

13-928

No. _____

Supreme Court, U.S.
FILED

JAN 31 2014

OFFICE OF THE CLERK

In the Supreme Court of the United States

CRAIG CROCKETT, as alleged assignee of Dehart and
Crockett, P.C.; CRAIG M. CROCKETT, P.C.,
d/b/a Crockett Firm,

Petitioners,

v.

REED ELSEVIER, INC.,
through its LexisNexis Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

BLAIR C. FENSTERSTOCK

Counsel of Record

MICHAEL T. PHILLIPS II

FENSTERSTOCK & PARTNERS LLP

100 Broadway, 8th Floor

New York, New York 10005

(212) 785-4100

bfensterstock@fensterstock.com

Counsel for Petitioners

QUESTIONS PRESENTED

In *Oxford Health Plans LLC v. Sutter*, 569 U.S. ____ (2013), 133 S. Ct. 2064, this Court unanimously held that an arbitrator's determination that the parties to an arbitration agreement intended to authorize class-wide arbitration survives judicial review under § 10(a)(4) of the Federal Arbitration Act as long as the arbitrator was arguably construing the contract.

In this case, the United States Court of Appeals for the Sixth Circuit affirmed the District Court ruling that it, and not the arbitrator, should make the determination on whether a dispute can be a class action arbitration, despite the fact that the arbitration clause at issue referred “any controversy, claim, or counterclaim” to binding arbitration before the American Arbitration Association. In so doing, the Sixth Circuit stated, that the United States Supreme Court “has not yet decided whether the availability of class arbitration is a gateway question. Thus, the issue before us – whether classwide arbitrability is presumptively for an arbitrator to decide, or presumptive for a judge – remains an open issue.” The questions presented here are:

Does the arbitration clause at issue and applicable law require that the arbitrability of class claims must be decided by the arbitrator?

Does the arbitration clause at issue and applicable law permit an arbitration to proceed as a class arbitration under the American Arbitration Association's Supplementary Rules on Class Arbitration?

Are the consumer contracts at issue adhesion contracts that contain arbitration clauses that, if they do not permit class arbitration, are unconscionable and therefore without legal effect?

PARTIES TO THE PROCEEDING

The plaintiff in this case is Respondent Reed Elsevier, Inc., through its LexisNexis Division.

The defendants in this case are Petitioners Craig Crockett, as alleged assignee of Dehart and Crockett, P.C., and Craig M. Crockett, P.C., d/b/a Crockett Firm.

CORPORATE DISCLOSURE STATEMENT

Petitioners Craig M. Crockett as assignee of Dehart & Crockett, P.C. and Craig M. Crockett P.C. d/b/a Crockett Firm are not publicly owned corporations, nor are they subsidiaries or affiliates thereof. No publicly held company owns 10% or more of either Petitioner's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
INTRODUCTION	1
STATEMENT	5
REASONS FOR GRANTING THE PETITION ...	11
I. THE CIRCUITS ARE DIVIDED ON THE “WHO DECIDES” ISSUE	11
II. THE DECISION BELOW IS INCORRECT AND RAISES IMPORTANT AND RECURRING LEGAL ISSUES	15
A. Class Arbitrability Should Be Determined By the Arbitrator	15
B. The Arbitration Clause Authorizes Class Arbitration	25
C. Without Class Arbitration, Petitioners Have No Practical Recourse and the Clause Is Unconscionable	30
CONCLUSION	32

APPENDIX

- Appendix A Opinion and Judgment in the United States Court of Appeals for the Sixth Circuit (November 5, 2013) App. 1
- Appendix B Entry Expressly Finding That There Is No Just Cause for Delay and Directing That Final Judgment Be Entered in Favor of Plaintiff and Against Defendants on Plaintiff's First Claim for Relief; Termination Entry in the United States District Court for the Southern District of Ohio, Western Division (April 9, 2012) App. 14
- Appendix C Judgment in a Civil Action in the United States District Court for the Southern District of Ohio, Western Division (April 9, 2012) App. 19
- Appendix D Decision and Entry Overruling Defendant's Motion to Certify this Court's March 31, 2011, Decision and February 24, 2012, Expanded Opinion for an Interlocutory Appeal and for Stay of Proceedings Pending Appeal (Doc. #44); Reasons Set Forth in the United States District Court for the Southern District of Ohio, Western Division (March 29, 2012) App. 21

Appendix E	Expanded Opinion Setting Forth Reasoning and Citations of Authority in Support of Decision of March 31, 2011 (Doc. #39), to Sustain Plaintiff's Motion for Partial Summary Judgment (Doc. #7); Conference Call Set in the United States District Court for the Southern District of Ohio, Western Division (February 24, 2012)	App. 23
Appendix F	Opinion Sustaining Plaintiff's Motion for Partial Summary Judgment (Doc. #7); Expanded Opinion to Be Filed Within Stated Period of Time; this Opinion Does Not Constitute a Final Appealable Order in the United States District Court for the Southern District of Ohio, Western Division (March 31, 2011)	App. 55
Appendix G	Statutory Provisions Involved . .	App. 57
	9 U.S.C. § 9	App. 57
	9 U.S.C. § 10	App. 58

TABLE OF AUTHORITIES

CASES

<i>Amchem Products, Inc. v. Windsor</i> , 521 U. S. 591 (1997)	30
<i>American Express Co. v. Italian Colors</i> , 133 S. Ct. 2304 (2013)	11, 30, 31
<i>Aracri v. Dillard's, Inc.</i> , 2011 WL 1388613 (S.D. Ohio Mar. 29, 2011)	12-13
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. –, 131 S.Ct. 1740, 179 L. Ed.2d 742 (2011)	4, 11, 31
<i>Belmont Cty. Sheriff v. Fraternal Order of the Police</i> , 104 Ohio St. 3d 568, 820 N.E.2d 918 (Ohio 2004)	24
<i>Brookdale Senior Living, Inc. v. Dempsey</i> , 2012 WL 1430402 (M.D. Tenn. Apr. 25, 2012)	13
<i>Carnegie v. Household Int'l, Inc.</i> , 376 F. 3d (7th Cir. 2004)	30
<i>Connecticut General Life Ins. Co. v. Sun Life Assurance Co. of Canada</i> , 210 F. 3d (7th Cir. 2000)	26
<i>Dealer Computer Services, Inc. v. Dub Herring Ford</i> , 623 F.3d 348 (6th Cir. 2010)	16

