

14-988

No. 14

Supreme Court, U.S.
FILED

FEB 10 2014

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINT SPECTRUM L.P., DBA SPRINT PCS,

Petitioner,

v.

VINCENT EMILIO, Individually
and on behalf of all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Summary Order issued by the United States Court of Appeals for the Second Circuit conflicts with the Federal Arbitration Act and the United States Supreme Court's decisions in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) and *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) by upholding the trial court's determination that arbitrator Kathleen A. Roberts (the "Arbitrator") properly held that, despite the fact that there was a valid and binding arbitration agreement between Sprint and then Claimant, Vincent Emilio, that required bilateral arbitration, Emilio had the right to abandon arbitration and proceed with class-action litigation.

PARTIES AND RULE 29.6 STATEMENT

The parties to this petition are petitioner Sprint Spectrum, L.P.

Petitioner Sprint Spectrum, L.P. is 99% owned by Sprint Spectrum Holding Company, and Sprint Corporation is the ultimate owner of Sprint Spectrum Holding Company. SoftBank Corp. owns greater than 10% of Sprint Corporation. Sprint Communications, Inc. is 100% owned by Sprint Corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. A) is reported at 582 Fed. Appx. 63 (2d Cir. 2014). The order of the United States District Court for the Southern District of New York (App. B) is available on LexisNexis at 2014 U.S. Dist. LEXIS 17152 (S.D.N.Y. Feb. 11, 2014).

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on November 11, 2014, (App. A), and affirmed the trial court's denial of Sprint's motion to vacate the Arbitrator's Partial Final Award (the "Arbitration Award") pursuant to § 10(a)(4) of the Federal Arbitration Act of 1925 as amended (the "FAA") (App. B). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2, 3 and 4 of the FAA, and the Supremacy Clause of the United States Constitution. 9 U.S.C. §§ 2, 3 and 4; U.S.C.A. Const. Art. VI cl. 2.

STATEMENT OF THE CASE

I. INTRODUCTION

In *Stolt-Nielson, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), this 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." This petition presents the

next logical question. Namely, the important question presented is: once an arbitrator rules that the parties' arbitration agreement does not permit class arbitration and that the parties' intent was to preclude – not permit – class arbitration, can the arbitrator then refuse to compel bilateral arbitration, and instead provide a party to a binding arbitration agreement the right to abandon arbitration and pursue class action litigation?

The parties, the District Court and the Second Circuit have already agreed that a valid and binding arbitration agreement exists between the parties, which expressly provides that all issues and disputes regarding Plaintiff's claims shall be resolved in arbitration. (A103-A111; A112-A127; *Emilio v. Sprint Spectrum L.P.*, 315 F. App'x. 322 (2d Cir. 2009)). It is also undisputed that the applicable arbitration agreement contains a clause expressly precluding class arbitration and that the parties to the arbitration agreement did not intend to arbitrate on a classwide basis.

Based on *Stolt-Nielsen* and the FAA, the Arbitrator had no choice but to compel bilateral arbitration of Emilio's claims. Instead, the Arbitrator rejected the fundamental rule enunciated by this Court time and time again that an arbitration agreement must be enforced; the express provisions of the FAA; and *Stolt-Nielsen*, by forcing Sprint to litigate a class-action in district court. This result occurred, and was affirmed by the Second Circuit, despite an agreement providing for bilateral arbitration. The Arbitrator had no jurisdiction or authority to defeat the arbitration agreement altogether, and fashion her own brand of justice based on her public policy concern for Plaintiff's class action rights. The Second Circuit erred

in failing to consider the issue *de novo*, and in failing to vacate the Partial Final Award issued on March 10, 2011 (the “Arbitration Award”).

Additionally, the Second Circuit erred in failing to vacate the Arbitration Award on the basis of manifest disregard of the law. At the time of the Arbitrator’s Award, the doctrine of federal preemption under the FAA was well developed, the FAA was not new law, nor was the Supreme Court’s holding in *Stolt-Nielsen*, clearly articulating that arbitration is “ a matter of consent, and not coercion,” which will not waiver in the face of contrary state law. As such, the Arbitration Award was in direct conflict with this then-existing, and clear-cut legal landscape.¹

The bizarre outcome is that Sprint is being forced to litigate a class action² in violation of the arbitration agreement, the FAA, and Supreme Court precedent in *Stolt-Nielsen* and *Concepcion*. This inequitable result must be corrected.

