AMERICAN ARBITRATION ASSOCIATION

| | |
|---|---|
| GABRIEL CILLUFFO, et al,<br><br>Claimants,<br><br>v.<br><br>CENTRAL REFRIGERATED SERVICE, INC., et al,<br><br>Respondents. | 77 160 00126 13 PLT<br>(Collective Matter) |

**CLAIMANTS' BRIEF IN RESPONSE TO RESPONDENTS' BRIEFS DATED SEPTEMBER 23, 2013**


Dan Getman
Lesley Tse
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, New York 12561
Telephone: (845) 255-9370
Fax: (845) 255-8649
dgetman@getmansweeney.com

Edward Tuddenham
228 W. 137th St.
New York, New York 10030
Telephone: (212) 234-5953
Fax: 512-532-7780
etudden@prismnet.com

Susan Martin
Jennifer Kroll
Martin & Bonnett, PLLC
1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
Fax: (602) 240-2345
smartin@martinbonnett.com

ATTORNEYS FOR CLAIMANTS

## Table of Contents

## Table of Authorities

### Cases

**Other Authorities**

## I. ANSWER TO RESPONDENTS' BRIEF 1 (Drivers' Point 3): THE DISTRICT COURT'S DIRECTIVE THAT THIS ARBITRATION PROCEED COLLECTIVELY IS BINDING

Respondents argue that their contracts with the Drivers require the Arbitrator to decide whether this FLSA arbitration can continue to proceed collectively and that the District Court's order mandating collective arbitration of the FLSA claim is not binding. Respondents' reasoning should be rejected for two reasons: First, Respondents took the position in the District Court that the contract required the Court to make the individual/collective determination and they cannot now urge a different interpretation of the contract simply because they don't like the District Court's decision to order collective arbitration. Second, even if Respondents' were permitted to change their interpretation of the contract, the District Court's referral of this case to collective arbitration is the law of the case and the Arbitrator has no authority to review or override that decision.

### A. The Respondents Have Consistently Claimed That the Contract Required the District Court to Decide Whether Arbitration Should Proceed Individually or Collectively

From the very beginning of this controversy Respondents took the position that the contract gave the District Court the authority to decide whether this arbitration should proceed individually or on a collective basis.

In their initial motion to compel arbitration, filed July 16, 2012, Respondents did not just move to compel arbitration, they moved the court for an order "compelling all of the Plaintiffs and Opt-in Plaintiffs to arbitrate their clams *on an individual basis* . . ." Doc. 25 at 2 (emphasis in the original). The Drivers agreed that the individual/collective issue was properly before the District Court and urged the Court, if it granted arbitration, to interpret the contract as permitting collective arbitration of their FLSA claim. Doc. 40 at 11 fn 6. When the Court's order compelling arbitration did not specifically state whether the FLSA arbitration would proceed individually or collectively, Doc. 53 at 14, Respondents' again urged the Court to "issue an order that states . . . [the] Court's September 24, 2012 Order requires the named Plaintiffs and any Opt-in Plaintiffs to pursue *individual* arbitration in Utah." Doc. 58 at 5 (emphasis added). The Drivers responded by re-urging their argument that the contract should be construed against Respondents' as the drafters and held not to prohibit collective actions.[1] Doc. 59 at 6.

[1] Contrary to Respondents' contentions Claimants did not argue that the contract required the Arbitrator to determine the issue of individual v. collective arbitration. As noted above, Claimants' specifically and repeatedly argued to the district court in both their opposition to the motion to compel arbitration, Doc. 40 at 11 fn 6, and in their response to Respondents' attempt to seek clarification, Doc. 59 at 6, that the Court should rule that collective actions are permitted. The language quoted by the Respondents' from Doc. 59 at 6 was an alternative argument made by Claimants in the event the Court rejected their primary argument made in Doc. 40 at 11 fn 6 and again in Doc. 59 at 5-6, that the district court should construe the contract language against Respondents as the

Ultimately, the District Court interpreted the contract to require collective arbitration of the FLSA claim and ordered the parties to proceed in that manner. Doc. 61 at 4 ("Plaintiffs' FLSA claims should be collectively arbitrated."). At no time did either of the parties argue to the District Court that the issue of collective v. individual arbitration was one given by the contract to the Arbitrator.