<i>Dealer Computer Services, Inc. v. Dub Herring Ford,</i> 547 F.3d 558 (6th Cir. 2008)	16
<i>Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.,</i> 683 F.3d 18 (1st Cir. 2012)	12
<i>First Options of Chicago v. Kaplan,</i> 514 U.S. 938 (1995)	20, 21
<i>Green Tree Fin. Corp. v. Bazzle,</i> 539 U.S. 444 (2003)	<i>passim</i>
<i>Guida v. Home Sav. of Am., Inc.,</i> 793 F.Supp.2d 611 (E.D.N.Y.2011)	13
<i>Howsam v. Dean Witter Reynolds, Inc.,</i> 537 U.S. 79 (2002)	2, 10, 21, 23, 25
<i>International Union of Elec. Salaried, Mach. and Commc'n Workers of America v. Dubois Chem., Inc.,</i> 2010 WL 348314 (S.D. Ohio Jan. 26, 2010)	23
<i>John Wiley & Sons, Inc. v. Livingston,</i> 376 U.S. 543 (1964)	1, 19, 20
<i>Lee v. J.P. Morgan Chase & Co.,</i> 2013 WL 6068601 (Nov. 14, 2013)	4, 14
<i>Oxford Health Plans LLC v. Sutter,</i> 569 U.S. ____ (2013)	i, 1
<i>Quillion v. Tenet Healthsystem Philadelphia, Inc.,</i> 673 F.3d 221 (3d Cir. 2012)	4, 11
<i>Reed Elsevier, Inc. v. Crockett et al.,</i> 734 F.3d 594 (6th Cir. 2013)	2, 11

<i>Rent-A-Center West, Inc. v. Jackson</i> , 561 U.S. 63 (2010)	2, 22, 23, 24, 25
<i>Southland v. Keating</i> , 465 U.S. 1 (1984)	15
<i>Smith v. Cheesecake Factory Restaurants</i> , 2010 WL 4789947 (M.D. Tenn. Nov. 16, 2010)	13
<i>Stolt-Nielsen v. AnimalFeeds International Corp.</i> , 559 U.S. 662 (2010)	<i>passim</i>
<i>Vilches v. Travelers Companies, Inc.</i> , 413 F. Appx. 487 (3d Cir. 2011)	13
<i>Von Arras v. Columbus Radiology Corp.</i> , 2005 WL 1220735 (Ohio Ct. App. May 24, 2005)	23, 24

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16	i, 1, 8, 9, 14, 15
9 U.S.C. § 9	1
9 U.S.C. § 10	1
9 U.S.C. § 10(a)(4)	1
28 U.S.C. § 1254(1)	1

RULES

AAA Commercial Arbitration Rule 7	23, 24
Supplemental Rules 3, 4, 5	24
Fed. R. Civ. P. 23	25

OPINIONS BELOW

The opinion of the court of appeals (App. 1-13) is reported at 734 F.3d 594. The expanded opinion of the district court (App. 23-54) is unpublished, but is available at 2012 WL 604305.

JURISDICTION

The Sixth Circuit issued its opinion affirming the District Court's final judgment on November 5, 2013. App. 13. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 10, are reprinted at App. 57-58.

INTRODUCTION

Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, questions of arbitrability are presumptively for a court to decide, while questions of arbitration procedure are presumptively for the arbitrator to decide. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). In *Oxford Health Plans LLC v. Sutter*, 569 U.S. ____ (2013), 133 S. Ct. 2064, this Court unanimously held that an arbitrator's determination that the parties to an arbitration agreement intended to authorize class-wide arbitration survives judicial review under § 10(a)(4) of the Federal Arbitration Act as long as the arbitrator was arguably construing the contract. But, as this Court noted in Footnote 2 of its Opinion, "this Court has not yet decided whether the availability of class arbitration is a question of arbitrability." Petitioners respectfully seek a writ of

certiorari so that this Court may answer this and related questions.

In this case, the District Court ruled that it, and not the arbitrator, would make the determination, despite the fact that the arbitration clause at issue referred “any controversy, claim, or counterclaim” to binding arbitration before the American Arbitration Association. App. 23-54. The Sixth Circuit affirmed that decision, while conceding that “the Supreme Court’s puzzle of cases on [the class arbitration] issue is not complete ... whether classwide arbitrability is presumptively for an arbitrator to decide, or presumptively for a judge ... is an open one.” App. 6-7; *Reed Elsevier, Inc. v. Crockett et al.*, 734 F.3d 594 (6th Cir. 2013).

The Sixth Circuit’s decision expressly disagrees with Supreme Court and other Circuit authority holding that whether class arbitration is permitted by an arbitration clause is a question for the arbitrator. Under all Supreme Court precedent, when there is no question, as in this case, that parties have (a) agreed to arbitrate all issues and (b) expressed their intent, through inclusion of the class arbitration rules in the arbitration agreement, to provide for class treatment, the arbitrator is the proper tribunal to decide class issues; not the Court. *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); see *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

The Sixth Circuit’s decision created multiple and growing fissures amongst the Circuits, raising issues of considerable national importance that require the Supreme Court’s review. The Third and First Circuits

have split from the Sixth Circuit, as has a District Court in the Ninth Circuit. The harm from an absence of clarity and uniformity is particularly acute where, as here, many of the parties affected are consumers spread out across the country. As arbitration agreements increasingly govern consumer disputes of all kinds, a lack of uniformity creates unacceptable costs and complexity for a large segment of the nation's population. Such parties are entitled to clear and reliable rules that implement the actual arbitration procedures to which they agreed.

This case raises two further issues related to the question of "who decides." The first is the specific interpretation of the arbitration clause at issue. As required by *Stolt-Nielsen v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), a number of contractual bases establish that the arbitration clause at issue permitted class arbitration and directed the class arbitration question to the arbitrator. These bases include the parties' intent and the text of the clause, the latter of which specified that "any controversy, claim or counterclaim ... will be resolved by binding arbitration under ... the then-current Commercial Rules [of the American Arbitration Association]." The incorporation of the AAA's Commercial Arbitration Rules is pivotal, as they contain Supplementary Rules on Class Arbitration, which further guide the AAA's experienced arbitrators as to when class arbitration is appropriate.