1. The Arbitrator rendered the Arbitration Award approximately one month prior to this Court’s holding in *AT&T Mobility v. Concepcion, LLC*, 131 S. Ct. 1740 (2011), which decided conclusively that the FAA preempts state laws prohibiting the waiver of class arbitration, however, the Arbitration Award nonetheless manifestly disregarded pre-*Concepcion* law.

2. In the most recent decision by the District Court dated December 23, 2014, Sprint has even been precluded from asserting its contractual arbitration provisions against the claims of putative class members, even though no class was certified during the arbitration, and thus, the putative class members were not parties to the arbitration resulting in the Arbitration Award. See *Emilio v. Sprint Spectrum, L.P.*, 11 civ. 3041, 2014 U.S. Dist. LEXIS 177027 (S.D.N.Y. Dec. 23, 2014).

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Emilio's Claim Against Sprint

The underlying claim in this case arises from a challenge to the manner in which Sprint described a New York State Excise Tax surcharge on its invoices to customers. (A100, ¶ 2). On or about January 4, 2005, Emilio filed an arbitration demand with JAMS, “individually and on behalf of all others similarly situated” against Sprint, which demand was twice amended on or about June 2, 2006 and again on or about February 20, 2007 (the “Arbitration Demand”). (*Id.* at ¶ 3). Notably, Emilio brought his claim before JAMS in the first instance. (*Id.* at ¶ 4). This is not a case where Emilio filed his claim in a judicial forum, and sought to avoid arbitration on the basis that the entire arbitration clause was unenforceable because it contained a class action waiver. He chose the forum. (*Id.*). The arbitration, captioned as *Emilio, Vincent v. Sprint Spectrum L.P. d/b/a Sprint PCS, Binding Arbitration Referenced #1425000444* (the “Arbitration”), was conducted by Arbitrator Kathleen Roberts.

In his Arbitration Demand, Emilio alleged, among other things, that Sprint failed to make appropriate disclosures regarding an excise tax surcharge, thereby leading customers to believe that it was a tax imposed on customers directly by New York State, rather than a surcharge imposed by Sprint to recover this governmental cost. (A101, ¶ 5). While Emilio originally brought multiple claims against Sprint relating to the surcharge, Sprint obtained summary disposition in its favor on all claims except for a claim under the Kansas Consumer Protection

Act (the “KCPA”). This sole remaining claim in the Arbitration is premised only upon the allegation that Sprint violated the KCPA by failing to make appropriate disclosures regarding the excise tax surcharge. (*Id.* at ¶ 6).

B. The Parties, The District Court and The Second Circuit Agreed That Emilio’s Claims Are Governed By An Enforceable Arbitration Agreement

The parties, the District Court and the Second Circuit have already agreed that Emilio’s claims against Sprint are required to be arbitrated under an enforceable arbitration agreement. (A103-A111; A112-A127; *Emilio v. Sprint Spectrum L.P.*, 315 F. App’x. 322 (2d Cir. 2009)). Emilio annexed to his initial Arbitration Demand, filed in January 2005, a copy of the Arbitration Agreement governing the arbitration obligations between Emilio and Sprint. (A128-A141). Indeed, and as set forth below, the District Court previously granted a Petition to Compel Arbitration filed by Emilio in connection with the underlying Arbitration (the “2008 Petition to Compel”), and in 2009, the Second Circuit affirmed that ruling. (A103-A111; *Emilio v. Sprint Spectrum L.P.*, 315 F. App’x. 322 (2d Cir. 2009)).