In these circumstances the Arbitrator has no choice but to defer to the parties' shared interpretation of the contract. *Am. Cas. Co. of Reading, Pa. v. Baker*, 22 F.3d 880, 887(9th Cir. 1994) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning" *quoting* Restatement of Contracts 2d §201(1)); *Sunbury Textile Mills v. Comm'r*, 585 F.2d 1190, 1196 (3d Cir. 1978) (parties' agreed understanding of contract is "conclusive"). It is true that Respondents now want to urge a different interpretation of the contract. But a party cannot urge one interpretation of a contract and then, when it dislikes the results that flow from that interpretation, seek to urge a different one. Respondents honestly expressed their interpretation of the contract when they urged the District Court it to

---

drafters and hold that the contract permits collective arbitration of Claimants' FLSA claims.

decide the collective versus individual question and they are bound by that interpretation.

### B. The Parties Are Bound By the Terms of the Order Referring the Matter to Arbitration

Even if Respondents were permitted to change their interpretation of the contract, it would do them no good, for the fact remains that the District Court *ordered* collective arbitration of the FLSA claim. Doc. 61 at 4. Nothing in the parties' contract or in the AAA rules gives the Arbitrator the authority to overrule the terms under which the District Court ordered Arbitration or to sit in appellate review of the correctness of the District Court's order. Respondents cite no authority, nor can they, that would give the Arbitrator such powers as no such authority exists. *See RTA Transit Serv. Inc. v. Amalgamated Transit Union Local 22*, 50 Fed. Appx 455 (1st Cir. 2002) (noting that arbitrator lacked authority to overrule district court order). Indeed, Respondents argued in their motion to certify the District Court's Order for interlocutory appeal and in their petition for mandamus to the 9th Circuit that absent appeal or mandamus relief, they would be "required" to conduct collective arbitration of the FLSA claim. *See* Doc. 82 at 20 ("both parties will be required to incur substantial time and expense to arbitrate… on two separate tracks (i.e. the collective arbitration . . . as well as 75 individual arbitrations . . . on . . . non-FLSA claims)"); Pet. For Mandamus

at 13 (Petitioners have no "adequate remedy, other than mandamus, from the District Court's Order [compelling collective arbitration]." Plainly, Respondents could not have made these arguments if the Arbitrator had the authority to provide a remedy by overruling the District Court's order.[2] Absent reversal by the Ninth Circuit, the parties and the Arbitrator are bound by the Order of the District Court.

Respondents' lengthy arguments about law of the case do not change this result. While it is certainly true that the law of the case doctrine is a discretionary one and that a district court may, at any time prior to final judgment, reconsider one of its own orders (even if there has been a substitution of judges), that does not give an arbitrator, or any other

[2] Respondents also argued that they would suffer irreparable injury if mandamus were not granted because they would be "forced" to conduct two separate proceedings for each Claimant, one in the collective FLSA arbitration and the other in the individual forced labor arbitration. *Id.* at 14. They also argued that they would suffer injury if the Ninth Circuit were ultimately to reverse the order requiring collective arbitration and vacate the collective award because they would then have to arbitrate the FLSA claims again. *Id.* Obviously all of these arguments were premised on the fact that an arbitrator is powerless to review a district court order compelling collective arbitration. *Alpine Glass, Inc. v. County Mut. Ins. Co.*, 686 F.3d 874 (8th Cir. 2012), confirms this fact. In that case, the district court ordered 248 claims to proceed as one consolidated arbitration but refused to order consolidation of 234 other claims. *Id.* at 876. Alpine Glass attempted to bring an interlocutory appeal from the refusal to consolidate the 234 claims. In rejecting the appeal, the Eighth Circuit recognized that, absent interlocutory review, Alpine would have to obey the District Court's order and conduct individual arbitrations before it could appeal under the final judgment rule. *Id.* at 878. Nevertheless, the Court of Appeals held that the "avoidance of onerous arbitration to be sufficiently important to warrant immediate review." *Id.* at 879. In reaching this result, the Court of Appeals plainly recognized that only the Court of Appeals, and not the arbitrator, could review the District Court's order regarding the consolidation or not of court ordered arbitrations. The same rule applies here.

subordinate or co-equal forum, the right to reconsider a district court's orders. *McLaughlin v. Schenk*, 299 P.3d 1139 (Utah 2013), the case Respondent's rely upon, makes this clear when it states: "While the case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but *the court* remains free to reconsider that decision." *Id.* at 1144 (emphasis added). Here, the Drivers' lawsuit remains pending before the district court, Doc. 53, and the Court has explicitly refused to reconsider its order compelling collective arbitration of the FLSA claim, Doc. 77, or to certify it for immediate appeal. Doc. 89. In these circumstances, *McLaughlin* is clear: "the parties are bound by the court's prior decision" directing collective arbitration.[3]

## II. ANSWER TO RESPONDENTS' BRIEF 2 (Drivers' Point 4): THE COURT CORRECTLY DECIDED THAT THE PARTIES AGREED TO COLLECTIVE ARBITRATION.