The final issue is whether a consumer contract of adhesion (held as such by the Sixth Circuit Court of Appeals, App. 11) which requires arbitration in the city where Respondent is located, and which makes

consumer claims economically unfeasible, and imposes onerous terms on consumers is unconscionable. In *AT&T Mobility v. Concepcion*, 563 U.S. –, 131 S. Ct. 1740 (2011), the Supreme Court held that a consumer arbitration clause that requires bilateral arbitration is not unconscionable where it also establishes a number of claimant-friendly procedures. However, as the Sixth Circuit noted, that is not the case here. “The [arbitration] clause is indeed as one-sided as Crockett says: the clause favors LexisNexis at every turn, and as a practical matter makes it economically unfeasible for Crockett or any other customer to assert the individual claims that Crockett seeks to assert here.” App. 11. Arbitration clauses like these are unconscionable under Supreme Court precedent. The law does not immunize companies that commit small dollar wrongs against a large number of consumers.

Though the Supreme Court has revisited class arbitration in recent years, these questions remain open questions. The Circuits are split on these questions. The Third Circuit disagrees with the Sixth, see *Quillion v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (“The actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator”). A November 14, 2013 decision by the United States District Court for the Central District of California is also instructive. See *Lee v. J.P. Morgan Chase & Co.*, 2013 WL 6068601 (Nov. 14, 2013) (the question of whether class arbitration applies is one of what procedural arbitration mechanism should be used, and is for an arbitrator, not a gateway matter for a Court to decide). Moreover, as a practical matter, the questions presented here, while important and

recurrent, are frequently not litigated to an appellate conclusion because consumer claimants often lack the resources or the damages to justify the expense of appellate litigation. The Supreme Court should take this opportunity to “complete the puzzle.”

STATEMENT

1. Petitioners, including other putative Class members, represent customers that entered into subscription agreements and product offer contracts for Reed Elsevier’s LexisNexis research services and products, including access to a specific set of services and products known as the “Preferred Pricing Materials.” App. 23-25. LexisNexis and Reed Elsevier marketed and promoted their electronic research service plans and products to consumers like Crockett, who purchased these products and entered into subscription plans governed by subscription agreements, specifically the LexisNexis Subscription Agreement (the “Lexis SA”), and purchased Reed Elsevier’s products that were sold pursuant to contracts, specifically the LexisNexis Total Practice Solutions Order (the “Lexis TPSO”). App. 23-25.

Under the Lexis SA and Lexis TPSO, consumers who purchased products and subscribed to specific online electronic databases – the “Preferred Pricing Materials Subscription Plan” (the “PPM Plan”) – were charged a flat monthly fee for unlimited access to those specific products. App. 24. Thus, consumers could accept a specific rate for access only to the databases that met their usage and research requirements, rather than to a broader array of databases that were more expensive. Under this plan, consumers were to be charged a flat monthly fee for unlimited access to the

databases, but if they ventured into databases or products outside of their subscription plans – i.e., outside of the PPM Plan – they would be charged an additional, undiscounted rate for such access. App. 24.

Reed Elsevier assured consumers like Crockett that if they ventured outside of their subscription plans, they would be warned by a visual popup on their screen, prior to incurring the undiscounted usage fees. App. 3, 24. Specifically, LexisNexis and Reed Elsevier represented to Crockett and other consumers, through product brochures and flyers that “A dollar (\$) sign next to a source selection indicates that the source is outside of your flat rate subscription plan and is subject to an additional charge.” App. 3. In fact, no such warnings ever appeared, and LexisNexis and Reed Elsevier have admitted such wrongdoing. Unfortunately, as a result of this acknowledged product defect, consumers like Crockett were charged enormous fees for unknowingly accessing databases outside of their PPM Plan. App. 3. Crockett complained to LexisNexis that he and his firm were charged usage fees for unknowingly accessing databases outside of their PPM Plan, and that Reed Elsevier’s products and services did not display a dollar sign signaling that the sources were outside Crockett’s PPM Plan. At first, LexisNexis denied that such a problem existed, then eventually acknowledged the deficiencies in the warning system. Still, LexisNexis refused to deduct these fees from Crockett’s bills. Crockett continued to pay his basic subscription fee, but disputed these extra fees. Instead of separating the usage fees from the subscription fees while Crockett and LexisNexis sought to resolve the dispute, LexisNexis compounded the damage by forcing these extra fees onto Crockett’s

existing bills. This pushed Crockett's account into arrears, and LexisNexis ultimately sent it to collection agencies, damaging Crockett's credit rating.

2. In his class arbitration demand, Crockett sought relief for himself and for other consumers with small claims through arbitration on a classwide basis before the AAA. App. 3, 4. LexisNexis's subscription agreements contain a broadly-written arbitration clause that governs disputes between it and its customers. It reads:

. . . any controversy, claim or counterclaim ... arising out of or in connection with this Order, . . . whether based on contract, tort, statute or other legal theory ... will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association.

App. 9. It further requires all disputes (except those billing disputes initiated by LexisNexis) to be arbitrated in Dayton, Ohio, no matter the size of the amount in controversy or the location of the parties or witnesses. App. 11. Notably, Reed Elsevier excluded from arbitration:

claims and controversies involving either (a) violation of any of the proprietary rights of LN, including claims in equity or law to protect the intellectual property rights of LN or its third party content providers; or (b) failure to comply with restrictions on use of the services and materials included in this Order. . .

App. 43.

Crockett filed a Class Arbitration Demand with the AAA on February 25, 2010 and on March 24, 2010, Crockett filed an Amended Arbitration Demand. LexisNexis and Reed Elsevier filed their Answering Statement with the AAA on April 19, 2010, arguing that the AAA and any arbitrator appointed by the AAA were without power or jurisdiction to arbitrate the dispute on a classwide basis.

3. The AAA is well-versed and experienced in dealing with class arbitrations. Since the fall of 2003, in accordance with the Federal Arbitration Act and the Supreme Court's holding in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the AAA has developed a set of Supplementary Rules for Class Arbitrations. The AAA's rules and policies, in conjunction with *Bazzle* and relevant state law, have led arbitrators to determine, time and again, that broadly written arbitration clauses, like the one at issue here, permit class arbitration.

