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In the Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; 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 DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

DRI – The Voice of the Defense Bar ("DRI") is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership and to the judicial system. Based on its members' extensive practical experience, DRI is uniquely well suited to explain to the Court why class arbitration is a fundamentally different, more complex, and expensive process than individual arbitration. The Second Circuit's opinion, which effectively equates contractual silence with consent to class arbitration, will subject numerous defendants to the very financial risks and burdens they sought to contain by contracting for arbitration.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Arbitration is favored under federal law, the laws of many states, and this Court's jurisprudence, because it is inexpensive, streamlined, and efficient. Class arbitration, by contrast, is a markedly different procedure that offers none of these advantages. It is costly, risky, cumbersome, and may even involve substantial judicial oversight – the very attributes that generally motivate parties to choose traditional arbitration over litigation in the first place.

Arbitration agreements, like other contracts, must be enforced according to their terms. But there is no doctrinal support – and no principled justification – for subjecting parties to an alternative, non-judicial proceeding to which they never agreed, either expressly or implicitly. Accordingly, this Court should reverse the Second Circuit's holding that "silent" contracts may be interpreted to permit class arbitration unless it is clearly excluded. Pet. App. 28a. The rationale of the decision below – which effectively results in a presumption favoring class arbitration – derives from a misperception of this Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003). Unfortunately, a similar misapprehension of *Bazzle* permeates the decisions of arbitrators who have been called upon to resolve clause construction disputes regarding class arbitration. In the past few years, as a consequence, arbitrators have become overly eager to authorize class arbitration, even at the expense of other express terms in the parties'

agreement that are flatly incompatible with mass arbitral proceedings.

This *amicus curiae* brief addresses arbitral decisions that represent glaring departures from contract language, some of which employ an indefensible presumption favoring class arbitration. Such departures from the parties' contractual language and intent would be cause for grave concern in any circumstances. That they arise in the context of arbitral determinations that often are not subject to searching substantive judicial review – and that potentially affect the rights of parties with respect to a mass group of nonparticipating "claimants" – should set off alarm bells. This Court should heed the alarm.

Class arbitration simultaneously removes the protections – including Constitutional due process requirements – afforded parties in class action litigation and eliminates the traditional advantages of arbitration. In fundamental respects, class arbitration runs directly counter to the stated objectives of arbitration. Where arbitration promotes informal decisionmaking by experts in the substantive field in dispute, class-wide proceedings require strict adherence to procedural regularity in order to protect the rights of absent class members. And, there is no assurance that arbitrators in such proceedings have any experience, much less expertise, in conducting the process in a way that adequately protects the rights of all potentially affected participants and non-participants. Equally as important, a highly valued attribute of single party v. single party arbitration is the desire to

preserve confidentiality. That benefit, too, is lost in class arbitration since such proceedings result in publicly available awards. Perhaps most important of all is the uncertainty surrounding the finality of any result in a class arbitration. Unlike a traditional, single party v. single party arbitration that can be reduced to an enforceable, confirmed judgment under the Federal Arbitration Act ("FAA"), class arbitrations do not provide absent parties – or the respondent – any certainty of finality or repose. Because arbitration proceedings are, by definition, more informal and less bound to legal procedures and standards, serious questions will remain over the binding effect of any decision. In short, class arbitration is not an inherently desirable process, is not entitled to any favorable presumption, and should not be imposed on parties who have not expressly agreed to it.

As important as these governing rules are in the context of domestic contracts, they are even more vital with respect to transnational agreements. In the arena of international commercial transactions it should be undeniable that parties whose contracts do not expressly contemplate class arbitration should not – under the fiction of honoring their contractual intent – be relegated to a procedure they strenuously oppose.

ARGUMENT

Consistent With the Rule that Arbitration Contracts Must Be Enforced as Written, Courts Should Not Impose Class Arbitration on Parties to Silent Agreements

In holding that an arbitration agreement which is admittedly silent regarding class arbitration should nonetheless permit it, the Second Circuit joined several other courts – and numerous arbitrators – in misreading this Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), as a tacit endorsement of class arbitration in such circumstances. Based on the experience parties to "silent" agreements have gained in the six years since *Bazzle* was decided, it is no exaggeration to say that the issue has developed in ways that were not intended by this Court, by Congress, or by parties who could never have imagined that their "silence" could be so profoundly distorted.