In his 2008 Petition to Compel³, Emilio asked the District Court to declare “that [Emilio] and [Sprint] are parties to the Arbitration Agreement, the making of

3. Emilio moved to compel arbitration in order to preclude Sprint going to court in order to obtain a declaratory judgment that a prior class action settlement encompassed Emilio’s asserted claims.

which is not an issue,” and require Sprint “to continue to arbitrate in the Arbitration in accordance with the terms of the Arbitration Agreement.” As Emilio argued in 2008, the applicable Arbitration Agreement provides, in relevant part, as follows:

MANDATORY ARBITRATION OF DISPUTES. INSTEAD OF SUING IN COURT, YOU AND SPRINT AGREE TO ARBITRATE ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES AGAINST EACH OTHER ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, THE SERVICES, ANY PHONES/EQUIPMENT, OR ADVERTISING, EVEN IF IT ARISES AFTER YOUR SERVICES HAVE BEEN TERMINATED, AND INCLUDING CLAIMS YOU MAY BRING AGAINST SPRINT’S EMPLOYEES, AGENTS, AFFILIATES OR OTHER REPRESENTATIVES, OR THAT SPRINT MAY BRING AGAINST YOU (“CLAIMS”). THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT AND ITS PROVISIONS, NOT STATE LAW, GOVERN ALL QUESTIONS OF WHETHER A CLAIM IS SUBJECT TO ARBITRATION. THIS PROVISION DOES NOT PREVENT YOU OR SPRINT FROM BRINGING APPROPRIATE CLAIMS IN SMALL CLAIMS COURT, BEFORE THE FEDERAL COMMUNICATIONS COMMISSION OR A STATE PUBLIC UTILITIES COMMISSION.

YOU AND SPRINT FURTHER AGREE THAT NEITHER SPRINT NOR YOU WILL JOIN ANY CLAIM WITH THE CLAIM OF ANY OTHER PERSON OR ENTITY IN A LAWSUIT OR OTHER PROCEEDING; THAT NO CLAIM EITHER SPRINT OR YOU HAS AGAINST THE OTHER SHALL BE RESOLVED ON A CLASS-WIDE BASIS; AND THAT NEITHER YOU NOR SPRINT WILL ASSERT A CLAIM IN A REPRESENTATIVE CAPACITY ON BEHALF OF ANYONE ELSE. IF FOR ANY REASON THIS ARBITRATION PROVISION DOES NOT APPLY TO A CLAIM, WE AGREE TO WAIVE TRIAL BY JURY.

* * *

If any portion of this Mandatory Arbitration of Disputes is determined to be invalid or unenforceable, the remainder of the Section remains in full force and effect.

(A135-A136).

On November 5, 2008, the District Court granted the 2008 Petition to Compel, ruling that “[i]t is clear that a valid arbitration agreement covers the dispute at issue here. The Arbitration Agreement between the parties expressly provides that all issues and disputes regarding Emilio’s claims shall be resolved in the arbitration, by the Arbitrator.” (A105). The Second Circuit, by decision issued on March 12, 2009, affirmed the District Court’s November 5, 2008 ruling in its entirety that Sprint

“agreed to ‘arbitrate any and all claims, controversies or disputes . . . arising out of or relating to’ its agreement with Emilio.” *Emilio v. Sprint Spectrum L.P.*, 315 F. App’x. 322 (2d Cir. 2009).

C. The 2006 and 2010 Clause Construction Decisions

Rule 2 of the JAMS 2005 Class Rules, which applied to the underlying Arbitration, required the Arbitrator to decide “as a threshold matter whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class.” (A209). If the Arbitrator ruled that the applicable Arbitration Agreement permitted class arbitration, the Arbitration would proceed as a putative class arbitration and the Arbitrator would then decide whether a class could be certified under Rule 3 of the JAMS 2005 Class Rules. (A209-A210). Likewise, if the Arbitrator decided that the Arbitration Agreement did not permit class arbitration, or that the Rule 3 requirements were not met, the Arbitration would proceed as a bilateral arbitration. (*Id.*).

On October 25, 2006, after considering briefings submitted by the parties, the Arbitrator issued a decision ruling that the Arbitration Agreement permitted class arbitration (the “2006 Clause Construction Decision”).⁴ (A18, ¶¶ 10-11; A36-A52). The Arbitrator reached this result notwithstanding the acknowledgement that the arbitration clause expressly precluded class arbitration. (*Id.*). Notably, the Arbitrator found that the class action

4. This decision predated this Court’s 2010 decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

preclusion provision of the Sprint contract was *not* unconscionable. (A50). The Arbitrator also unequivocally found that the parties were required to arbitrate all disputes between them under a binding Arbitration Agreement. (A41).

