IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JASON SHORE AND COINABUL	)	
Plaintiff,	)	Case No. 2016-cv-04363
v.	)	
JOHNSON & BELL	)	
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO DIRECT PLAINTIFF TO PROCEED TO ARBITRATION ON AN INDIVIDUAL BASIS AND ENJOIN CLASS ARBITRATIONS

INTRODUCTION

Johnson & Bell brought this matter pursuant to section 4 of the Federal Arbitration Act ("FAA") to direct Jason Shore and Coinabul LLC., ("Plaintiffs") to arbitrate their disputes with Johnson & Bell on an individual (non-class) basis in accordance with the bilateral arbitration clause in the parties' Client Engagement Letter ("Letter") and to enjoin the class arbitration demands filed by Plaintiffs before JAMS on May 31, 2016 and July 12, 2016.[1] Section 4 permits any "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995).

The courts in this District that have previously held an arbitrator should decide whether an agreement permits class arbitration, have done so on the premise that the issue is procedural.

[1] As mentioned in the Memorandum, this Court also has jurisdiction pursuant to its collateral jurisdiction over the initial Complaint filed by Plaintiffs, for which there are still matters pending before the Court. (Mem. at 7-8).

However as numerous courts have more recently recognized, that premise is mistaken. Relying on guidance from the Supreme Court highlighting the fundamental differences between bilateral and class arbitration, courts are increasingly concluding that the question of whether an arbitration agreement permits class arbitration is too consequential to just be "procedural." This is because class action arbitration redefines the nature of arbitration in a manner often unanticipated by parties when agreeing to arbitrate. Accordingly, these recent and prevailing courts hold that this issue must be reserved for a judge, unless the parties *clearly and unmistakably* provide otherwise.

As shown in Johnson & Bell's Memorandum in Support of its Motion ("Memorandum"), *Henderson v. U.S Patent Comm'n, Ltd.*, No. 15 C 3897, 2016 WL 3027895 (N.D. Ill. May 27, 2016), is the latest decision in this District on the matter, and the most illustrative regarding the most recent Supreme Court and appellate circuit rulings. *Henderson* holds the availability of class arbitration is a substantive question for judicial determination. The Third, Fourth and Sixth Circuits also hold this position. Plaintiffs do not seriously question the reasoning in any of these decisions. Nor do they seriously question the various district court rulings cited in the Memorandum that follow their reasoning. This Court should follow the decisions of *Henderson*, and the Third, Fourth and Sixth Circuits, and reach the gateway question of whether the arbitration clause provides a contractual basis for concluding the parties agreed to permit class arbitration. On that matter, there can be no real dispute the arbitration clause provides no such basis.

ARGUMENT

I. THIS COURT SHOULD DECIDE WHETER THE PARTIES' AGREEMENT PERMITS CLASS-WIDE ARBITRATION AS THE ISSUE IS SUBSTANTIVE

a. *Bazzle* Is Not Instructive Here as Proven by Post-*Bazzle* Supreme Court Decisions, the Seventh Circuit, and Decisions from this District.

Plaintiffs' reliance on *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) for the proposition that an arbitrator should decide questions of class arbitrability instead of the court is badly misplaced given the evolution of Supreme Court precedent and other authority. "Unfortunately, the opinions in *Bazzle* appear to have baffled [Plaintiffs]. For one thing, [Plaintiffs] appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration . . . . In fact, however, only the plurality decided that question." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010). Post-*Bazzle*, the Supreme Court has "effectively disavowed th[e] rationale" in that case, making clear that courts need not follow the reasoning of the "thin reed that is now *Bazzle*." *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 874, 877 (4th Cir. 2016).