Indeed, it was not until *after*, and in response to, the decision in *Bazzle* that the leading domestic arbitral organizations even developed procedures for handling class action arbitration: the American Arbitration Association ("AAA") did not issue procedures to govern class arbitrations until October 2003, and JAMS had none until 2005. *See* AAA Supplementary Rules for Class Arbitrations (Oct. 8, 2003), http://www.adr.org/sp.asp?id=21936 ("AAA Supplementary Rule(s)"); JAMS Arbitration Rules Archive, *available at* http://www.jamsadr.com/rules-rules-archive. The agreement in this case was based

on a version first published more than 50 years ago, when silence on the subject of class arbitration – a procedure that was essentially nonexistent – was the norm. *See* Pet. Br. 4. In these circumstances, it is counterfactual to conclude that parties should have known to draft provisions about a process that did not exist in its present form. And it is even more counterfactual to conclude that "silent" contracts should favor class arbitration.

A. Arbitrators Have Overreached Their Authority in Construing Silent Agreements to Permit Class Arbitration

The reality since 2003 is that arbitrators have fallen into two related mistakes: (1) they have been too quick to deem a contract "silent" on class arbitration even in the face of provisions that are flatly incompatible with such mass arbitration, and (2) they have been too quick to conclude that such silence is tantamount to acquiescence in class arbitration. In short, in the wake of *Bazzle*, 539 U.S. 444, arbitrators issuing "clause construction" decisions overwhelmingly favor class arbitration – even where there is no evidence the parties intended to allow it. David S. Clancy, "Re-Evaluating *Bazzle*: the Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume," 7 Class Action Lit. Rept. (BNA) 649, at p. 2 (Sept. 22, 2006). Indeed, the AAA's written policy states that, pursuant to *Bazzle*, it will administer class arbitrations if the agreement incorporates AAA rules and if "the agreement is silent with respect to class claims, consolidation or

joinder of claims." AAA Policy on Class Arbitrations (July 14, 2005), *available at* http://www.adr.org/Classarbitrationpolicy.

As one arbitrator acknowledged:

> Although the AAA, as an institution, takes no position regarding class arbitration, the overwhelming majority of Clause Construction Awards under its Class Arbitration Rules have held that, where the arbitration clause contains broad language similar to that here, and is silent on whether a class proceeding is contemplated or not, class arbitration is permitted.

Depianti v. Bradley Mktg Enters., Inc., AAA No. 11 114 00838 07 (Am. Arb. Ass'n Aug. 1, 2008) (Jentes, Arb.) (Partial Final Clause Construction Award And Rulings on Respondents' Motions To Dismiss), *available at* http://www.adr.org/si.asp?id=5442, at 9.

In order to assist the Court in its consideration of the important issues in this case, we have reviewed published class arbitration awards to discern the factors that led arbitrators to these lopsided results. That review shows that, absent an express contractual prohibition of class arbitration, arbitrators will find the agreement "silent" and, further, that they will regard such deemed silence to permit class arbitration. In sum, arbitrators have expanded this Court's delegation in *Bazzle* of a limited question of contract interpretation into a license to make the policy determination – not rooted in contractual language or intent – that class arbitration is preferred.

With respect to the threshold question whether a contract is "silent" on the subject of class arbitration, the decisions indicate that, as a practical matter, arbitrators will find such silence even when other contractual provisions point decisively against class arbitration. For example, the respondents in one arbitration argued that their agreement had a confidentiality provision that was inconsistent with class arbitration. *Terrapin Express v. Airborne Express, Inc.*, AAA No. 11 199 01536 05 (Am. Arb. Ass'n May 9, 2006) (Hodge, Longhofer & Farber, Arbs.) (Clause Construction Award), *available at* http://www.adr.org/si.asp?id=3952, at 4-5. But the panel of arbitrators gave this confidentiality provision no weight because (among other reasons) it was drafted by respondents, and their failure to exclude class arbitration "signifie[d]… that the intention of the parties was to permit class arbitration." *Id*. at 6. In so ruling, the arbitrators failed to recognize that confidentiality, a hallmark of arbitration, is inconsistent with class arbitration: "The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitration. All class arbitration hearings and filings may be made public…." *See* AAA Supplementary Rule 9(a).

Likewise, in *McCague v. Corinthian Colleges, Inc*., AAA No. 111 434 01278 08 (Am. Arb. Ass'n May 11, 2009) (Widman, Arb.) (Partial Final Clause Construction Award), *available at* http://www.adr.org/si.asp?id=5733, at 7, the arbitrator rejected respondent's concern that federal law regarding the confidentiality of student educational records would be violated in class arbitration, on the grounds that

the Agreement allowed the *arbitrator* to see the student records (apparently equating that disclosure with full public disclosure), and because, if the case reached the merits, "necessary protections can *likely* be put in place" (emphasis added).

In another instance, an arbitrator found that contractual language giving every potential plaintiff the right to arbitration "within 100 miles" of the customer's residence did not preclude a nationwide class arbitration, finding that plaintiffs could simply opt out of the class action if they preferred a more convenient venue. *XM Satellite Radio, Inc. v. Enderlin*, AAA No. 11 181 00989 06 (Am. Arb. Ass'n Aug. 13, 2008) (Wilkinson, Arb.) (Class Action, Clause Construction Partial, Final Arbitration Award), *available at* http://www.adr.org/si.asp?id=5412, at 5-6.

