parties submits a dispute to arbitration on behalf of or against a class or purported class. Rule 1(a), Addendum A at 1a. The Class Rules are intended to supplement, rather than supplant, other applicable rules that may apply in a proceeding. *Ibid.* In the event of inconsistencies between the Class Rules and other applicable rules, however, the Class Rules govern. Rule 1(b), Addendum A at 1a. Following the model of the Rules, the term "arbitrator" in this brief encompasses a panel of three arbitrators for proceedings in which the agreement of the parties calls for more than one arbitrator.

1. *The Clause Construction  
Award Phase*

The first phase under the Rules is the “Clause Construction Award” phase. This phase is designed to permit the arbitrator to fulfill the Court’s directive in *Bazzle* by determining, “in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration award to proceed on behalf of or against a class.” Rule 3, Addendum A at 2a. The Clause Construction Award determination must be made “as a threshold matter” at the outset of the arbitration, before the arbitrator determines any questions regarding class certification or the merits of the dispute. *Ibid.* In making this determination, the arbitrator seeks to effectuate the intent of the parties, as required by this Court’s precedents governing the interpretation of arbitration agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991). To emphasize that the parties’ selection of AAA Rules to govern their proceeding is not evidence bearing on whether the arbitration should be conducted on a class-wide basis, the Rules specify that, “[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules . . . to be a factor in either favor of or against permitting the arbitration to proceed on a class basis.” Rule 3, Addendum A at 2a.<sup>7</sup>

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<sup>7</sup> The parties in the instant case agreed that Rules 3-7 of the AAA’s Class Rules would govern their arbitration

As explained in the Commentary to the AAA's Policy on Class Arbitrations, the AAA will neither commence administration of an arbitration nor refer a matter to an arbitrator if the arbitration agreement contains a class waiver clause that "on its face prohibits class actions," unless a court has determined that the class action waiver is unenforceable, or if a court otherwise orders that the arbitrator determine the enforceability of the class action waiver. Commentary to AAA Policy on Class Arbitrations, Feb. 18, 2005 (attached as Addendum B at 15a ).<sup>8</sup>

After the Clause Construction Award is rendered, the Rules require the arbitrator to stay proceedings for a period of at least thirty days to "permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award." Rule 3, Addendum A at 2a.<sup>9</sup> That automatic stay affords an opportunity for early

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proceeding. Pet. App. 56a. The arbitrators' determination that the agreement permitted class arbitration was made pursuant to Rule 3. *Id.* at 4a.

<sup>8</sup> The AAA adopted its policy of declining to accept requests for class arbitration when the agreement contains a waiver clause expressly prohibiting class proceedings because caselaw on the enforceability of such waivers of class action rights was – and remains – somewhat unsettled. See Commentary, Addendum B at 15a; compare, e.g., *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (enforcing class action waiver clause), with *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (declining to enforce such a clause).

<sup>9</sup> The Petitioners in the instant case invoked the Rule 3 stay provision and sought judicial review of the arbitrator's Clause Construction Award. Pet. App. 52a.

judicial review of the arbitrator's decision on whether class arbitration is permitted under the arbitration agreement. The stay thus conserves resources by allowing a party to subject the Clause Construction Award to judicial scrutiny before further investment of time and resources in the arbitration proceeding. If a party informs the arbitrator that it has sought judicial review of the award after the 30-day period has lapsed, the arbitrator has the discretion to stay further proceedings until the arbitrator is informed of the ruling of the court. *Ibid.*

In crafting the provision for an automatic stay of the Clause Construction Award, the AAA relied on case law that permitted courts to confirm partial final arbitration awards under certain circumstances. *See, e.g. Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 2d 280 (2d Cir. 1986). The inclusion of the mandatory stay provision also drew on, but did not adopt entirely, the judicial oversight model proposed by the state courts in *Keating* and *Dickler* (the only judicial precedents on the administration of class arbitrations at the time the AAA was drafting the Rules). Early in the AAA's administration of class action arbitrations, parties expressed a positive reaction to the automatic stay, which they viewed as a safety valve in the class arbitration process. However, as the AAA and parties have become more familiar with class arbitration proceedings, the need for an automatic stay after the Clause Construction Award has been called into question by some who believe that it unnecessarily delays the arbitration process. As warranted by changes in arbitration law and developments in arbitration practice, the AAA makes periodic amendments to its various rules. In

assessing possible future changes to the Class Rules, the AAA will consider the continued need for the automatic stay following the Clause Construction Award.<sup>10</sup>

## 2. *The Class Determination Award Phase*

If the arbitrator decides that the arbitration clause permits a class action and after the stay following the Clause Construction Award has expired, the second phase under the Rules commences. In that second phase, the Class Determination Award phase, the arbitrator decides whether the matter should proceed as a class action. Rule 4(a), Addendum A at 5a.