"The Supreme Court has never cited *Bazzle* for the proposition that class arbitrability is a question for the arbitrator."[2] *Henderson*, No. 15 C 3897, 2016 WL 3027895, at *3. Plaintiffs even admit in their Response to Johnson & Bell's Memorandum, ten years after *Bazzle*, the Supreme Court pronounced that "*Stolt-Nielsen* made clear that th[e] Court has not yet decided whether the availability of class arbitration is a question of arbitrability." (Resp. at 6.) (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013)). Thus, while Plaintiffs would prefer this Court conclude otherwise, *Bazzle* is not "the most instructive Supreme Court authority on [who decides the availability of class arbitration]." (Resp. at 7.) Actually, *Bazzle* is uninformative here.

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[2] The Seventh Circuit also has declined to accord *Bazzle* any precedential value. *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 580-81 (7th Cir. 2006) ("*Wausau*"); *see also Williams-Bell v. Perry Johnson Registars*, No. 14-C-1002, 2015 WL 6741819, at *6 (N.D. Ill. Jan. 8, 2015) ("The Seventh Circuit acknowledged *Bazzle* but declined to rely on it."). Similarly, four of the six judges in this District who held an arbitrator should determine class arbitration declined to rely on *Bazzle*. *See id.* at *8 (relying on *Wausau and Blue Cross Blue Shield of Mass. v. BCS Ins. Co.*, 671 F.3d 635 (7th Cir. 2011) ("*BCBS*")); *Cramer v. Bank of Am.*, No. 12-C-8681, 2013 WL 2384313, *4 (N.D. Ill. May 30, 2013) (same); *Chatman v. Pizza Hut*, No. 12-C-10209, 2013 WL 2285804, at *7 (N.D. Ill. May 23, 2013) (same); *Collier v. Real Time Staffing Servs.*, No. 11-C-6209, 2012 WL 1204715, *4 (N.D. Ill. Apr. 11, 2012) (same). Further, the two judges in this District who did rely on *Bazzle* did so in a very limited fashion. *Price v. NCR Corp*, 908 F. Supp. 2d 935, 946 (N.D. Ill. 2012); *Kovachev v. Pizza Hut*, No. 12 C 9461, 2013 WL 4401373, slip op. at *2.

Despite the Supreme Court's pronouncements mentioned above, Plaintiffs assert, "significantly," in the relevant majority opinions since *Bazzle*, the "Court has been confronted with several opportunities to render a decision contradicting *Bazzle*," but "has never done so." (Resp. at 7.) There is good reason for that. In *Stolt-Nielson*, the Court explained it did not "revisit" the issue of who should determine the availability of class arbitration because the parties "assigned this issue to the arbitration panel." 559 U.S. at 680. In *AT&T Mobility LLC v. Concepcion*, the Court was only presented with the issue of whether the FAA preempted a state law that made class arbitration waivers unconscionable. 563 U.S. 333 (2011). Finally, in *Oxford Health*, the Court said, while the "sole question" before it was whether the arbitrator "interpreted the parties' contract," it "would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability.'" 133 S. Ct. at 2068 n.2.

> [Indeed,] *Bazzle* has been cited in only three Supreme Court majority opinions: twice to emphasize that it did not bind the Court as to whether the availability of class arbitration is a question of arbitrability, *see Oxford Health*, 133 S.Ct. at 2068 n. 2; *Stolt–Nielsen*, 559 U.S. at 680, 130 S.Ct. 1758; and once in a "line of cases" that "merely reflects the principle that arbitration is a matter of contract," *Rent–A–Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).

Henderson, No. 15 C 3897, 2016 WL 3027895, at *3.