4. When the AAA indicated that it would proceed by following its Commercial Rules and Supplementary Rules on Class Arbitration, Reed Elsevier filed a Complaint for Declaratory Judgment and Injunctive Relief in the United States District Court for the Southern District of Ohio on June 25, 2010, seeking a ruling that the arbitration clause at issue did not permit class arbitration. Reed Elsevier moved for partial summary judgment on the issue, which motion the District Court granted on March 31, 2011 (App. 55-56), offered an Expanded Opinion setting forth the District Court's reasoning and citations in support of its decision on February 24, 2012 (App. 23-54), and entered a final judgment on April 9, 2012 (App. 19-20).

In its Expanded Opinion, the District Court stated that “deciding whether the parties have agreed to class arbitration is not the same as applying procedural rules,” and held that the class arbitration question is a “gateway matter” for the District Court to decide.

The District Court also ruled that the arbitration clause did not permit arbitration, because it referred to arbitration “any controversy, claim or counterclaim ... arising out of or in connection with this Order.” The District Court interpreted “this Order” as an exclusive reference to the Petitioners’ arbitration clause, and to no other consumer’s contract. Finally, the District Court held that, even if the arbitration clause is unconscionable under state law, it would enforce the arbitration clause because the finding of unconscionability would be preempted by the Federal Arbitration Act. (“Similarly, this Court concludes that classwide arbitration, to the extent manufactured by a rule of contract construction that would render arbitration agreements unconscionable contracts of adhesion if interpreted not to permit class arbitration, would be inconsistent with the FAA.”) App. 51.

5. The Sixth Circuit Court of Appeals affirmed. In doing so, the court reasoned that “[g]ateway questions are fundamental to the manner in which the parties will resolve their dispute—whereas subsidiary questions, by comparison, concern details. And whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail. Unlike the question whether, say, one party to an arbitration agreement has waived his claim against the other—which of course is a subsidiary question—the question whether the parties agreed to classwide arbitration is vastly

more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would “forc[e] parties to arbitrate” not merely a single “matter that they may well not have agreed to arbitrate[,]” *Howsam*, 537 U.S. at 84, 123 S.Ct. 588, but thousands of them.” App. 8.

Holding that the arbitration clause did not permit class arbitration, the Sixth Circuit Court of Appeals explained that “[t]he principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it.” App. 10. But this neglects the Court’s holding in *Stolt-Nielsen*, which requires a contractual *basis* for class arbitration, not explicit contractual terms.

The Sixth Circuit Court of Appeals accepted Petitioners’ argument that the arbitration clause was severely disadvantageous to consumers:

“The clause is indeed as one-sided as Crockett says: the clause favors LexisNexis at every turn, and as a practical matter makes it economically unfeasible for Crockett or any other customer to assert the individual claims that Crockett seeks to assert here. The clause provides that any arbitration of any dispute concerning LexisNexis’s charges must occur in Dayton, Ohio, where LexisNexis is headquartered. The customer must pay his own legal fees, even if the arbitrator concludes that LexisNexis’s charges were improper. And unlike many corporations that require arbitration of disputes with their customers, LexisNexis makes its customer split the tab for the arbitrator’s fee. The idea that the

arbitration agreement in this case reflects the intent of anyone but LexisNexis is the purest legal fiction.”

App. 11. Still, the Sixth Circuit Court of Appeals declined to find the clause unconscionable, citing *American Express Co. v. Italian Colors*, 133 S. Ct. 2304 (2013) (class action waivers do not render arbitration clauses unenforceable). This ruling and rationale did not consider the Supreme Court’s logic in *AT&T Mobility v. Concepcion*, 563 U.S. —, 131 S. Ct. 1740 (2011), which held that an arbitration agreement that prohibits class treatment is not unconscionable where the agreement also establishes consumer-friendly bilateral arbitration procedures.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON THE “WHO DECIDES” ISSUE

The Circuits are now expressly divided on the issue of whether an arbitrator or court should decide whether an arbitration agreement authorizes class arbitration. The Sixth Circuit has reserved this decision for the district courts. *Reed Elsevier, Inc. v. Crockett et al.*, 734 F.3d 594 (6th Cir. 2013). In contrast, the Third Circuit and the First Circuit have delegated this issue to the arbitrator. *Quillion v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (“The actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator”).

Other courts, including other Circuit Courts, agree that class arbitrability is a procedural issue, not a substantive or “gateway” issue. The First Circuit

recently so held in *Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.*, 683 F.3d 18 (1st Cir. 2012). In *Fantastic Sams*, a coalition of franchisees demanded arbitration against their franchisor for common statutory violations. All of the franchisees had signed agreements with arbitration clauses, many of which did not address class arbitration and broadly provided for the arbitration of any and all disputes arising out of the agreements. *Id.* at 20. The First Circuit held that those franchisees who had signed agreements with no explicit mention of class arbitration were permitted to proceed because “express contractual language evincing parties’ intent to permit class arbitration” was not required under *Stolt-Nielsen*. *Id.* at 22. Furthermore, the Court concluded that the question of whether these franchisees could continue as a collective group was a matter for the arbitrator to decide because it was a “procedural” matter within the AAA Commercial Rules. *Id.* at 25.

The same rationale applies here. The arbitration clause in this case directs this controversy – any controversy, which would include a dispute over the clause’s class arbitrability – to an arbitrator. The arbitration clause is broadly drafted. Drafted by Reed Elsevier, this adhesion contract contains no express carve-out for or against class arbitration. Instead, it simply incorporates the AAA Supplementary Rules on Class Arbitration.

Other courts have come to the same conclusion, including the Southern District of Ohio. “The question of whether class arbitration is forbidden is initially a question of contract interpretation and should be decided in the first instance by an arbitrator.” *Aracri*

v. Dillard's, Inc., 2011 WL 1388613 at *10 (S.D. Ohio Mar. 29, 2011). See also *Brookdale Senior Living, Inc. v. Dempsey*, 2012 WL 1430402 (M.D. Tenn. Apr. 25, 2012) (declining to follow the Expanded Opinion appealed from in this case); *Smith v. Cheesecake Factory Restaurants*, 2010 WL 4789947 (M.D. Tenn. Nov. 16, 2010) (same); *Guida v. Home Savings of America, Inc.*, 793 F.Supp.2d 611 (E.D.N.Y. 2011) (same); *Vilches v. Travelers Companies, Inc.*, 413 F. Appx. 487 at 492 n. 3 (3d Cir. 2011) (“*Stolt-Nielsen* suggests a return to the pre-*Bazze* line of reasoning on contractual silence, albeit decided by an arbitrator, because it focuses on what the parties agreed to – expressly or by implication”).