And in another proceeding, an arbitrator found that the contractual provision giving "each party" the right to select an arbitrator did not bar class arbitration, even though absent class members did not participate in the selection of arbitrators (and the respondent was deprived of its express contractual right to select an arbitrator for the dispute with each claimant). *Anderson v. Check 'N Go of Cal., Inc.*, AAA No. 11 160 03021 04 (Am. Arb. Ass'n June 20, 2005) (Slater, Arb.) (Partial Final Clause Construction Award of Arbitrator), *available at* http://www.adr.org/si.asp?id=3922, at 8.

As a final example, in *Tomeldon Co., Inc. v. Medco Health Solutions, Inc.*, AAA No. 11 193 00546 06 (Am. Arb. Ass'n Nov. 22, 2006) (Hare, Katzenbach & LaMothe, Arbs.) (Partial Final Award Re: Clause

Construction), *available at* http://www.adr.org/si.asp?id=4516, the arbitration panel determined that a contract permitted class arbitration despite the contract's fee-shifting provision. Such a provision is necessarily incompatible with class arbitration because the defendant contracted to pay the fees of only one plaintiff – not all at once – if it loses, and because if the defendant wins it would be totally impractical to collect its prevailing party fees from absent class members.[2]

Having made the initial mistake of finding "silence" even where provisions incompatible with class arbitration reverberate throughout the contracts, arbitrators have erected – as a matter of policy, not contract interpretation – a virtual presumption favoring class arbitration. As one arbitrator concluded, "class arbitration is permitted because it was not expressly barred." *Lichter v. Alarm One, Inc.*, AAA No. 11 180 00240 08 (Am. Arb. Ass'n Aug. 13, 2008) (Widman, Arb.) (Pre-Hearing Order No. 2 – Partial Final Clause Construction Award), *available at* http://www.adr.org/si.asp?id=5409, at 6. Another arbitrator opined that "[i]f the person drafting the revised arbitration

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[2] These examples do not by any means exhaust the list of contractual provisions that should preclude class arbitration. Other illustrations include contracts that expressly incorporate the rules of organizations that, in turn, either bar or make no provision for class arbitration; contracts that place a monetary cap on disputes subject to arbitration; contracts that exclude from arbitration certain remedies that make it unlikely that class-wide determination was acceptable to the parties; and contracts that describe anticipated arbitral proceedings in ways that are simply not suited to class-wide disposition.

agreement form wanted to exclude class or representative arbitrations, he or she could have and should have said so, plainly." *Harris v. Teletech Holdings, Inc.*, AAA No. 11 160 02701 04 (Am. Arb. Ass'n Dec. 16, 2005) (Barnes, Arb.) (Clause Construction Order), *available at* http://www.adr.org/si.asp?id=3823, at 7.

Some arbitrators have expressly found – albeit incorrectly – that *Bazzle* itself places an additional burden on parties to "draft around" *Bazzle* to exclude class action arbitration. One arbitrator concluded silence meant acquiescence to class arbitration because *Bazzle* "clearly signal[ed] countrywide that arbitrators would be dealing with class arbitrations. In other words, [Respondent] had notice of its drafting responsibilities to preclude class claims if that was its desire." *Lichter*, at 7. Indeed, that arbitrator also inaccurately concluded that *Bazzle* "effectively affirm[ed] the South Carolina Supreme Court's holding that class-wide arbitration is [proper] when the arbitration agreement is silent." *Lichter* at 4. Yet another arbitrator found *Bazzle* "agree[d] with" the state court's ruling that class arbitration is permitted if the agreement is silent. *Bezaury v. Arbor Homes, LLC*, AAA No. 11 148 02161 04 (Am. Arb. Ass'n Jan. 31, 2005) (O'Leary, Arb.) (Clause Construction Award of the Arbitrator), *available at* http://www.adr.org/si.asp?id=3902, at 6. Similarly, in *Tomeldon,* the arbitrators found that an agreement permitted class arbitration in part because it was amended post-*Bazzle* but failed to

exclude class arbitration.[3] As these examples show, arbitrators have ascribed to the *Bazzle* plurality opinion rulings and presumptions that do not exist.

The real life experience of how arbitrators have totally misunderstood *Bazzle* is all the more problematic because these arbitral mistakes are often not subjected to searching substantive review. As a consequence, the losing party is relegated to a complex, high-stakes, class arbitration procedure to which it never actually agreed (although contractual agreement to arbitrate is supposedly the cornerstone on which the entire arbitration system rests) and in which it is deprived of substantial rights, including the benefits of finality and repose even if it wins on the merits (although class-wide finality and repose are supposedly principal attributes of class action procedures in litigation).