If the Arbitrator revisits the District Court's order compelling collective arbitration of the drivers' FLSA claims, the same result should obtain as the Court's Order was correctly decided. As a matter of contract interpretation, construing ambiguity against the drafter, and applying the

[3] Respondents claim that they did not have a full and fair opportunity to litigate the collective/individual arbitration issue in the district court is patently untrue given the fact that they briefed the issue in their initial motion to compel arbitration, Doc. 25, in their position statement, Doc. 54, in their motion for reconsideration, Doc. 71, and again in their motion for certification of an interlocutory appeal. Doc. 82. That is more opportunity than most litigants get to argue an issue.

doctrine of *expressio unius est exclusio alterius*, the arbitration clause permits FLSA claims to be collectively arbitrated. Central's argument that the arbitration clause is "silent" as to "collective" arbitration is a misreading of the Supreme Court's decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Further, that case, which arose under the Federal Arbitration Act ("FAA"), does not even apply to this case, as it was referred here exclusively under the Utah Uniform Arbitration Act ("UUAA").

On reconsideration, the District Court correctly held that *Stolt-Nielsen* did not apply because (1) it dealt with compelling arbitration under the FAA, which the Court had previously found did not apply to Plaintiffs; (2) it dealt with a class, not a collective, action, which the Court found to be different; and (3) this case is factually different from *Stolt-Nielsen* in that in *Stolt-Nielsen*, the parties' agreement was completely silent on the method of arbitration, while here, the parties expressly considered the method of arbitration by agreeing that "no consolidated or class arbitrations will be conducted." *See* Doc. 77 at pp. 4-5. Central's arguments rehash their arguments before the District Court, *see e.g.* Doc. 67 at pp. 9-12; Doc. 74 at pp. 3-7; Doc. 82 at pp. 12-17, and offer no further argument here as to why

their properly rejected argument mandates further consideration by the Arbitrator.

**A. Stolt-Nielsen**

*Stolt-Nielsen* is a Federal Arbitration Act case. This is important for two reasons. First, this arbitration was sent here under the Utah Uniform Arbitration Act and the UUAA has not been interpreted to follow the FAA in this regard. Central cites no case decided under the UUAA where *Stolt-Nielsen* was applied and Claimants have found none either. Second, because this case is heard in arbitration only under a state arbitration act, any enforcement of an arbitral provision in conflict with a federal statute mandating collective treatment, such as the FLSA, cannot override federal law. *See Drivers' Opening Brief* at pp. 40-46.

Furthermore, Central's argument that the U.S. Supreme Court decision in *Stolt-Nielsen* prohibits class arbitration in this case is based entirely on a misunderstanding of that decision. It is important, therefore, to begin with a clear understanding of what *Stolt-Nielsen* actually held. The case arose from a dispute between AnimalFeeds, a supplier of animal feed, and Stolt-Nielsen, a maritime shipping company that transported AnimalFeeds products. 130 S. Ct. at 1764. The parties entered into a form contract used in the maritime trade referred to as a "charter party." *Id.* The

arbitration clause in the charter party was silent with respect to whether class arbitration was permitted, but the parties went a step further and stipulated that they had reached no agreement regarding class arbitration. *Id.* at 1765. Nevertheless, AnimalFeeds filed a demand for class arbitration and the arbitration panel allowed arbitration to proceed on a class-action basis. Stolt-Nielsen appealed and the case eventually ended up before the Supreme Court.

The Court's analysis began by noting that the arbitration panel's ruling in favor of class arbitration "was not based on a determination regarding the parties' intent." *Id.* at 1768 fn. 4. Rather, in permitting class arbitration "the panel simply imposed its own conception of sound policy." *Id.* at 1769. Such policymaking clearly went beyond the authority granted to the arbitrators by the arbitration agreement itself. Consequently, the Court had little choice but to vacate the class arbitration decision. *Id.* at 1770. However, rather than remand the case to the arbitrators to reconsider, the Court then went on to analyze for itself whether the charter party permitted class arbitration. *Id.*

The Court began with the principle that interpretation of an arbitration agreement subject to the FAA is controlled by state law as well the Federal Arbitration Act and, like all contracts, "is a matter of consent, not coercion."