This sharp contrast has caught the attention of the district courts. In the Ninth Circuit, the District Court for the Central District of California analyzed:

In a recent decision, the Sixth Circuit diverged from the reasoning of the Third Circuit, holding that the question of whether class arbitration is permitted is a question of arbitrability for the court. See *Reed Elsevier, Inc. v. Crockett*, No. 12-3574, 2013 WL 5911219, at *4 (6th Cir. Nov. 5, 2013). The Sixth Circuit found *Bazze* unpersuasive, reasoning that because the Supreme Court had concluded that various features of class actions made them poorly suited for arbitration, the availability of class procedures must be a question of arbitrability for the court. See *id.* at *4 (citing *Stolt-Nielsen*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 and *Concepcion*, —U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742). However, this Court

concludes, as did the Third Circuit, that the Supreme Court identified these features only to explain why the standard for determining when parties have consented to class arbitration is stringent. *See Vilches*, 413 Fed. App'x at 492 n. 3 (“Although contractual silence in the post-*Bazzle* era has often been treated by arbitrators as authorizing class arbitration, *Stolt-Nielsen* suggests a return to the pre-*Bazzle* line of reasoning on contractual silence, albeit decided by an arbitrator, because it focuses on what the parties agreed to—expressly or by implication.”). See also *Guida v. Home Sav. of Am., Inc.*, 793 F.Supp.2d 611, 619 (E.D.N.Y.2011) (“It is apparent that the Supreme Court simply intended to say that arbitration on a class basis is not a preferred method to proceed and should not be inferred lightly from a contract”).

Lee v. J.P. Morgan Chase & Co., 2013 WL 6068601 (Nov. 14, 2013) (holding that an arbitrator, and not the court, should decide whether an agreement authorizes class arbitration). Only one of these positions can be correct. The Court should grant review to ensure nationwide uniformity in application of its arbitration precedents and the Federal Arbitration Act.

This split imposes significant costs upon a large population of consumers nationwide, as arbitration agreements increasingly govern consumer disputes. Arbitration clauses are in widespread use, including in long-term service contracts and consumer contracts with both nationwide and international operations. Arbitration can have many advantages, but only if the rules for invoking it are predictable and implement

that actual agreements and procedures to which the parties agreed. It is essential that there be clear, uniform rules governing these questions, such as whether a court or an arbitrator decides whether class arbitration is available. Conflict and confusion in the law promote inconsistency and unfairness, and "encourage and reward forum shopping." *Southland v. Keating*, 465 U.S. 1, 15 (1984).

II. THE DECISION BELOW IS INCORRECT AND RAISES IMPORTANT AND RECURRING LEGAL ISSUES

A. Class Arbitrability Should Be Determined By the Arbitrator

The Court should grant Crockett's Petition because it raises important and recurring legal issues on which the stakes are high and a determination can be outcome determinative. For parties to view arbitration as a desirable alternative to litigation, they must be confident that the courts will not undermine the longstanding federal policy favoring arbitration enshrined in the Federal Arbitration Act. Moreover, the questions presented here are important and recurrent, yet frequently not litigated to an appellate conclusion. This is because consumer claimants often lack the resources or the damages to justify the expense of appellate litigation. The Court should grant Crockett's Petition to answer these questions, which are of increasing national importance as consumer contracts increasingly incorporate broadly-written arbitration clauses.

The appointed arbitrator, not the Court, must determine whether an arbitration clause permits class

arbitration. *Bazzle*, 539 U.S. 444. Prior to its decision in this case, the Sixth Circuit soundly relied upon *Bazzle* to protect the arbitrator's role as the arbiter of the class arbitration question. *Dealer Computer Services, Inc. v. Dub Herring Ford*, 623 F.3d 348 (6th Cir. 2010) (affirming district court's dismissal of Plaintiff's motion to confirm AAA Class Certification Award, holding decision is for arbitrator); *Dealer Computer Services, Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008) (vacating district court's order upholding AAA Clause Construction Award, holding that Plaintiff's motion to vacate the Award was not ripe for judicial review and therefore the district court lacked jurisdiction).

In *Bazzle*, a plurality of the Supreme Court ruled that the question of whether an arbitration agreement forbids class arbitration "is a matter for the arbitrator to decide." 539 U.S. at 447. In doing so, the plurality noted that courts assume that parties intended for courts, rather than arbitrators, to have the power "to decide a particular arbitration-related matter," including "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Id.* at 452. With this in mind, the plurality determined that the question of "whether the contracts forbid class arbitration" was really a question of "*what kind of arbitration proceeding* the parties agreed to," and thus did not fall within the "narrow exception" of issues suited for judicial determination. *Id.* at 452 (emphasis in original). The plurality explained that the issue "concerns contract interpretation and arbitration procedures," and pointed to the "arbitration contracts'

sweeping language concerning the scope of the questions committed to arbitration,” and thus concluded that “this matter of contract interpretation should be for the arbitrator, not the courts, to decide.” *Id.* at 453. As a result, the Court remanded the case for the arbitrator to decide the issue of the arbitrability of class claims. *Id.* at 454.

The lower courts’ rationale for ignoring the holding in *Bazzele* is based, in part, upon an incorrect reading of *Stolt-Nielsen*. *Stolt-Nielsen* does not stand for the proposition that businesses like Reed Elsevier can set their own terms in adhesion contracts and cripple the ability of their consumers to act collectively to seek justice on their valid small claims. On the contrary, *Stolt-Nielsen* leaves undisturbed the law and procedure that requires an arbitrator to determine the scope and applicability of an arbitration clause. The *Bazzele* Court opined that there are limited circumstances where it is assumed “that the parties intended courts, not arbitrators” to make the judgment, but the issue of whether arbitration clauses forbid class arbitrations “[does] not fall into this narrow exception.” *Id.* at 452; see also *Stolt-Nielsen*, 559 U.S. at 676.

Bazzele and *Stolt-Nielsen* are not in conflict. *Bazzele* continues to stand for the proposition that an arbitrator, and not a court, is the right tribunal to interpret the arbitration clause to determine if it permits class arbitration. *Stolt-Nielsen* merely goes one step further, which the Court admits it did not do in *Bazzele*, and provides a guidepost for how arbitrators are to interpret “silence” with respect to class arbitrations in arbitration clauses.