B. Class Arbitration is Fundamentally Different from Individual Arbitration and from Class Action Litigation

There is no principled basis for empowering arbitrators to create, as a matter of policy, a "default" presumption that an arbitration agreement which is silent on class arbitration should be construed to

[3] The same arbitrators also relied on the fact that AAA issued its Supplementary Rules regarding class arbitration prior to amendment of the parties' agreement. *Tomeldon* at 5. But AAA Supplementary Rule 3 states, "In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor in favor of or against permitting the arbitration to proceed on a class basis."

permit it. Quite the contrary presumption should be operative due to the substantial differences between class arbitration and other procedures. First, parties typically enter arbitration agreements to take advantage of the traditional benefits of efficiency, simplicity and confidentiality. These attributes do not exist in class arbitration, which by its nature is protracted, complex and public. Second, despite the recent efforts of some arbitration organizations to create class arbitration procedures similar to those for litigation, numerous vital safeguards are lacking. Third, federal policy favors resolution of class actions in federal courts. Accordingly, "class arbitration is a proceeding of profoundly different substance and scope, in which many of millions of dollars and the company's future could be at stake." David S. Clancy & Matthew M.K. Stein, "An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History," 63 Bus. Law. 55, 72 (Nov. 2007). For these compelling reasons, private disputes should be subject to class arbitration only if the parties' contracts expressly so provide.

1. The Benefits of Individual Arbitration Do Not Exist in Class Arbitration

During the Congressional hearings on the FAA, witnesses testifying in favor of arbitration touted its inherent advantages. These included the "prompt, inexpensive, and procedurally streamlined" nature of arbitration, and the "face-to-face" component which encouraged an atmosphere of conciliation. *Id.* at 58-61. The Senate Judiciary

Committee described arbitration, as anticipated under the FAA, as follows:

> In contrast with the long time required by courts with their congested calendars to settle a dispute, the records of the [AAA] show that the average arbitration required but a single hearing and occupied but a few hours of the time of disputants, counsel and witnesses…

Id. at 61-62 (quoting S. Rep. No. 68-536, at 3 (1924)). Consistent with the clearly expressed legislative understanding, this Court has acknowledged that parties choosing arbitration "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985)).

Class arbitration, by contrast, provides none of these advantages. First, class arbitration can be as costly as class action litigation – indeed, even more expensive. Unlike litigation, class arbitration imposes on parties the additional cost of paying the often substantial fees of an arbitrator – or a panel of arbitrators – stretching over many hearings on clause construction, on class certification, on the merits of class-wide claims, and on claims administration. With "millions of dollars and perhaps the company's future…at risk," and absent "the safeguards litigation provides[,]… the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *supra,* at 71, 73-74 (internal

citations omitted). Moreover, one right that parties commonly bargain for in arbitration agreements is the right to choose the arbitrator, or to choose one or more arbitrators in a panel. Yet, for all parties, this right is fundamentally inconsistent with class arbitration. Absent class members by definition do not participate in arbitrator selection. Imposing class arbitration, in which only one or a few plaintiffs will choose the arbitrator, in spite of contract provisions giving each prospective claimant the right to do so, would violate the absent plaintiffs' due process rights. *See Anderson*, AAA No. 11 160 03021 04, at 8 (ignoring the arbitrator selection provisions in order to construe the clause in favor of class arbitration). In addition, the respondent is deprived of its contractual right to participate in the selection of arbitrators with respect to claims by absent class members.

Another right that parties to arbitration expect is the right to have their disputes resolved confidentially. Typically, arbitration awards are confidential (*see* AAA Supplementary Rule 9(a)); indeed, arbitrators are generally discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 598 (1960); *Domke on Commercial Arbitration* § 29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality, and in AAA class arbitrations the parties can expect their demands and all rulings will be publicly posted on the Internet. *See generally* AAA Searchable Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id=25562. Thus, again, class arbitration is a very different procedure from

individual arbitration and should not be imposed on parties who did not expressly choose it.

In its consideration of this case, the Court should be mindful of the larger context in which the questions arise. Principal among the benefits generally attributed to class-wide determination of legal and factual issues under Rule 23 is the availability of a mechanism for the resolution of claims that, individually, are too small to justify the expense of litigation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997). But parties to contracts with arbitration clauses have already provided a mechanism for inexpensive, informal dispute resolution: the single party v. single party arbitration itself. In these circumstances, is there any valid justification for creating new short-cuts to encourage the prosecution of claims that are *too small to justify individual arbitration?* The answer is plainly no. And the Court should refrain from making – and from endowing arbitrators with the authority to make – what is essentially a policy judgment to favor class arbitrations, especially where that is a policy judgment that neither Congress nor the parties to "silent" contracts have ever expressed.