*Id.* at 1773. In "construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties," *id.* at 1773-74, and may not compel a party "to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," *id.* at 1775. Normally the next step would be to examine the arbitration provision as a whole to determine whether, properly construed, it evidenced such an agreement. However, the Court in *Stolt-Nielsen* had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration," *id.* at 1776 fn 10, because of Stolt-Nielsen's and AnimalFeeds' stipulation that "no agreement ha[d] been reached on that issue," *id.* at 1766. Given that stipulation, there was nothing to interpret. In the stipulated absence of an agreement to permit class arbitration, the FAA precluded the arbitration panel from imposing class arbitration. *Id.* at 1776. The Court summed up its analysis this way: "[W]e see the question as being whether the parties *agreed to authorize* class arbitration. Here, where the parties stipulated that there was 'no agreement' on that question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.*

Two important principles arise from *Stolt-Nielsen:* First, the question of whether an arbitration agreement permits class arbitration cannot be

decided on policy grounds. Second, the fact that an agreement does not explicitly reference class arbitration does not decide the issue unless, as in *Stolt-Nielsen*, the parties have stipulated that there was no agreement on class arbitration. Absent such a stipulation – and there is none here – the ordinary rules of contract interpretation must be applied to discern whether an agreement, properly construed, reflects an intent to permit class arbitration. *See generally, Smith & Wollensky Restaurant Group, Inc., v. Passow et al.*, 831 F.Supp.2d 390 (D. Mass. Jan. 18, 2011) (finding that absent a stipulation barring class actions, *Stolt-Nielsen* requires an arbitrator to "decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration"); *Galakhova v. Hooters of America, Inc.*, 34-2010-00073111-CU-OE-GDS (Cal. Sup. Ct., Sacramento County July 7, 27, 2010) (same); *Fisher v. Gen. Steel Domestic Sales, LLC*, No. 10-cv-01509-WYD-BNB, 2010 WL 3791181 (D. Colo. Sept. 22, 2010) (analyzing holding of *Stolt-Nielsen*); *Colquhoun, et al., v. Chemed Corp., et al.*, AAA No. 11-160-001581-10, p. 20 (Partial Final Clause Construction Award May 6, 2011).

The Supreme Court has since confirmed this understanding of the holding in *Stolt-Nielsen*. In *Oxford Health Plans LLC v. Sutter*, the Supreme Court stated:

> We overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked any contractual basis for ordering class procedures, not because it lacked, in [defendant's] terminology, a "sufficient" one. The parties in *Stolt–Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. *See* 559 U.S., at 668–669, 673, 130 S. Ct. 1758. In that circumstance, we noted, the panel's decision was not—indeed, could not have been—"based on a determination regarding the parties' intent." *Id.*, at 673, n. 4, 130 S. Ct. 1758; *see* id., at 676, 130 S. Ct. 1758 ("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement. *Id.*, at 673, 130 S. Ct. 1758. Instead, "the panel simply imposed its own conception of sound policy" when it ordered class proceedings. *Id.*, at 675, 130 S. Ct. 1758. But "the task of an arbitrator," we stated, "is to interpret and enforce a contract, not to make public policy." *Id.*, at 672, 130 S. Ct. 1758. In "impos[ing] its own policy choice," the panel "thus exceeded its powers." *Id.*, at 677, 130 S. Ct. 1758… In *Stolt–Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role.

133 S. Ct. 2064, 2069-70 (2013).

Thus, contrary to Defendants' assertions, *Stolt-Nielsen* in no way holds that an arbitration agreement must expressly and specifically state that the parties agree to collective arbitration in order to find that the parties

intended such collective arbitration to be permitted. As the District Court for the Northern District of California in *Vazquez v. ServiceMaster Global Holding Inc.* explained:

> [I]n *Stolt–Nielsen*, the Supreme Court was using the word "'silent' in the sense that they had not reached any agreement," not in the literal sense that there were no words in the contract discussing class arbitration one way or the other. *See* 130 S. Ct. at 1768. **The Supreme Court has never held that a class arbitration clause must explicitly mention that the parties agree to class arbitration in order for a decisionmaker to conclude that the parties consented to class arbitration.** Rather, the Supreme Court has held that parties must *consent* to class arbitration. *Id.* at 1775… In *Stolt–Nielsen* itself, the Supreme Court indicated that it would be appropriate for the decisionmaker to consider the "sophisticat[ion]" of the parties, and even the "tradition of class arbitration" in the field, when determining whether a contract was truly "silent" as to class arbitration. 130 S. Ct. at 1775. In this case, the failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the "silence" discussed in *Stolt–Nielsen.*