On October 19, 2010, Sprint requested that the Arbitrator reconsider and vacate (“2010 Motion to Vacate”) the 2006 Clause Construction Decision based upon the United States Supreme Court’s decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). (A20, ¶ 16; A178-A193). At no point during the proceedings before the Arbitrator did Emilio ask for permission to proceed with his claims in a judicial forum.

On December 27, 2010, the Arbitrator issued a decision on the motion for reconsideration (the “2010 Clause Construction Decision”) wherein the Arbitrator vacated the 2006 Clause Construction Decision. (A20, ¶ 17; A53-A59). In the 2010 Clause Construction Decision, the Arbitrator ruled that under *Stolt-Nielsen*, “Sprint cannot be compelled to proceed with a class-wide arbitration.” (A59). The Arbitrator also ruled, despite never having been requested to do so, that “[Emilio] cannot be compelled to proceed with a bilateral arbitration, and must be given the opportunity to pursue his class claims in a court action.” (*Id.*). Indeed, the Arbitrator was not asked by either Emilio nor Sprint to decide whether Emilio could take any action to litigate his class claims in a judicial forum.

D. The 2011 Partial Final Award

On March 10, 2011 – approximately one month before this Court issued its decision in *AT&T Mobility LLC*

v. Concepcion, 131 S. Ct. 1740 (2011) – the Arbitrator issued the Arbitration Award based upon the 2010 Clause Construction Decision. (App. C). The Arbitration Award was served on the parties on March 21, 2011. In the Arbitration Award, which is substantially similar to the 2010 Clause Construction Decision, the Arbitrator ruled that “Sprint cannot be compelled to proceed with a class-wide arbitration.” (App. C at 40a). The basis for this ruling was that in *Stolt-Nielsen*, the Supreme 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.” (App. C at 37a) (*quoting Stolt-Nielsen*, 130 S. Ct. at 1776) (emphasis in original).

The Arbitrator also ruled, however, that “plaintiff cannot be compelled to proceed with a bilateral arbitration, and must be given the opportunity to pursue his class claims in a court action.” (App. C at 40a).⁵ This part of the Award was made without authority, and was in direct contravention to the Arbitration Agreement, Emilio’s own admissions that the Arbitration Agreement is binding on the parties, the Arbitrator’s and the Second Circuit’s prior rulings that the Arbitration Agreement between the parties is enforceable under the FAA, and the decisions issued by this Court.

5. Notably, the Arbitrator supplied no basis for her authority or jurisdiction to make this award.

E. The District Court's March 16, 2012 Ruling And The Appeal Thereof

On May 4, 2011, Emilio filed a Petition to Confirm the Arbitration Award, and on May 12, 2011, filed papers in support of his Petition. (A14-A91). On May 27, 2011, Sprint filed its Answer to the Petition and Cross-Petition to Confirm in Part and Vacate in Part the 2011 Partial Final Award together with its supporting papers. (A92-A150). Sprint sought to confirm the Arbitration Award in so far as it found that Sprint could not be compelled to arbitrate on a class-wide basis, but to vacate the part of the Award directing that Emilio's claims against Sprint proceed in court as a putative class action. In its Cross-Petition, Sprint argued that the District Court should vacate the Award to the extent that the Arbitrator ruled that Emilio cannot be compelled to proceed with a bilateral arbitration and must be given the "opportunity to pursue his class claims in a court action."

By Memorandum & Order entered March 16, 2012, the District Court denied Emilio's Petition in part and granted it in part, and granted Sprint's cross-petition. (A213-A224). In the March 16, 2012 Order, the District Court held that:

Both parties have asked the Court to confirm the Arbitrator's Award with respect to her determination that Sprint cannot be compelled to proceed with class-wide arbitration. The Court grants both parties' requests to confirm the Award with respect to this determination.

(*Id.*). In the March 16, 2012 Order, the District Court also vacated the Arbitration Award to the extent it allowed Emilio to proceed in court based on the finding that “[t]he Arbitrator exceeded her power in deciding the enforceability of the class action preclusion provision” when she found that it is unenforceable because it violates the anti-class action waiver provisions of the KCPA. (*Id.*). The District Court then found, *de novo*, that the class action waiver was enforceable. (*Id.*).