2. The Risks Associated With Class Arbitration Are Not Mitigated By the Same Procedural Safeguards as in Class Action Litigation

Class action litigation with the judicial oversight of the courtroom guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms, such as

motions to dismiss, to end meritless and frivolous litigation before discovery or trial. Plaintiffs – particularly absent class members – benefit from due process rights designed to protect their interests. Both sides benefit from full, substantive judicial review. But none of these protections is assured in arbitration, and some are nonexistent.

a. Class Arbitration Provides No Guaranteed Opportunities to Cut Short Meritless Claims, Creating Improper Pressure for Defendants to Settle

With particular reference to the potential abuses of class action litigation, this Court has been alert to require safeguards that prevent defendants from facing the inordinate risks and expense or defending against nonmeritorious claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (finding that to avoid a motion to dismiss, the plaintiffs' class action complaint must "possess enough heft to show that the pleader is entitled to relief") (internal quotations omitted); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements…"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 168 (1974) (noting that adoption of a rule that defendants must pay to notify class members would "encourag[e] frivolous class actions" and cause defendants to pass defense costs on to their customers) (citation omitted). Indeed, the development of the class action device in litigation has always been accompanied by such safeguards,

lest the sheer magnitude of potential financial exposure coerce settlement of baseless suits.

In litigation, motions to dismiss and motions for summary judgment are common methods defendants and courts employ to dispose of legally and factually deficient lawsuits short of trial. *See, e.g.*, Fed. R. Civ. P. 12(b)(6) & 56. But in arbitration, most defendants lack the right to be heard on a motion to dismiss. Dispositive motions in arbitration are not encouraged and are rarely granted.[4] In fact, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, "Employment Arbitration and Workplace Justice," 38 U.S.F. L. Rev. 105, 113 (Fall 2003). In individual arbitration, the absence of such motions practice serves one of the primary purposes of arbitration – simplification of proceedings. And that absence can be justified in individual arbitration as one of the tradeoffs the parties may make in order to achieve the goal of quicker, less expensive, less formal proceedings that provide an opportunity for face-to-face presentations to the ultimate decisionmakers.

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[4] *See* David Sherwyn, "Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication," 1 Berkeley J. Emp. & Lab. L. 1, 27 & n. 122 (2003); Marc I. Steinberg, "A Decade After McMahon: Securities Arbitration: Better for Investors Than the Courts?" 62 Brooklyn L. Rev. 1503, 1513-14 & n. 56 (Winter 1996). *Cf.* Jill I. Gross, "McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration," 76 U. Cin. L. Rev. 493, 496-97 (Winter 2008) (noting that the SEC amended its Code of Arbitration Procedure for Customer Disputes (Customer Code) to authorize dispositive motions practice).

But those justifications are incompatible with the practical demands of class arbitration: the unavailability of pre-hearing dispositive motions will unnecessarily and unfairly prolong cases that are devoid of legal or factual merit. As this Court has explained, the requirements of Federal Rule of Civil Procedure 8(a) are designed to prevent "a plaintiff with 'a largely groundless claim' [from] 'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Twombly*, 550 U.S. at 557-58 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347-48 (2005)).

Precisely because of such unwarranted pressure, the Seventh Circuit's instructive opinion in *Rhone-Poulenc* reversed the certification of a class. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.). In that case, a class of people with hemophilia sued numerous drug companies, alleging their products infected plaintiffs with AIDS. Because each individual claimant could recover millions if victorious, defendants faced approximately $25 billion in liability – and almost certain bankruptcy – if they lost. *Id.* at 1298-99. But, in 92.3% of the past judgments on this issue (12 out of 13), the defendants had prevailed. *Id.* at 1299. The court reversed the class certification decision, which included a plan for a single trial, because it was grossly unfair to the defendants to have to bet their businesses on one jury trial, rather than several decentralized trials. *Id.* As the Seventh Circuit explained, "They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *Id.* at 1298; *see also*

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001) (noting that "granting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (reversing class certification where a $200,000 dispute was transformed into a $200 million dispute, which "puts a bet-your-company decision to [defendant's] managers and may induce a substantial settlement even if the customers' position is weak"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims…. [This] creates insurmountable pressure on defendants to settle…. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted). Absent the procedural mechanisms to end meritless class claims at a pre-trial stage, defendants will be under even greater pressure to settle class arbitration than class action litigation. The mistake of unleashing such coercive pressure is magnified where the parties never expressly agreed to class arbitration in the first place.

b. Absent Class Members Do Not Have the Same Due Process Rights in Arbitration as in Litigation