C 09–05148 SI, 2011 WL 2565574, at *3 fn 1 (N.D. Cal. June 29, 2011) (emphasis added). *See also Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124, 125-26 (2d Cir. 2011) ("*Stolt–Nielsen.*… did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration… *Stolt–Nielsen* did not hold that the intent to agree to [class]

arbitration must be stated expressly in an arbitration agreement"). Class or collective arbitrations have been repeatedly ordered based on the interpretation of the agreement, which does not literally and explicitly state that class arbitrations are permitted. *See e.g. Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012), *as amended* (Apr. 4, 2012), *cert. granted*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (U.S. 2012) *and aff'd*, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (U.S. 2013) (court affirmed arbitrator's finding that parties' arbitration clause authorized class arbitration; arbitrator determined that clause providing that "[n]o civil action concerning any dispute arising under this [a]greement shall be instituted before any court," was broad enough to include class arbitration, and arbitrator noted that an express exception for class arbitration would be required to carve out and prohibit class arbitration); *c.f. Velez v. Perrin Holden & Davenport Capital Corp.*, 769 F. Supp. 2d 445, 446 (S.D.N.Y. 2011) (where applicability of *Stolt-Nielsen* was addressed in briefing and court ordered arbitration of FLSA claims under arbitration rules of Financial Industry Regulatory Authority ("FINRA") despite FINRA prohibition of class actions because "'collective action' is not encompassed within the term 'class action'").

In the Order denying reconsideration, the District Court wrote:

> Defendants base the bulk of their argument on the Supreme Court's decision in Stolt-Nielsen S.A. v.

> AnimalFeeds Int'l, Corp., 130 S. Ct. 1758 (2010). In that case, the Supreme Court decided "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq." Stolt-Nielsen S.A., 130 S. Ct at 1764. In Stolt, the agreement between the parties "was 'silent' in the sense that [the parties] had not reached any agreement on the issue of class arbitration." Id. at 1768. The Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Id. at 1775 (emphasis in original). Stolt is inapplicable here for a number of reasons. First, this Court refused to compel arbitration under the FAA, finding that it does not apply here. (Arbitration Order at 9.) The Court found applicable the Section 1 exemption to the FAA, exempting from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. §1. (Arbitration Order at 9.) The Court, refusing to compel arbitration under the FAA, instead compelled arbitration under the Utah Uniform Arbitration Act ("UUAA") and found that Utah law governed. (Id. at 9, 14.) In Stolt, the Court decided whether class arbitration could be imposed under the FAA. Since the FAA is not at issue here, the decision in Stolt is not on point.

Doc. 77 at pp. 4-5.

Here, the District Court correctly applied ordinary rules of contract interpretation, specifically the doctrine of *expressio unius est exclusio alterius*. The Court was presented with and considered the sophistication of

the parties, the tradition of collective actions in FLSA claims, and full briefing as to whether the parties' agreement was truly "silent" as to collective arbitration. And the Court found that Defendants, who are admittedly sophisticated corporate entities, drafted the arbitration clause. The contract between the parties clearly shows that Central was concerned that the Drivers might claim that they were employees and thus be subject to the Fair Labor Standards Act,[4] but still specifically left out collective actions from the waiver that included consolidated and class actions. Thus, under the doctrine of *expressio unius est exclusio alterius*, the Court correctly held that the arbitration agreement, properly construed, reflected an intent to permit class arbitration. *Stolt-Nielsen*, and the other cases cited by Defendants do not invalidate the reasoning of the Court that the arbitration agreement authorizes FLSA collective actions.

### B. The Contract Must Be Construed To Permit Collective Actions.

Central also argues again that the language of the contract, specifically the language barring "consolidated" and "class actions," was meant to bar

[4] Indeed, the ICOA contract clearly is written with knowledge of possible FLSA claims arising from the independent contractor Agreement giving Defendants total control over the drivers, by stating, "The parties agree that this [exclusive possession, control and use] provision is set forth solely to conform with FMCSA regulations, and shall not be used for any other purposes, including any attempt to classify CONTRACTOR as an employee of COMPANY." Defendants were well aware of the existence of possible employment claims such as the FLSA, when drafting the Agreement, but they simultaneously excluded collective actions from the waiver contained in the arbitration clause.

"collective" actions as well because that is a similar type of action. As the District Court correctly found, a FLSA collective action is different from a "consolidated" action and it is also different from a "class" action. *See* Doc. 61 at p. 4; Doc. 77 at p. 5.

In fact, a collective action is neither a class action nor a consolidated action. The FLSA collective action– also known as a representative action is created by a special statutory section in the FLSA, 29 U.S.C. §216(b). It originated *sui generis,* as a particularized response to Congress' perception that unions were using spurious class actions on behalf of individuals who might not know they were participants in an action to impose excessive liability on companies seeking to rebuild the U.S. economy after World War II. *Hoffman-LaRoche, Inc. v. Sperling,* 493 U.S. 165, 173 (1989); *U.S. v. Cook*, 795 F.2d 987, 992-3 (Fed. Cir. 1986); *Arrington v. National Broadcasting Co.*, 531 F. Supp. 498, 501 (D.D.C. 1982).