The criteria to be applied by the arbitrator in making a Class Determination Award largely track the provisions of Rule 23 of the Federal Rules of Civil Procedure. The AAA decided to hew closely to Federal Rule 23 because of its protections of the due process rights of the parties and absent class

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<sup>10</sup> At least one federal appellate court has declined to exercise jurisdiction to review a Clause Construction Award under the stay provision, holding that the propriety of the arbitration panel's decision that the agreement permitted class arbitration was not ripe for review. *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 562 (6th Cir. 2008). The court in that case noted, however, that the AAA's Class Rules provide "ample opportunity [later] to obtain judicial review . . . of the arbitration panel's prior Clause Construction Award." *Ibid.* The "ample opportunity" to which the court referred was the Class Rules' stay provision allowing judicial review following the second phase – the Class Determination Award, which is discussed in point 2, *infra*.

members, and because of the extensive body of case law under Rule 23 on which arbitrators could rely in making Class Determination Awards.

As is the case with judges under Federal Rule 23, arbitrators making a Class Determination Award must decide whether certain “prerequisites” to class treatment are met. Those prerequisites include the familiar Rule 23 factors of numerosity, commonality, typicality, and adequacy of representation and class counsel. Rule 4(a), Addendum A at 5a.

The Rules go further than Federal Rule 23(a) in one respect, however: the arbitrator may certify a class arbitration only if “each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.” Rule 4(a)(6), Addendum A at 5a. The inclusion of that provision seeks to ensure that each putative class member entered into the same arbitration agreement. That inquiry is necessary because commercial entities sometimes use different standard form contracts for different subsets of clients or customers. Class treatment under the Rules thus is authorized only if the differences in the arbitration clauses of the contracts are not material.

If those prerequisites are satisfied, the arbitrator must make additional determinations that mirror Federal Rule 23(b)(3)’s standards. Specifically, a class may be certified for arbitration only if (i) common issues of law or fact predominate over individual issues, and (ii) class arbitration would be a superior method for resolving the matter. Rule 4(b),

Addendum A at 5a. The factors to be considered in making those determinations echo Rule 23(b) by focusing on (i) the interest of putative class members in individually controlling separate arbitrations; (ii) the extent and nature of proceedings already commenced by or against the class members; (iii) the desirability of concentrating the resolution of claims in one tribunal; and (iv) the degree of difficulty in managing a class arbitration. *Ibid.*

The Class Determination Award must contain the arbitrator's findings with respect to the required elements for class certification. Rule 5(a), Addendum A at 6a. In addition, borrowing from Federal Rule 23(b)(3)'s "opt-out" provision, the Rules require that any Class Determination Award state how class members may be excluded from the class action, absent some exceptional circumstance that precludes permitting opt outs. Rule 5(c), Addendum A at 6a.

Like the Clause Construction Award stage, the Class Determination Award provision provides for a thirty-day automatic stay to allow a party or an intervening class member to seek a judicial order either confirming or setting aside the Class Determination Award. Rule 5(d), Addendum A at 7a. That provision is akin to the interlocutory appellate review of district court class certification decisions that is authorized by Rule 23(f).

If the arbitrator determines that class arbitration should proceed and after the 30 day stay for judicial review expires, the arbitration proceeds to the stage of providing notice to class members and administering exclusions from the class. The

particular details of the notice and exclusion process are specified in the Rules. Rule 6, Addendum A at 7a.

### 3. *The Final Award Phase*

After the notice to class members is issued and exclusions are addressed, the class arbitration moves to the merits phase, which will ultimately result in a Final Award. Rule 7, Addendum A at 9a. Whether favorable to the class or not, the Final Award must define the class with specificity, state to whom notice was sent, and identify who (if anyone) elected to exclude himself or herself from the class. *Ibid.* In addition, like Federal Rule 23, the Class Rules require arbitrator approval of any settlement or dismissal of a class action arbitration. Rule 8, Addendum A at 9a.