As this Court has been vigilant to observe, absent class members in litigation have certain due process rights guaranteed by the Fourteenth Amendment to the Constitution. Specifically, the Due Process Clause mandates that absent class

members cannot be bound by any judgment in a class action unless they have had notice that describes the action and the parties' rights in it, an opportunity to opt out of the class, as well as adequate representation of their interests by the named class member(s) and their counsel. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). If the parties to a class action settle, the court must review and approve that settlement to ensure fairness to absent class members. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval"); *Amchem*, 521 U.S. at 627 (reversing certification along with settlement that failed to provide any "structural assurance of fair and adequate representation" for all plaintiffs). Congress has singled out particular types of settlements that it deems improper, including those where most or all the money was paid to class counsel rather than to class members, or where class members receive only a "coupon" for products or services. S. Rep. No. 109-14, at 15 (2005), *reprinted in* 2005 U.S.S.C.A.N. 3, 16 (Leg.Hist.) (Class Action Fairness Act of 2005). It is only because such procedural due process protections are provided that an absent class member "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips*, 472 U.S. at 810-11.

These safeguards are critical because, unlike in typical litigation, where "the judicial system itself bears no responsibility for the protection of the parties," in a class action "[j]udges effectively serve as guardians of the interests of absent class members

… assuring that their interests are not sacrificed." Carole J. Buckner, "Due Process in Class Arbitration," 58 Fla. L. Rev. 185, 196 (Jan. 2006). Absent class members have no assurance that these minimal due process rights will be safeguarded in arbitration. Indeed, federal courts have consistently held that arbitration does not constitute state action, which is a prerequisite for Constitutional due process rights. *See, e.g., Smith v. American Arbitration Ass'n*, 233 F.3d 502 (7th Cir. 2000); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1190-91 (11th Cir. 1995). In short, due process rights that must assiduously be provided in litigation are relegated in class arbitration to the less rigorous, less formal, and less accountable procedures established by arbitrators who are not necessarily lawyers and who lack experience with the constitutional requirements for class-wide disposition of claims.[5] *See* Pet. Br. 34 & n.15.

The absence of such constitutional protection is of concern not only to absent class members, but also to respondents who are subjected to proceedings that, at best, provide questionable finality and

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[5] For example, the AAA website lists qualifications for its arbitrators, which include a "[m]inimum of 10 years of senior-level business or professional experience **or** legal practice." *See* Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, http://www.adr.org/si.asp?id=4223. While the AAA has a separate roster of class arbitrators and requires that at least one arbitrator in each class arbitration panel be chosen from that roster (*see* AAA Supplementary Rule 2(a)), the AAA provides no separate qualifications for its class arbitrators.

respose with respect to absent class members. At the end of the day, the respondent has been deprived of important procedural and substantive rights, without receiving the supposedly reciprocal benefit of terminating claims expeditiously – or at all. And this is true whether the respondent wins, loses, or settles the class arbitration.

c. The Finality of a Class Arbitration Award is Highly Questionable, and There is Limited Judicial Review

Because arbitration agreements are binding only on parties, any potential class members who have no arbitration agreements, or whose agreements do not cover the dispute at issue, will likely be unaffected by the arbitrator's final award. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983), this Court held that where a party has related disputes with two different parties – one with an arbitration agreement and one without – each case must proceed in a separate forum. As this Court explained,

> [T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

Id. (emphasis in original; footnote omitted). It is well-settled, moreover, that a contract cannot bind a non-party. *See, e.g., EEOC v. Waffle House, Inc.*, 534

U.S. 279 (2002). And even contractual parties can be required to arbitrate a given matter only when they have agreed to do so. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). As a result, in class arbitration, if an arbitrator has issued an award in favor of the plaintiff class, the defendant(s) could still face additional litigation – even class litigation – by purported class members. Most directly, this threat exists for absent class members not subject to an arbitration agreement; but the threat exists as well with respect to absent class members with arbitration agreements who did not receive the full panoply of due process notice and procedural regularity that must precede judgments in class action litigation. Although this burden may reasonably be imposed on those defendants whose contracts expressly permit class arbitration, it is an unreasonable burden for those whose contracts do not.