To participate in a collective action, an individual must affirmatively "opt-in" to the litigation. This is exactly the opposite of class actions where class members are members unless they "opt-out," and that different procedural hurdle leads to drastic differences in participation and coverage. Collective actions are similar to consolidated actions only insofar as the opt-in must take some affirmative measure to indicate their desire to participate.

But collective actions are vastly different from a consolidated action in many other respects. First, an opt-in need not make arrangements to have their own representation as would be required in consolidated actions. Second, an opt-in also may not need to participate in individualized discovery. *See e.g. Adkins v. Mid-America Growers, Inc.*, 141 F.R.D. 466, 469 (N.D. Ill. 1992) (limiting discovery to only representative samples); *Smith v Lowe's Home Centers, Inc.*, 236 FRD 354, 357 (S.D. Ohio 2006) (discovery limited to representative sampling). Third, an opt-in may not need to even appear at trial, as FLSA actions handled on a representative basis are tried on a representative basis. *See e.g. Anderson v Mt. Clemens Pottery Co.*, 328 U.S. 680, (1946) (representative testimony by eight workers sufficient to establish liability on behalf of 300 workers); *Mclaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (five workers' representative testimony suffices for non-testifying workers). Finally, unlike a consolidated action, an opt-in need not pay filing fees for their case to be joined with other claims, thereby enabling low income workers to bring FLSA claims at lower cost. Defendants' protestations about how they view collective actions as identical to consolidation notwithstanding, a collective action is very different from a consolidated action.

Central also argues that the arbitration agreement uses the phrases "each party" and "both parties" and thus could not be referring to arbitration on a collective basis. But this usage flows entirely from the fact that the agreements containing the arbitration clause were signed by a driver and a Central representative individually. They do not compel a conclusion that only individual as opposed to collective arbitration could occur under the agreements.

Central also argues that the contractual language that "the parties agree that this Agreement is not an 'exempt contract of employment'… " implies that the parties meant not to permit FLSA claims to be heard collectively. But, in fact, this language cuts against Central. The contract clearly discloses Central's concern that the level of control set forth in the Lease and ICOA would make the Drivers "employees" as a matter of law.[5] And yet Central omitted "collective actions" from the waiver they drafted. Indeed, Central's designation of the UUAA to apply if the FAA were held not to apply could only come into play if the Drivers were found to be employees. For Central to have planned that the UUAA would apply if the drivers were found to be employees, but to have omitted exclusion of

[5] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (employee status determined by law, rather than contractual labels); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (same); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (same).

"collective actions" from the arbitral bar, can only be taken to further show that Central intended FLSA collective actions to be heard in arbitration.

Central's final argument expresses the odd concern that a single arbitration of all FLSA claims will somehow defeat the goal of arbitration "to dispense justice in an efficient and orderly way." Obviously a collective arbitration for hundreds of claimants will involve substantially less work, less time, and less money for all parties than will hundreds of separate arbitrations.[6] Moreover, allowing the Drivers to proceed collectively in their FLSA claims will enable common documentary discovery and common deposition testimony, as well as common proof and common trial testimony on all sides. Rather than have Central's managers testify 200 times, they will only have to do so once, and the Drivers will be able to prove their case through representative testimony rather than having to arrange for hundreds of truck drivers to take time off from their current jobs in far-flung locales to testify. Most importantly, collective arbitration will allow the arbitrator to render decisions that would apply to all the Drivers in this case, rather than having several arbitrators render numerous possibly conflicting rulings, as they will have to do for Drivers' other claims, which must be arbitrated

[6] In addition to filing fees Plaintiff has paid, Defendants will also have to pay separate filing fees, arbitrator compensation, expenses and hearing room charges. Each case will require selection of a separate arbitrator, separate clause construction hearings, separate determinations of the facts and separate determinations of the law, notwithstanding that the identical claims are raised in each arbitration.

individually. In other words, Central seeks to impose on the Drivers' FLSA claims the very same inefficiencies that they ensured will afflict the Drivers' other claims.

If the Arbitrator finds that the District Court's order may be revisited, the same result should apply for the reasons given by the Court. Construing the parties' agreement against the drafter, and considering the *expressio unius* doctrine, the agreement expresses the intention that the Drivers' FLSA claims should be collectively arbitrated. If the Arbitrator disagrees with the District Court's holdings, then Arbitrator must address the question of whether the Supremacy Clause precludes enforcement of a collective action waiver under the terms of the FLSA or the NLRA, as set forth in the *Drivers' Opening Brief*, pp. 40-46. However, because the District Court's Order is mandatory, and because it is correct for the reasons stated, the Drivers' collective FLSA claims should be heard collectively.