Reed Elsevier drafted the adhesion contracts containing the arbitration clause *years* after (a) the *Bazzle* decision was issued and (b) the AAA had promulgated its rules and policies regarding class arbitration. Unlike the parties in *Stolt-Nielsen*, Reed Elsevier received the benefit and guidance that *Bazzle* and the AAA rules offered to contracting parties with respect to class arbitration. As such, Reed Elsevier knew that if it failed to include express language prohibiting class arbitration in the parties' arbitration agreement, while including the requirement that the parties abide by the "then current Commercial Rules ... of the American Arbitration Association," it would be subject to the AAA's class arbitration procedures. App. 42. Still, Reed Elsevier did not amend or change the arbitration clause at any time during the relevant period, and never added language barring class arbitration.

Instead, Reed Elsevier (a) used and maintained the "any controversy" language in its arbitration clause, and (b) explicitly required that the arbitration be administered by the AAA under the "then-current Commercial Rules." The AAA Commercial Rules, since October 8, 2003, have incorporated the Supplementary Rules, which, in turn, govern class arbitration. Reed Elsevier's choices here are *evidence of its full intent* that all forms of dispute resolution, via AAA administered arbitration, would be available to the parties, including class arbitration.

The AAA and its arbitrators are more than qualified to evaluate the arbitration agreement in order to determine the scope of the arbitration proceeding to which the parties have agreed, where such analysis

necessarily involves contract interpretation and the application of arbitration procedures. *Bazzle*, 539 U.S. 444. The parties contemplated that the issue of class arbitration, as well as any other controversy or claim between them, would be resolved through binding arbitration before the AAA and under the application of the then-current Commercial Rules, including Rule 7, which grants the Arbitrator the authority to rule on his own jurisdiction. Given *Bazzle*, the parties' explicit agreement, and the fact that the arbitrator is more than qualified to evaluate the applicability of the arbitration agreement, this issue is absolutely one to be decided by the arbitrator, and not the District Court.

Other Supreme Court authority also supports the proposition that the arbitrator should decide the procedural issue of class action arbitrability. Three particular cases are demonstrative. The first case is *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). There, the Supreme Court held that "procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley*, 376 U.S. at 557. Class treatment is the procedural question which has grown out of this consumer dispute, and that is a question for the arbitrator. What *John Wiley* reserves for the courts are what the Second Circuit had called questions of "substantive arbitrability," *i.e.*, whether the substance of the dispute is subject to the terms of the arbitration clause. *John Wiley*, 376 U.S. at 547 ("whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties"). There is no dispute that the parties in this case agreed to arbitrate "any controversy, claim, or

counterclaim.” There is only the question of class treatment, a procedural issue that *John Wiley* would reserve to the arbitrator.

The second case, *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), turned on the narrow question of whether the arbitrator or the court must decide if the parties have agreed to arbitrate the question of whether a certain dispute must be arbitrated. As the Court stated:

“To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI’s debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the second matter*. Does that power belong primarily to the arbitrators ... or to the court [...]? We consider here only this third question.”

First Options, 514 U.S. at 942 (emphasis in original) (holding that whether arbitrators or courts have primary power to decide if parties agreed to arbitrate the merits of dispute depends on whether parties agreed to submit that question to arbitration).

There are different types of disagreement in the present controversy. They are not the same as those in *First Options* and do not compel the conclusion reached by the lower courts here.

First, the parties disagree about whether Reed Elsevier is liable to Crockett and other consumers for selling, marketing, and operating defective research subscription plans that created substantial unwarranted usage fees. This is the merits of the dispute. But here, unlike in *First Options*, the parties agreed that the merits of “any controversy, claim, or counterclaim” are to be arbitrated. There is no dispute over whether Petitioner and Reed Elsevier agreed to arbitrate the merits of the dispute – there is no dispute about *arbitrability*, as the Supreme Court in *First Options* put it.

Instead, the parties disagree about whether the arbitration clause permits the arbitration to proceed on a classwide basis, and whether the arbitrator or a court should decide. These issues are, in essence, issues of arbitration procedure – whether to follow the AAA Supplementary Rules on Class Arbitration, for instance. The arbiter of that question will determine arbitration procedure.

The final case is *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (holding that NASD rule imposing six-year time limit for arbitration was for arbitrator, as it was a question of procedure, not a question of whether the parties were bound to arbitrate their dispute). *Howsam* held that courts should resolve “a disagreement about whether an arbitration clause in a concedingly binding contract applies to a particular type of controversy.” *Howsam*, 537 U.S. at 84.

Here, the Sixth Circuit affirmed the district court’s opinion that it was being asked “whether the arbitration provisions in the parties’ agreement apply to classwide arbitration” (App. 37), and that this was

not a question of procedure, but a question of whether the arbitration clause “applies to a particular type of controversy.” This is incorrect.

As it is under the Federal Rules of Civil Procedure, class treatment is a procedural issue. In arbitrations, procedural issues are to be determined by the arbitrator. The Sixth Circuit also relied too heavily on *Stolt-Nielsen*’s discussion of the differences between class arbitration and bilateral arbitration when it held that the question of class treatment is not sufficiently procedural to warrant reserving to the arbitrator. There, the Supreme Court did not conclude that the Court, and not an arbitrator, should decide whether an arbitration clause permits class arbitration. Instead, the Court stated that “the differences between bilateral and class-action arbitration are too great for arbitrators to *presume* ... that the parties’ mere silence on the issue of class-action arbitration *constitutes consent* to resolve their disputes in class proceedings.” *Stolt-Nielsen*, 559 U.S. at 687 (emphasis added). This does not mean that the *Stolt-Nielsen* opinion found that class arbitrability was substantive, and not procedural. And thus, to be consistent with the line of cases holding that procedural questions are for arbitrators, the Sixth Circuit should not have ruled that the issue was one for the district court to decide.

The Supreme Court has ruled that certain initial issues are “gateway” issues for a court to decide. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). But “class arbitrability” is not one of them. Under *Rent-A-Center*, the question of class arbitrability is not a “gateway” issue for the Court to decide. This case is instructive on the issue of whether the arbitrator or

court should determine whether an arbitration may proceed on a classwide basis.