Likewise, the restrictions on judicial review associated with classwide arbitration are indefensible if imposed on parties who did not contemplate this specialized process. The FAA provides that a court may vacate an arbitrator's substantive award of relief on the merits only in the event of fraud, corruption, bias, misconduct or misbehavior by the arbitrators, or where the arbitrators exceeded their powers or failed to make a "final and definite" award. 9 U.S.C. § 10(a). Courts' powers to modify such an arbitration award are limited to cases involving material miscalculations or mistakes, errors in form, and rulings on issues not before the arbitrator. 9 U.S.C. § 11. These grounds for review may not be expanded by agreement of the

parties, as this Court held in *Hall Street Assoc's v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

These limitations on judicial review raise serious questions of fairness for all parties to class arbitration. For example, this feature appears to have emboldened some plaintiffs' attorneys to think they have virtually limitless license in class arbitration to pressure defendants. As one stated, "[f]irst and foremost, a decision by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable…a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71 (quoting Gary W. Jackson, "Prosecuting Class Actions in Arbitration," 2006 ATLA Ann. Convention Reference Materials 829). Defendants' concerns regarding the coercive impact of a class certification award are entirely understandable. Federal Rule of Civil Procedure 23(f), which gives appellate courts discretion to review class certification decisions, was enacted in part to alleviate unfair pressure on defendants to settle, particularly where the plaintiffs are unlikely to succeed on the merits. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). Moreover, the limited availability of appellate review in class arbitration should concern plaintiffs as well, especially absent class members who have not participated in the proceedings. Clancy & Stein, *supra*, at 71. These concerns are all the more justified when parties who never contemplated class arbitration are forced into it solely because their arbitration contract did not expressly preclude it.

d. The Procedural Safeguards Some Courts and Arbitrators Have Imposed on Class Arbitration Are Wholly Inadequate

Some private arbitration organizations may provide a few – but not all – of the protections and safeguards described above. For example, the AAA Supplementary Rules allow class arbitration where the arbitrator has determined that numerosity, commonality and typicality requirements similar to those in Federal Rule 23 are met, and where class representative(s) and counsel "fairly and adequately protect the interests of the class." *See* AAA Supplementary Rule 4(a). Likewise, the relevant JAMS rules incorporate by reference certain portions of Rule 23. *See* JAMS Class Action Procedures, Rule 3 (May 1, 2009), *available at* http://www.jamsadr.com/rules-class-action-procedures. But one safeguard for absent class members that is notably absent from the AAA Supplementary Rules is that, although arbitrators may exclude certain members of the class under certain circumstances (AAA Supplementary Rule 5(c)), there is no provision allowing an arbitrator to divide the class into subclasses. Buckner, *supra*, at 252. Division into subclasses is important where subsets of class members have different interests, or even conflicts of interest. *See Amchem*, 521 U.S. 591 (rejecting class due to divergent categories of absent class members).

Further, several state jurisdictions, in an attempt to provide some semblance of due process to absent parties in class arbitrations, created a so-called "hybrid" model of class arbitration. Buckner,

supra, at 226-27. This model contemplates a need for substantial judicial involvement, in which a court would: (1) certify the class, (2) provide notice to absent class members, (3) adjudicate conflicts, (4) monitor arbitrator selection, (5) review the settlement, and (6) generally supervise the arbitration. *See Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1980), *rev'd in part on other grounds*, *sub nom., Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Dickler v. Shearson Lehman Hutton, Inc*., 596 A.2d 860 (Pa. Super. Ct. 1991).

Because the FAA neither incorporates nor contemplates any of these additional judicial oversight activities, there is a limit to the protections a court, or a private organization, can provide in class arbitration. So what is a court to do when asked to confirm or vacate a class arbitration award? Must the court ascertain that the arbitrators have afforded the parties – and absent class members – sufficient due process in the arbitral proceedings, including the formalities of notice to class members, opportunities for voicing objections and to be heard in opposition, and determinations of fairness to the class? And if the court determines that the arbitrator failed to provide these basic components of due process, what then? Does the FAA permit the award to be vacated on that ground? And if the court confirms an award despite these deficiencies, how can any party be assured of finality and repose when the rights of absent class members were curtailed? Or, does the court have to provide full Rule 23-like constitutionally-mandated procedures before ruling on confirmation or vacatur (whether or not the arbitrator has already done so)?

To be sure, where parties (including absent class members) have entered into contracts that expressly specify class arbitration as the stated method of dispute resolution, then the absence of such safeguards is something the parties have chosen. In those particular circumstances, fidelity to the contractual terms would warrant class arbitration. But where the parties (including absent class members) have not expressly articulated that waiver of the constitutional protections required for class actions, it is wrong to subject parties to class arbitration.

For all of these reasons, it would be a profound mistake to permit class arbitration to proceed where the contract is "silent" on this pivotal point. The rationale for this conclusion in the context of domestic contracts and disputes is even more compelling in the context of transnational contracts. Under the FAA, international arbitration contracts are subject to treaties and multilateral agreements such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. But, there is serious question that class arbitration could satisfy even the most elementary requirements for an enforceable award under international standards to which the United States is a signatory. For example, the Rules of the Inter-American Commercial Arbitration Commission require that a request for arbitration must contain the names and addresses of the parties. Inter-American Commercial Arbitration Commission Rules, at Art. 3 (amended Apr. 1, 2002), *available at* http://www.adr.org/sp.asp?id=22093. Class arbitration fails that basic test.