On March 28, 2012, Emilio filed his Notice of Appeal to the Second Circuit with respect to the portion of the District Court’s March 16, 2012 Order that vacated a portion of the 2011 Partial Final Award. (A227). On January 18, 2013, the Second Circuit reversed in part. It affirmed the judgment that Sprint could not be compelled to proceed in class arbitration, which neither party challenged. However, the Second Circuit vacated the remainder, reasoning that although the enforceability of a class action waiver is generally a question of arbitrability for the court, here the parties had unambiguously delegated such questions to the arbitrator by incorporating JAMS Comprehensive Rule 11 and Streamlined Rule 8 into the Arbitration Agreement. *Emilio v. Sprint Spectrum, L.P.*, 508 F. App’x. 3, 5 (2d Cir. 2013). The Second Circuit remanded the judgment for “the district court to address Sprint’s other arguments [for vacatur] in the first instance.” *Id.* at 6–7.

F. The District Court’s July 11, 2013 Ruling on Remand

On July 11, 2013, Emilio filed a renewed Motion to Confirm the Arbitration Award, which essentially was the same as his original motion, but also requested leave to file

a proposed class action complaint. (A228-A229). Also on July 11, 2013, Sprint filed a Motion to Vacate the part of the Arbitration Award (“2013 Motion to Vacate”) that held that Emilio could not be compelled to proceed in bilateral arbitration and could proceed with his claims against Sprint in court as a putative class action. (A230-A231). On August 15, 2013, Sprint filed a motion to strike Emilio’s request for leave to file a class action complaint.

On February 11, 2014, the District Court granted Emilio’s Motion to Confirm the 2011 Partial Final Award and denied Sprint’s Motion to Vacate the 2011 Partial Final Award in part and denied Sprint’s Motion to Strike. (App. B). In reaching this decision, the District Court opined as follows:

Several of Sprint’s arguments in support of finding manifest disregard of the law rely upon changes in the law after the issuance of the Award. Sprint observes, for instance, that post-*Concepcion* the FAA preempts the KCPA’s anti-waiver provision, and that *Fensterstock*—relied upon by the arbitrator in fashioning relief—is no longer good law. However, manifest disregard of the law can exist only where the arbitrator ignored or refused to apply a governing legal principle that was “well defined, explicit, and clearly applicable to the case.” *Halligan*, 148 F.3d at 202. It follows that “an intervening change of law, standing alone, [cannot] provide[] grounds for vacating an otherwise proper arbitral award.” *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 125 (2d Cir. 2011).

Finally, Sprint asserts that the arbitrator acted *ultra vires* by issuing an award which purportedly “attempt[s] to dictate to a court how it must proceed with a yet-to-be-filed action.” The Award plainly states, however, that Emilio must be given an “opportunity” to pursue his claims on a class basis in court. To say that this constitutes an “order” to this Court—presumably to permit Emilio to file a class complaint, which he is free to do regardless—is inaccurate.

See App. B at 18a-19a; 28a.

G. The Second Circuit’s November 11, 2014 Ruling

On November 12, 2014, the Court of Appeals entered a Summary Order affirming the District Court’s confirmation of the Arbitration Award. *See App. A.* In that opinion, the Second Circuit ruled that by permitting Emilio to proceed in court despite a valid arbitration agreement, the Arbitrator did not exceed her authority by making any rulings as to “what actions Emilio can or cannot take in a judicial forum.” *Id.* at 2a. The Court of Appeals refused to even consider whether the Arbitrator’s decision was correct as a legal matter. According to the Court of Appeals, “[w]hether or not we agree with the Arbitrator’s construction of the contract or of the Kansas law by which it is governed, the parties bargained for the Arbitrator’s construction, not ours.” *See id.* at 3a.