## III. ANSWER TO RESPONDENTS' BRIEF 3 (Drivers' Point 1): THE CONTRACT MANDATES APPLICATION OF THE EMPLOYMENT ARBITRATION RULES

On November 26, 2012, the Drivers filed a demand for collective arbitration of their FLSA claims under the AAA's Employment Rules. *See* Ex A (11/26/12 Letter from D. Getman and Collective Demand for Arbitration). Respondents objected arguing, *inter* alia, that the Commercial

Rules should apply to the arbitration. *See* Ex B (11/28/12 Letter from D. Hansen; 12/4/12 Letter from D. Hansen; 2/6/13 Email from D. Hansen). Both parties briefed the rules issue for the AAA. *See id.*; *see also* Ex. C to *Drivers' Opening Brief* (11/30/12 Letter and 12/18/12 email from D. Getman). After considering the parties' respective arguments, the AAA determined that the Employment Rules would apply to the arbitration and that the parties should select an Arbitrator from the Employment List. Ex. D (12/19/12 email from A. Shoneck).

Respondents now ask the Arbitrator to revisit the AAA's determination that the Employment Rules apply to this case. This request should be denied for two reasons: First, the AAA rules themselves make clear that the determination of which Rules apply to an arbitration is exclusively a determination for AAA to make, not the Arbitrator. Second, even if the Rules allowed the Arbitrator to revisit the AAA's determination, that determination was clearly correct.

### A. Respondents Cannot Appeal The AAA Rules Determination To The Arbitrator.

As Respondents argue at length, the parties' agreements reference the AAA Commercial Rules. Rule 1 of the Commercial Rules states unequivocally that "[a]ny disputes regarding which AAA rules shall apply shall be decided by the AAA." The AAA decided that the footnote to Rule 1

of the Commercial Rules applied and, pursuant to that footnote, the AAA required use of the Employment Rules for this particular dispute. The AAA having decided which rules shall apply, that is the end of the matter.

The Drivers recognize that Adam Shoneck's letter of Dec. 19, 2012 stating on behalf of the AAA that the Employment Rules would be applied also states that "[t]his determination may be raised to the arbitrators for a final ruling once appointed." Ex. D. However, the Drivers do not believe that a single AAA employee has the authority to alter the clear mandate of the AAA Rules which make the AAA's rules determination final. There is no question that the AAA knew how to draft its rules to give an arbitrator power to review an AAA decision in appropriate circumstances. Indeed, the same Rule 1 that gives the AAA final say over which Rules apply, also discusses supplementary procedures and with respect to that entirely different context states that "the AAA will have the discretion to apply or not to apply the supplementary procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator." AAA Commercial Rule 1 fn * Since the Rules conspicuously do NOT give the arbitrator a similar review power over the decision regarding which Rules apply, no such appeal lies and the AAA's determination is final.

### B. The AAA Correctly Determined That the Employment Rules Should Apply To This Arbitration

Even if the Rules allowed Respondents to appeal the AAA's rules determination to the Arbitrator, they have failed to show any error in the AAA's determination to apply the Employment Rules. In urging review of the AAA's determination, Respondents make the same argument they made to the AAA – that the arbitration agreements refer to the Commercial Rules and therefor the Commercial Rules should apply. As the AAA recognized, however, the reference to the Commercial Rules in the contract does not resolve the issue since Commercial Rule 1 contains a footnote that calls for the application of the Employment Rules if a dispute arises out of an employer-promulgated plan. The question then is when should the Commercial Rule 1 footnote control and when should the general Commercial Rules control? The AAA answered that question by looking to the parties' allegations. Because Claimants clearly allege that they are employees and that the contract is, in reality, a contract of employment, the AAA found that the footnote applied and that the Employment Rules govern this dispute. The AAA's view that the application of the Commercial Rule

footnote, *vel non*, turns on the *allegations* made by the Claimant is a reasonable one and is entitled to deference.[7]

Respondents do not contest the fact that Claimants have alleged that the contracts at issue are contracts of employment. Nor can they given the District Court's finding that the contract was a contract of employment for purposes of the §1 exemption from the FAA. Rather, Respondents argue that the AAA erred in looking to the *allegations* in the dispute to determine whether to apply the footnote. According to Respondents, allegations alone are insufficient. Instead, they argue that the Commercial Rules required the Arbitrator to "conduct[] a full blown trial" as to whether Claimants are employees before the Rule 1 footnote can be applied. *Respondents' Brief 3* at 9, fn 10. Recognizing that that is impractical, they argue in the alternative that the Arbitrator should just ignore the footnote and apply the Commercial Rules as if the footnote did not exist. *Id.*

Neither of these alternatives is a rational way to interpret the AAA's Commercial Rules or the contracts' reference to those Rules. Plainly the footnote cannot just be ignored -- it is as much a part of the Commercial Rules referenced in the arbitration agreement as any other Commercial Rule.