What *is* significant, is that although the Court has yet to again be presented with the specific issues cited in *Bazzle*, it no less has taken the time in these subsequent opinions to inform that the *Bazzle* plurality is not dispositive on the question whether the court or the arbitrator determines the availability of class arbitration. *See Stolt-Nielsen*, 559 U.S. at 680–81 ("*Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted."); *Concepcion*, 563 U.S. at 347–48 (affirming *Stolt-Neilson*); *Oxford Health*, 133 S. Ct. at 2068 ("[T]his Court has not yet decided whether the availability of class arbitration is a question of arbitrability."). These statements have caused circuit courts to conclude that the Court has "given every indication, short

of an outright holding, that class-wide arbitrability is a gateway question." *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013); *accord Carlson*, 2016 WL 1178829, at *7–8 ("The evolution of the Court's cases [is] but a short step away from the conclusion that whether an arbitration agreement authorizes class arbitration presents a question as to the arbitrator's inherent power, which requires judicial review."). Accordingly, this Court should not consider *Bazzle* controlling on the issue of who decides class arbitrability.

b. Plaintiffs Fail to Refute *Henderson*, which Distinguishes Class and Consolidated Arbitration.

Plaintiffs argue Johnson & Bell relies "almost entirely" on Judge Feinerman's opinion in *Henderson* to conclude class arbitrability—unlike consolidated arbitration—is a substantive question for the court. But interestingly, Plaintiffs offer ***absolutely nothing*** to refute Judge Feinerman's analysis. They do not disagree with the positions of the Third, Fourth and Sixth Circuits either. This is telling. At most, Plaintiffs say in a footnote *Henderson* is "inapposite" here because the parties agreed by contract "to let an arbitrator decide" the availability of class arbitration. (Resp. at 7 n.5.) Putting aside momentarily that this assertion is clearly erroneous, it does nothing to disprove Judge Feinerman's analysis. Oddly, Plaintiffs actually rest their argument for class arbitration being procedural on the very line of consolidation cases Judge Feinerman demonstrates are unreliable.

First, Plaintiffs rely on the Seventh Circuit's holdings in *Employers Insurance Company of Wausau v. Century Indemnity Company*, 443 F.3d 573 (7th Cir.2006) ("*Wausau*") and *Blue Cross Blue Shield of Massachusetts. v. BCS Insurance Co.*, 671 F.3d 635 (7th Cir.2011) ("*BCS Ins.*") regarding *consolidated* arbitration to conclude that *class* arbitration should be decided by an arbitrator. (Resp. at 8.) *Next*, Plaintiffs cite six prior district court rulings that all apply *Wausau* and *BCS Ins.* As the Memorandum states, *none* of these rulings considered the instructive Third,

Fourth and Sixth Circuit decisions, and all but one of them occurred prior to those decisions. Nonetheless, Plaintiffs tout these rulings as the "majority opinion" in this District, predicating their argument for why this Court should follow them on a game of numbers. This is problematic. By failing to refute Judge Feinerman's analysis, and relying on a "majority opinion" which has been found by more recent decisions to be misguided, Plaintiffs' best argument for why this Court should find class arbitrability is procedural appears to be, "because everyone else is doing it."

This, ostensibly, is the approach Plaintiffs would have this Court adopt. However, as *Henderson* explains, and as the Memorandum discusses, the extension of *Wausau* and *BCS Ins.*, to the considerably different context of class arbitration is troublesome, because unlike consolidation, class action cases fundamentally alter and redefine the nature of arbitration. *See Henderson* No. 15 C 3897, 2016 WL 3027895, at *5 (explaining that "[w]hether it would be simpler and cheaper to handle twelve claims separately or together is the sort of issue an adjudicator—whether judge or arbitrator—resolves all the time" whereas, "[w]hether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail"); (Mem. § I.a.)

i. Class Disputes Are Not Procedural Because They Redefine Arbitration.