Even more important, engrafting the prospect of class arbitration onto transnational contracts that are silent on the issue would disturb the regularity that, as this Court has frequently stated, is necessary for the United States to participate in worldwide commerce. *See, e.g., Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 516 (1974) (holding that adherence to contractual choice-of-law and choice-of-forum provisions was "an almost indispensable precondition to . . . orderliness and predictability essential to any international business transaction"); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 537 (1995) (enforcing foreign forum selection clause in international arbitration and noting the practical need to "give way to contemporary principles of international comity and commercial practice"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context").

3. Federal Policy Dictates That Class Actions Are Best Adjudicated by the Federal Courts; Thus, No Pro-Class Arbitration Presumption is Warranted

There are additional reasons why the pro-class arbitration presumption employed by the Second Circuit and many arbitrators runs counter to recent

Congressional action designed to ensure that more class action cases are litigated in federal court than in other fora. The Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d), 1453 & 1711-1715, passed in 2005, changed the diversity of citizenship jurisdiction statute which had barred most interstate class actions from the federal courts.

Congress passed CAFA in response to evidence of gross abuses of the class action device, particularly in the state courts. Such abuses included the indiscriminate certification of classes, resulting in inordinate pressure on defendants to settle meritless lawsuits. The same concerns that led Congress to prefer a federal forum over a state forum for class action litigation are equally applicable to the hybrid proceedings of class arbitration. In light of Congress' clear preference for class actions to be litigated in federal court, it should be entirely contraindicated for the Court to tolerate a pro-class arbitration presumption.

The Senate report on CAFA noted that state courts took an "'I never met a class action I didn't like' approach to class certification," S. Rep. No. 109-14, at 22 (2005), reprinted at U.S.S.C.A.N. 3, 22 (Leg.Hist.). In recent years, there had been a "dramatic explosion of class actions in state courts" because those courts had not applied Rule 23's requirements for certification with the same rigor as their federal counterparts. *Id.* at 14. The Senate viewed state courts' cavalier attitude toward class certification as unfairly damaging to the rights of plaintiffs and defendants alike, particularly in massive national class actions. *Id.* at 22-27.

Just as Congress was troubled by state courts' haphazard approach to class certification, this Court should be troubled by arbitrators' markedly one-sided approach to clause construction. Although state procedural rules – like those of private arbitral organizations – need not precisely track Federal Rule 23, Congress ultimately measured the fairness of state procedures against the Rule 23 standard, and concluded that the federal courts are best suited to resolve class actions, particularly those with large, nationwide classes.[6] Indeed, Congress could scarcely have expressed itself more clearly on this subject. An entire section of the Senate report is entitled, "National Class Actions Belong in Federal Court…." S. Rep. No. 109-14, at 23, *reprinted in* 2005 U.S.S.C.A.N. 3, 24 (Leg.Hist.).

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[6] Moreover, as one court observed, federal judges have no built-in incentive to certify class actions, particularly large ones. In reversing a district court's class certification order, the Seventh Circuit noted that, "We do not mean to suggest that the district judge is engaged in a deliberate power-grab. We have no reason to suppose that he *wants* to preside over an unwieldy class action." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (emphasis in original). But arbitrators, who are paid by the hour, stand to earn more if they allow a class action to go forward than if they do not. This fact has caused some to suggest that arbitrators may even have a conflict of interest in deciding clause construction awards. Clancy & Stein, *supra*, at 73; P. Christine Deruelle & Robert Clayton Roesch, "Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now – Part I," *The Metropolitan Corporate Counsel*, August 2007, at p. 9, *available at* http://www.metrocorpcounsel.com/pdf/2007/August/09.pdf.

When courts – or arbitrators – precipitously certify class actions, this increases the pressure on defendants to settle nonmeritorious claims. *See* p. 17-20, *supra*. The Senate found the use of class actions to obtain "blackmail settlements" especially problematic:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit.

S. Rep. No. 109-14, at 20, *reprinted in* 2005 U.S.S.C.A.N. 3, 21. In fact, the Senate found that state courts certified such a large number of class actions precisely *because* this would induce defendants to settle rather than face trial. *Id*. at 20-21. And the pressure to settle meritless class *arbitration* may be even greater than the pressure to settle meritless class action *litigation*.

These practical concerns, domestic and international, should inform this Court's resolution of this case. Where neither Congress nor the parties to "silent" agreements have chosen class arbitration, this Court should not endorse a form of proceeding that fails in so many ways. The real world experience since *Bazzle* tells a powerful cautionary tale that this Court should heed.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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