The Sixth Circuit has stated that the “limited function of the federal courts is to ascertain whether the party seeking arbitration is making a claim which on its face is governed by the contract.” *International Union of Elec. Salaried, Mach. and Commc’n Workers of America v. Dubois Chem., Inc.*, 2010 WL 348314 (S.D. Ohio Jan. 26, 2010). Parties can agree to arbitrate “gateway” questions of arbitrability, including whether the parties have agreed to arbitrate and whether their agreement covers a particular controversy. *See Rent-A-Center*, 561 U.S. 63 (2010); *see Howsam*, 537 U.S. 79; *Bazzle*, 539 U.S. 444. Here, there is no dispute – the parties agreed to arbitrate all controversies. The only question in dispute is whether this arbitration clause authorizes the *procedure* of class treatment.

Here, the parties specifically agreed, after the Supplementary Rules were promulgated, that any controversy or claim must be resolved through binding arbitration, to be administered by the AAA under the “then-current” Commercial Rules. This establishes that “class arbitrability” is not a “gateway” issue under *Rent-a-Center*. As in *Von Arras v. Columbus Radiology Corp.*, 2005 WL 1220735 (Ohio Ct. App. May 24, 2005), the arbitration agreement at issue here explicitly directs that the parties’ claims shall be arbitrated under the AAA’s Commercial Arbitration Rules. Under Rule 7 of the Commercial Arbitration Rules, “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration

agreement.” Like in *Von Arras*, the parties have explicitly incorporated the AAA’s Commercial Rules, including Rule 7, which serves as “clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.” *Von Arras*, 2005 WL 1220735 at *4. There can be no doubt that the parties “have clearly and unmistakably vested the arbitrator with the authority to decide the issue of arbitrability, the question of whether a matter is arbitrable is to be decided by the arbitrator.” *Belmont Cty. Sheriff v. Fraternal Order of the Police*, 104 Ohio St. 3d 568, 571, 820 N.E.2d 918, 919 (Ohio 2004). Therefore, it is for the arbitrator, and not the Court, to decide whether the parties have an agreement to arbitrate the relevant dispute between them. *Von Arras*, 2005 WL 1220735.

Where there is no question that the parties to the dispute agreed to arbitrate, as in this case, and the parties agreed to assign all controversies to the arbitrator, as in this case, the question of class arbitration is to be determined by the appointed arbitrator. *Rent-A-Center*, 561 U.S. 63 (2010). Thus, whether class arbitration is permitted under the arbitration clause is determined by the arbitrator in the “clause construction award phase” under AAA Supplementary Rule 3. The definition, scope, and certification of any potential class is determined by the “class determination award phase” under AAA Supplementary Rules 4 and 5. Once the arbitrator decides each issue, the arbitrator’s decision is subject to appeal and review by a court pursuant to AAA Supplementary Rules.

This is consistent with *Bazzle*, *Howsam*, *Stolt-Nielsen*, and *Rent-a-Center*. *Matters of arbitration procedure are issues for the arbitrator*. As the Supreme Court said in *Howsam*, “parties to an arbitration contract would normally expect a forum-based decision maker to decide forum-specific procedural gateway matters.” *Howsam*, 537 U.S. at 86. Arbitrability of class claims is precisely one of the “procedural questions which grow out of the dispute and bear on its final disposition [and] are presumptively not for the judge, but for an arbitrator, to decide.” *Id.* at 84.

Class action treatment is procedural by definition. That is how class actions are handled in federal court under Federal Rule of Civil Procedure 23. When the parties do not dispute that they have agreed to arbitrate, and when they have agreed to assign all controversies to the arbitrator, then procedural gateway matters such as the arbitrability of class claims are to be determined by the arbitrator.

B. The Arbitration Clause Authorizes Class Arbitration

A number of contractual bases establish that the parties agreed to resolve this dispute through class arbitration. These include: (1) the plain meaning of the text of the arbitration clause; (2) Reed Elsevier’s exclusions of certain disputes, but not class disputes, in the arbitration clause; (3) custom and usage in the consumer context per the *Stolt-Nielsen* analysis; and (4) Reed Elsevier’s inclusion of the Commercial Rules of the American Arbitration Association.

The plain meaning of the arbitration clause does not, as Reed Elsevier has alleged, “clear[ly] and

indisputab[ly]" eliminate agreement to class arbitration. If this were the case, Reed Elsevier, having been aware of class arbitrations at the time it drafted the parties' agreement, could have excluded class claims. Reed Elsevier did not do so. Rather, Reed Elsevier included a broad, generally applied clause - precisely the type of clause that the AAA developed the Supplementary Rules to interpret:

" . . . any controversy, claim or counterclaim ... arising out of or in connection with this Order, ... whether based on contract, tort, statute or other legal theory ... will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association."

App. 9. Arbitration clauses with precisely this "*any controversy*" construction have been repeatedly upheld to indicate the parties' agreement to class arbitration. Crockett's Counsel submitted to the District Court a representative set of arbitration decisions before the AAA in which an "*any dispute*" or "*any controversy*" construction was held to permit class arbitration. (Record Entry No. 29, Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 3, fn. 6). The rationale of these decisions is supported by Justice Ginsburg, citing case law and asking rhetorically: "Why should the class-action prospect vanish when the 'any dispute' clause is contained in an arbitration agreement?" Cf. *Connecticut General Life Ins. Co. v. Sun Life Assurance Co. of Canada*, 210 F. 3d 771, 774-776 (7th Cir. 2000) (reading contract's authorization to arbitrate "[a]ny

dispute" to permit consolidation of arbitrations). *Stolt-Nielsen*, 559 U.S. at 698.

In *Stolt-Nielsen*, the Supreme Court held that there was no agreement about class arbitration in part because of the custom and usage in anti-trust claims in the maritime context. The majority found convincing the evidence that arbitrations in admiralty do not traditionally permit class arbitrations in their "custom and usage." In contrast, here, in the consumer context, the class action vehicle is widely used and makes practical sense. Reed Elsevier drafted its adhesion contract to its procedural advantage, eliminating Crockett's recourse to the courts and requiring that all disputes (with few specified exceptions) be arbitrated. In cases like these, consumers have small claims that, on an individual basis, are worth much less than the cost to litigate or arbitrate. Without class treatment, businesses would be permitted to engage in unchecked market misbehavior, harming consumers and the public at large.