In a clear misunderstanding of the issue, Plaintiffs have stated, "whether class proceedings 'change[] the nature of arbitration' is irrelevant to whether a court or an arbitrator should decide on the availability of class-wide arbitration." (Resp. at 10.) To be sure, the nature of the arbitration has *everything* to do with this question. Plaintiffs even explain in their Response, "[s]ubstantive questions of arbitrability" involve "whether an arbitration clause . . . applies to *this particular* ***type*** *of arbitration*," (Resp. at 6.) (emphasis added) (quoting *Wausau*, 443 F.3d at 576 – 77), whereas "[p]rocedural questions" refer to "prerequisites and conditions precedent to arbitration." *Id.* (quoting *Williams-Bell v. Perry Johnson Registars*, No. 14-C-1002, 2015 WL 6741819, at *6

(N.D. Ill. Jan. 8, 2015)). Simply put, procedural questions "grow out of the dispute" and concern ***how*** the arbitration will proceed—where, when, at what time, etc.—whereas substantive questions *define* the dispute, and concern ***whether*** a matter can even be arbitrated. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("procedural questions [] grow out of the dispute and bear on its final disposition"); *Henderson*, No. 15 C 3897, 2016 WL 3027895, at *6 ("[Class arbitration] does not 'grow out of the dispute,' but rather defines it."). Thus, class litigation defines a dispute. It redefines the "nature" or "type" of proceeding typically handled in an arbitration into something that cannot be arbitrated, unless the parties "clearly and unmistakably" provide otherwise. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995).

> This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Concepcion, 563 U.S. 333, 347–48. "Consolidation of suits that are going to proceed anyway poses none of these potential problems." *BCS Ins.*, 671 F.3d at 640.

> [Indeed,] Defendants are willing to accept the costs of these errors in [bilateral] arbitration, since their impact is limited to the size of individual disputes and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claims are aggregated and decided at once, the risk of an error will often become unacceptable.

Henderson, 2016 WL 3027895, at *5 (quoting *Concepcion*, 563 U.S. at 350). Accordingly, that class arbitration redefines the nature of the arbitral proceeding is the essential factor that makes class arbitration a substantive matter that should be decided by courts. With that in mind, this Court should adopt the reasoning in *Henderson* and the Third, Fourth and Sixth Circuits, and hold the issue of class arbitrability is a substantive question for this Court to decide.

II. THE PARTIES DID *NOT* AGREE AN ARBITRATOR WOULD DETERMINE WHETHER THEIR AGREEMENT INTENDED FOR CLASS ARBITRATION

a. Mere Reference to an Arbitration Administrator Is Not "Clear and Specific" Intent to Incorporate that Arbitration Administrator's Rules into an Agreement.

Plaintiffs ask this Court to consider JAMS' Comprehensive Arbitration Rules & Procedures, and its Supplemental Rules for Class Arbitration in determining whether based on the arbitration clause, the parties agreed to submit the question of class arbitration to an arbitrator. (Resp. § IV.A.2.) Plaintiffs have told this Court "the parties [] agreed that any dispute would be governed by JAMS' Comprehensive Arbitration Rules & Procedures ('JAMS' Rules')." (*Id.* at 12.) This statement is unequivocally false. The extent of what the parties agreed to is this:

> Although we do not expect that any dispute *between us* will arise, in the unlikely event of any dispute *under this agreement*, including a dispute regarding the amount of fees or the quality of our services, such dispute shall be determined through binding arbitration with the mediation/arbitration services of JAMS Endispute of Chicago, Illinois. Any such arbitration shall be held in Chicago, Illinois unless the parties agree in writing to some other location. Each party to share the costs of the arbitration proceeding equally. Each party will be responsible for their own attorney's fees incurred as a result of the arbitration proceeding.

(Arb. of Disp.'s, at 3) (emphasis added). Noticeably absent from this language are any words incorporating JAMS' Rules—or the rules of any arbitration administrator—into the agreement. Nonetheless, Plaintiffs would have this Court believe the parties agreed to incorporate JAMS' Rules, because somewhere in those Rules it mentions referencing JAMS as a forum means the Rules automatically apply when the parties *specifically do not* designate a particular administrator's rules, and also, somewhere in its Rules, JAMS permits arbitrators to rule on arbitrability. On this logic, Plaintiffs also hope to incorporate JAMS' Supplemental Class Action Rules—which are also notably absent from the agreement—into the arbitration clause.