[7] The AAA's letter specifying that the Employment Rules would apply to this Arbitration does not explain its reasoning. But the only documents before the AAA were the contract and the Drivers' allegations and it must be assumed that the decision was made on that basis.

And it must be assumed that the parties were aware of the footnote when they entered into the agreement referencing the Commercial Rules. *See, e.g.*, *In re Boulder Crossroads*, LLC, 09-10381-CAG, 2012 WL 1066482, *8 (Bankr. W.D. Tex. Mar. 28, 2012) ("a party is presumed to know the contents of what it signs, including items incorporated by reference."). Just as obviously it makes no sense to conduct a full blown trial on the Drivers' employment status just to determine what Rules to apply in conducting the trial on the merits where the primary issue will be the Drivers' status as employees. Such circularity would render the footnote meaningless. Clearly, the only sensible way to give meaning to the footnote is that adopted by the AAA – to apply it based on the nature of the allegations at issue. Such an approach is consistent with the requirement of the Rules that the AAA make the initial (and, as the Drivers argue, final) determination of what Rules apply. Clearly the AAA cannot conduct a preliminary trial. It must be able to determine the applicable rules from a review of the available documents and making the application of the Rule 1 footnote turn on the allegations in the arbitration demand allows just such a determination.

Basing the application of the Commercial Rule footnote on specific allegations that the Drivers are employees is also reasonable because if the Arbitrator's determination ultimately favors Drivers (i.e. if the Agreements

are found to be contracts of employment) the proper rules will have been applied, and, if the ultimate determination favors Respondents (i.e. if the Agreements are found to be business deals between independent businesses), no harm will have occurred because Respondents will have won the arbitration. For all of these reasons, the Arbitrator should defer to the AAA's interpretation of its Commercial Rules as calling for the application of the Employment Rules where, as here, the dispute is an employment dispute alleging as a critical element of the claim that the contract is a contract of employment.

Even if Respondents' interpretation that the Rule 1 footnote can only be applied where it has already been determined on the merits that the agreement is a contract of employment were deemed sufficiently reasonable to create an ambiguity as to when the employment rules should apply, that ambiguity must be resolved against Respondents as they were the drafters of the contract and could have clarified when the Rule 1 footnote would apply if they had wanted to. *Sears v. Riemersma*, 655 P.2d 1105, 1107 (Utah 1985) ("The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement.").

## IV. ANSWER TO RESPONDENTS' BRIEF 4 (Drivers' Point 2): THE EMPLOYMENT RULE FEE STRUCTURE APPLIES TO THIS ARBITRATION

After determining that the Employment Rules should apply to this dispute, the AAA assessed fees in accordance with the Employment Rules fee schedule for a collective arbitration. *See* Ex E (3/20/13 Letter from A. Shoneck). Respondents take issue with this ruling on the grounds that they did not agree to pay any fees for collective arbitration, only for individual arbitration. This is simply a restatement of the arguments presented in Respondents' Briefs Nos. 1 and 2 in which they claim that the District Court erred in interpreting the agreement as allowing for collective arbitration of the FLSA claim. As explained above, Respondents are bound by the District Court's interpretation and cannot relitigate it here. Since their agreement has been conclusively interpreted by the District Court (at Respondents' invitation) to allow for collective arbitration, the AAA properly assessed fees in accordance with the Employment Rules for collective arbitration.

Dated: October 23, 2013

Respectfully Submitted,

*/s/ Dan Getman*

Dan Getman
Lesley Tse
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, New York 12561
Telephone: (845) 255-9370
Fax: (845) 255-8649
dgetman@getmansweeney.com

Susan Martin
Jennifer Kroll
Martin & Bonnett, PLLC
1850 N. Central Avenue, Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
Fax: (602) 240-2345
smartin@martinbonnett.com

Edward Tuddenham
228 W. 137th St.
New York, New York 10030
Telephone: (212) 234-5953
Fax: 512-532-7780
etudden@prismnet.com

ATTORNEYS FOR CLAIMANTS