The scope of the parties' arbitration agreement in this case leaves little doubt, when read in conjunction with the AAA Policy and Supplementary Rules, that the AAA may properly administer this matter. The agreement provides that "any" controversy or claim must be resolved through binding arbitration, *to be administered by the AAA under the "then-current Commercial Rules."* The AAA Commercial Rules, since October 8, 2003, have incorporated the Supplementary Rules, which, in turn, govern class arbitration. By drafting the arbitration agreement so that it mandated that the parties would proceed under the "then-current" Commercial Rules, Reed Elsevier agreed to be

bound by whatever Commercial Rules existed at the time the dispute was brought before the AAA. As such, the parties' sole recourse to address any dispute under the arbitration agreement is to submit any controversies or claims, including claims for class arbitration, to the AAA, which then administers the case in accordance with the Commercial and Supplementary Rules. This is precisely the manner in which the AAA has proceeded in administering this matter.

In the years following *Bazzle*, and in the face of the AAA's Policy and Supplementary Rules concerning class arbitrations, Reed Elsevier easily could have amended the arbitration agreement to specifically bar class arbitration. It did not. Reed Elsevier's failure to exclude class arbitration, without any explanation, is even more glaring when considering that Reed Elsevier did specifically *preclude* certain issues from arbitration, such as issues regarding intellectual property.

Reed Elsevier knew how to exclude issues and types of cases from the parties' arbitration clause, yet chose not to exclude class arbitration. Having failed to include any such prohibition on class arbitration in the parties' agreement, when it had an opportunity to do so and was on notice of the AAA's rules and the Supreme Court's decision in *Bazzle*, Reed Elsevier either did not intend to bar class arbitration, knowingly waived its right to do so, or consented to class arbitration.

The arbitration agreement in *Stolt-Nielsen*, unlike the clause in this case, *pre-dated* the *Bazzle* decision and so the contracting parties there did not have the benefit of *Bazzle*, the AAA Policy, or the Supplementary Rules prior to drafting their arbitration

agreement. After *Bazzele*, the playing field had changed and class arbitration became a foreseeable reality. Another factor distinguishing *Stolt-Nielsen* from the case at bar is that the parties in *Stolt-Nielsen* were involved in arms-length contract negotiations, unlike the parties in the instant arbitration. Here, Reed Elsevier drafted take-it-or-leave-it adhesion contracts, including the arbitration provision, and offered it to consumers. Further, the parties in *Stolt-Nielsen* later stipulated, prior to the arbitration hearing, that the arbitration clause was "silent" as to class arbitration, and that this "silence" meant that the parties had no intent whatsoever with regard to class arbitration. These facts demonstrate that, as a matter of basic contract interpretation, it was outside the reasonable expectation of the parties in *Stolt-Nielsen* that class arbitration was contemplated by the arbitration agreement.

Stolt-Nielsen imposes no obligation on parties, whether sophisticated parties negotiating at arms-length or consumers offered adhesion contracts, to affirmatively express their consent to class arbitration. Justice Ginsburg, in her dissent, says as much: "the Court does not insist on express consent to class arbitration. Class Arbitration may be ordered if 'there is a contractual basis for concluding that the part[ies] agreed' 'to submit to class arbitration.'" 559 U.S. at 699 (emphasis in original). This is an issue to be determined by the arbitrator.

C. Without Class Arbitration, Petitioners Have No Practical Recourse and the Clause Is Unconscionable

To force Petitioners and other consumers with small consumer claims against Reed Elsevier to arbitrate their disputes on an individual basis in Dayton, Ohio would render the arbitration clauses unconscionable. These consumers need access to class procedure.

The logic of class treatment is familiar and was affirmed in *Stolt-Nielsen* by Justice Ginsburg: “When adjudication is costly and individual claims are no more than modest in size, class proceedings may be “the thing,” i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights. *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 617 (1997); *Carnegie v. Household Int’l, Inc.*, 376 F. 3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).” *Stolt-Nielsen*, 559 U.S. at 699. To prohibit class arbitration when individual consumers are bound to broadly-written arbitration clauses would grant companies like Reed Elsevier amnesty for its wrongdoings.

A universal prohibition restricting consumers from seeking any aggregate treatment of their small claims would be unconscionable. While the Supreme Court ruled that class action waivers do not necessarily render arbitration clauses unenforceable in *Italian Colors*, it would be improper to conclude that the case stands for the proposition that consumers have no access to aggregate treatment of small claims. *American Express Co. v. Italian Colors*, 133 S. Ct. 2304

(2013). Recent Supreme Court precedent is more nuanced. The Supreme Court's ruling on unconscionability in *AT&T Mobility LLC v. Concepcion*, 563 U.S. —, 131 S.Ct. 1740, 179 L. Ed.2d 742 (2011), held that a prohibition on class treatment was not unconscionable where the bilateral arbitration procedures provide a baseline of practicality for small claimants. *Id.* The arbitration clause that was upheld in *AT&T Mobility LLC v. Concepcion* has many traits that the arbitration clause here lacks. Pursuant to its arbitration clause with consumers, AT&T

[M]ust pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

563 U.S. —, 131 S.Ct. at 1744.

Measured against this standard, the Reed Elsevier consumer arbitration clause, were it to deny class treatment, would be unconscionable. Under it, all

arbitrations must proceed in Dayton, Ohio; and Reed Elsevier can seek costs and attorney's fees from consumer claimants; there are no provisions guaranteeing that Reed Elsevier will provide consumers with minimum recoveries or twice the claimant's attorney's fees in the event Reed Elsevier is found to have committed wrongdoing. App. 11. Instead, and especially if it is found to prohibit class arbitration, the Reed Elsevier arbitration clause is simply an unconscionable effort to burden consumers such that they would not wish to hire an attorney and pursue remedies for Reed Elsevier's wrongdoing under any circumstances.

For these reasons, the Court could not ask for a better vehicle to resolve the important legal questions presented on which the federal circuits have split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BLAIR C. FENSTERSTOCK

Counsel of Record

MICHAEL T. PHILLIPS II

FENSTERSTOCK & PARTNERS LLP

100 Broadway, 8th Floor

New York, New York 10005

(212) 785 – 4100

bfensterstock@fensterstock.com

Counsel for Petitioners

Dated: January 31, 2014