The presumption of confidentiality that applies to the majority of AAA arbitrations is abandoned for all phases of the proceedings under the Rules. Instead, the Rules provide that “[a]ll class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances.” Rule 9(a), Addendum A at 9a. The AAA determined that confidentiality was incompatible with the concept of class arbitration because of the large numbers of individuals – especially absent class members – potentially affected by class arbitration decisions. The AAA therefore adopted a policy of transparency, unprecedented in commercial arbitration, to ensure that all members of the putative class could fully monitor the proceedings. Accordingly, every class

arbitration administered by the AAA is posted on the class arbitration docket on the AAA's website (available at <http://wwr.adr.org.sp.asp?id=28763>). On that docket, the AAA posts the demand for arbitration, the identities of the parties, the names and contact information of counsel, all awards rendered in the case, and the date, time and place of any scheduled hearings. Rule 9(b), Addendum A at 10-11a. Very few objections to the lack of confidentiality have been raised by parties to proceedings under the Rules. Indeed, in only a few instances have parties requested, and arbitrators agreed, to refrain from posting certain information that otherwise would have been made available.

The AAA's response to this Court's directive in *Bazzle* generally has been seen as positive. One scholar has described the Rules as a "useful quasi-hybrid model" that combines arbitrator autonomy with a laudable opportunity for judicial oversight at phases 1 and 2 of the process. See S. I. Strong, *Enforcing Class Arbitration In The International Sphere: Due Process And Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 41 (2008). The same author also noted that the Rules "create a useful record and procedural guideline" that facilitates judicial review, while "minimiz[ing] expenditures of time, money, and effort," and limiting delays and obstructions in class arbitration proceedings. *Id.* at 41, 42.

**D. A Statistical Overview Of Arbitrations Administered By The AAA Under its Class Rules.**

The AAA provides the following statistical overview of arbitrations administered under the AAA's Class Rules.

In the nearly six years that the Class Rules have been in effect, the AAA has administered 283 class arbitrations, 121 of which remain active.

Of the 283 class arbitrations, 135 have resulted in Clause Construction Awards. Of those 135:

- 95 (70%) held that the arbitration clause permitted the arbitration to proceed on behalf of a class.
- 7 (5%) held that the arbitration clause did not permit the arbitration to proceed on behalf of a class.
- 33 (24%) involved stipulations among the claimants and the respondents that the underlying arbitration agreement permitted the arbitration to proceed on behalf of a class.

Of the cases permitted to proceed beyond the Clause Construction Award, 48 have resulted in Class Determination Awards. Of those:

- 24 (50%) granted class certification.
- 18 (38%) denied certification.
- 6 (13%) were resolved by stipulations among the parties to certify a class.

So far, no class arbitration conducted under the Rules has resulted in a final award on the merits, although one such award is imminent. However, 162 cases commenced as class arbitrations have been settled, withdrawn, or dismissed. At the time they were settled, withdrawn, or dismissed:

- 97 (60%) were in the Pre-Clause Construction Award Phase.
- 40 (25%) were in the Post-Clause Construction/Pre-Class Determination Award Phase.
- 23 (14%) were in the Post-Class Determination Award Phase.
- 2 (1%) were consolidated into other class arbitrations.

Furthermore, to the AAA's knowledge:

- 38 (17%) of the 228 cases where the arbitrator has been appointed have proceeded with three arbitrators. In 190 of the 228 cases, the arbitration proceeded with a single arbitrator.
- 81 (28%) of the arbitrations can be categorized as business versus business disputes. Those break down as follows:

Franchise	21	7%
Healthcare	20	7%
Financial Services	9	3%
Other	31	11%

- The remaining 196 cases (69%) can be categorized as disputes between businesses and consumers or employees. Those break down as follows:

Consumer	106	37%
Employment	96	34%

Overall, the median time from the filing of an arbitration to the Clause Construction Award is 281 days and a mean of 313 days. The median time from the Clause Construction Award to the Class Determination Award is 416 days and a mean of 501 days.

For all 162 closed cases, the median time frame from filing to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days.

All told, these statistics suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court.

**CONCLUSION**

While the AAA takes no position on the legal question presented, the AAA's substantial experience under the Class Rules indicates that they have achieved their stated goals of responding to this Court's decision in *Bazzle* by providing guidance to the parties and arbitrators, and a fair, balanced, and efficient means of resolving class disputes.

Respectfully submitted,

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