Additionally, the Court of Appeals held that Sprint's reliance on *Concepcion* as a basis to vacate the Arbitration Award was "self-defeating" because the Arbitrator "could not have ignored governing law that did not yet exist when she issued her decision." App. A at 4a. The Second Circuit also disagreed with Sprint that the Arbitrator manifestly disregarded pre-*Concepcion* law. *Id.*

H. The District Court's December 23, 2014 Ruling and Aftermath

Following the Arbitration Award and the various appeals and decisions by the District Court and Second Circuit, Emilio in February 2014 chose to abandon his arbitration before Arbitrator Roberts and initiate an entirely new proceeding in federal court in order to – again – force Sprint into defending the claims as a class proceeding. Neither the Arbitration Award, nor the court decisions subsequent thereto, as confirmed by the Second Circuit's 2014 ruling, required that Emilio take this course of action. Emilio was free to continue with bilateral arbitration before Arbitrator Roberts.

While Emilio was "given the opportunity to pursue his class claims in a court action" (*see* App. C at 40a), he was not granted immunity from any deficiencies in the claims he chose to file. Sprint therefore moved to dismiss the Class Complaint in March 2014 on the grounds that, *inter alia*, (i) the Class Complaint fails as a matter of law because the KCPA does not apply extraterritorially; and (2) because no class was ever certified in the arbitration proceedings, Emilio's putative class members were, and continue to be, bound to bilateral arbitration under the Arbitration Agreement, the enforcement of which

is further confirmed and supported by recent United States Supreme Court precedent in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

The law is clear: the KCPA applies only to “consumer transactions” that occur within Kansas. KSA 50-624(c); *Montgomery v. Sprint Spectrum, L.P.*, 2007 WL 3274833, at *6 (D. Kan. Nov. 6, 2007). There is no dispute here that Emilio’s consumer transaction with Sprint did not occur within the state of Kansas. There also is no dispute that Emilio did not receive any solicitation by Sprint in Kansas. Indeed, it is not alleged anywhere that Emilio ever stepped foot in Kansas. Despite these undisputed facts and the clear fact that the KCPA does not have extraterritorial application, Arbitrator Roberts determined that the KCPA applies extraterritorially in order to invalidate Emilio’s agreement to waive his right to class arbitration.

On December 23, 2014, the District Court denied Sprint’s Motion to Dismiss, holding, *inter alia*, that because Arbitrator Roberts analyzed the KCPA in connection with finding the class action waiver provision in the arbitration agreement unenforceable, Sprint is collateral estopped from relitigating the applicability of the KCPA. *Emilio v. Sprint Spectrum, L.P.*, 11 civ. 3041, 2014 U.S. Dist.. LEXIS 177027 * 21 (S.D.N.Y. Dec. 23, 2014). In other words, “regardless of the correctness of Arbitrator Roberts’ interpretation of Kansas law,” according to the District Court it is conclusive even in the new action filed by Plaintiff in district court. *See id.* Thus, the District Court now believes it is required to substantively apply the KCPA – in a court of law and notwithstanding that on its face it does not apply extraterritorially – because

Arbitrator Roberts determined that the KCPA rendered Emilio's agreement to waive his right to class arbitration void – a determination that was incorrect as shown by *Concepcion*. Sprint is therefore now being forced to litigate a class action KCPA claim, notwithstanding that the parties agreed to bilateral arbitration and the KCPA does not apply. This result cannot stand and is in conflict with the FAA, and this Court's rulings in *Stolt-Nielsen* and *Concepcion*.

REASONS FOR GRANTING THE PETITION

III. THE SECOND CIRCUIT'S DECISION RUNS AFOUL OF THE PARTIES AGREEMENT, THE FAA AND *STOLT-NIELSEN* ALL IN AN EFFORT TO ADHERE TO A STATE LAW RENDERED UNENFORCEABLE BY *CONCEPCION*

As quoted above, the applicable Arbitration Agreement provides for arbitration of any or all controversies between the parties, provides that the FAA shall govern and not state law, and provides that the parties agree to resolve any disputes bilaterally and not through a class action. There is no dispute over the applicability of this provision. Indeed, the Arbitrator, District Court and Second Circuit each held that the provision was applicable and not unconscionable.

This Court, in *Stolt-Nielsen*, reaffirmed the importance of the FAA:

In 1925, Congress enacted the United States Arbitration Act, as the FAA was formerly known, for the express purpose of making

‘valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.’ 43 Stat. 883.

Stolt-Nielsen 559 U.S. at 681-682. Section 2 of the FAA provides, in full:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

This Court has “said on numerous occasions that the central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’” *Stolt-Nielsen*, 559 U.S. at 682; *see also*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (“courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties] choose to arbitrate their disputes”) (internal citations and quotations omitted).

Notably, this Court has also said that while “the interpretation of an arbitration agreement is generally a matter of state law, ... the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.” *Stolt-Nielsen*, 559 U.S. at 681. (internal quotation marks and citation omitted) (emphasis added).

Following these principles, this Court held that because of the “fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration” “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 684. (emphasis added).

Here, it is undisputed that Sprint did not agree to class arbitration. To the contrary, the arbitration agreement expressly disavowed any right to bring class claims. Thus, applying *Stolt-Nielsen*, the Arbitrator correctly held that she could not compel Sprint to class arbitration. This left her with no option but to rule that Emilio should be compelled to arbitrate bilaterally as provided for in the arbitration contract. Nonetheless, she went on to hold that because the KCPA precluded the waiver of class-action arbitration, the class action waiver clause in Sprint’s arbitration agreement was unenforceable. Without reasoning, authority or logic, and in plain contravention of the FAA, the Arbitrator, rather than compelling bilateral arbitration, ruled that as a result, Sprint must engage in class-action litigation. *See* App. C at 40a.

In so doing, the Arbitrator went outside the scope of her authority and jurisdiction. Rule 2 of the JAMS Class

Action Procedures that governed these proceedings only contemplated two choices: (1) class arbitration; or (2) bilateral arbitration. There was no third option that would result in no arbitration at all. By refusing to compel Emilio to bilateral arbitration, and creating this third option, which allowed Emilio to escape his obligation to arbitration entirely, the Arbitrator violated the parties' agreement, the FAA's foundational principle that arbitration is a matter of consent, as well as then existing Supreme Court precedent including *Stolt-Nielsen*.

Simply put, the Arbitrator manifestly disregarded the existing law under the FAA and under this Court's decision in *Stolt-Nielsen*.

This Court noted in *Stolt-Nielsen* that:

[The] commercial stakes of class-action arbitration are comparable to those of class-action litigation even though the scope of judicial review is much more limited. We think the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, 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. It is beyond question that the "fundamental changes" brought about by the shift from bilateral arbitration to class-action arbitration are compounded when shifting from bilateral arbitration to class-action litigation. See, e.g., *AT&T Mobility v.*

Concepcion, 131 S.Ct. 1740 (2011). It is also beyond question that Sprint only consented to bilateral arbitration, and never consented to litigate in the event that the class action waiver provision of the parties' agreement was deemed not to apply.

As Sprint argued to the Second Circuit, even prior to *Concepcion*, courts have consistently held that the FAA does not permit the "nonconsensual elimination of arbitration altogether." *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160 (9th Cir.); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1213 (11th Cir. 2011).

Finally, the situation reaches the pinnacle of absurdity when, after Emilio abandoned the bilateral arbitration he agreed to and filed a class-action complaint in federal court, the District Court refused to engage in its own review of the governing law. Even though a new federal class action has been filed, both the District Court and Second Circuit have found Arbitrator Roberts' analysis of the substantive law governing Emilio's claims, i.e., the KCPA, to be conclusive. (*See* App. A at 3a; App. B at 22a-23a.) According to the Second Circuit, the parties bargained for Arbitrator Roberts' analysis of the law, and not its own. (App. A at 3a). Sprint, however, bargained for Arbitrator Roberts' analysis in a bilateral arbitration only. Sprint did not bargain for Arbitrator Roberts' analysis of the law in a new class-action litigation.

The fact that Sprint is now bound to litigate a class-action in federal court before a federal judge, but continues to be bound by Arbitrator Roberts' incorrect legal analysis of the substantive law, is not only prejudicial, but irrational. Indeed, the effect of the decisions by the District Court

and Second Circuit is to deny Sprint an appropriate review of the applicability of the KCPA, and to burden the courts with a new litigation even where the parties have already agreed to, and engaged in, arbitration.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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