Plaintiffs' attempt to read JAMS' Rules into the agreement must fail. Going *outside of the parties' agreement* to point to an obscure rule within another rule, in a set of arbitration rules and procedures that are not referenced *at all* in the agreement is prohibited under Illinois law, and is

far too tenuous a proposition to evince a "clear and specific" intent to incorporate JAMS' Rules into the agreement. Accordingly, this Court should not consider JAMS' Rules in determining whether the arbitration clause intends for an arbitrator or this Court to decide class arbitrability.

> Traditional contract interpretation principles in Illinois require that: "[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence."

Air Safety, Inc. v. Teachers Realty Corp., 185 Ill. 2d 457, 462 (1999). Illinois law is clear: for any document to be interpreted alongside a contract that document must be "clearly and specifically" referenced *in* the agreement. *See 188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002) ("For a contract to incorporate all or part of another document by reference, the reference must show an intention to incorporate the document and make it part of the contract. Illinois requires that incorporation be clear and specific."). Furthermore, "when the contract does not refer to a specific document" the Seventh Circuit has informed under Illinois law, whether the document is incorporated "cannot be answered simply by reference to the contract documents." *Id.* at 737.

Here, JAMS' Rules are not referenced *at all* in the agreement. The only reference is to JAMS as an arbitration administrator, and though Plaintiffs would like to do so, they cannot use this reference to go outside the agreement to attempt to craft some basis—by way of an unrelated set of rules—to say the agreement intends an arbitrator to decide class arbitrability. The law does not require, "clear and specific reference to the organization that created the document the party is seeking to incorporate." It says clear and specific reference to the document *itself*. This too was acknowledged by Judge Feinerman in *Henderson*, where the court was "unpersuaded" that an arbitration clause that directs "arbitration take place before a particular arbitral forum, without *explicitly* stating that the forum's rules shall apply, [could] incorporate[] by reference that forum's

rules."[3] *Henderson*, No. 15 C 3897, 2016 WL 3027895, at *7. Accordingly, JAMS' Rules do not and should not weigh into this Court's interpretation of the arbitration clause.

b. Mere Reference to an Arbitration Administrator Is Not "Clear and Unmistakable" Evidence of an Intent to Arbitrate Arbitrability.

The Supreme Court has held courts "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (1995) (quoting *AT & T Techs. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986)). The Court also made clear "silence or ambiguity on the 'who should decide arbitrability' point" should be resolved *against* finding the arbitrator has that authority and in *favor* of finding the court does. *Id.* at 945; *Crockett*, 734 F.3d at 597. It reasoned a contrary rule would "often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 944.

First Options compels the conclusion that merely identifying an arbitration provider is insufficient to indicate an intent by the parties to delegate an arbitrability issue to the arbitrator. Recognizing this much, courts have routinely held that arbitration agreements similar to the one here—which make no mention of an arbitral forum's rules—*do not* show a "clear and unmistakable" intent by the parties to arbitrate arbitrability. In one case, for instance, the arbitration clause provided that "[i]n the event of any dispute or claim arising out of or relating to your employment relationship . . . all such Disputes shall be . . . resolved by binding arbitration . . . conducted by the [AAA][.]" *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1304 (N.D. Cal. 2013). Applying *First Options*, the court held because "the parties did not choose to

[3] After the dispute in *Henderson* was filed with JAMS, the court did not consider "whether arbitrability was designated to the arbitrator because the JAMS Rules were automatically incorporated when no other rules were referenced." The question was whether based on the clause language, the parties "clearly and unmistakably" intended to arbitrate issues of class arbitrability. *See Henderson*, No. 15 C 3897, 2016 WL 3027895, at *7–8.

incorporate the rules of the [AAA]" and the arbitration clause "is completely silent as to the issue of who should decide questions of arbitrability," the "question is for the Court to decide." *Id.*[4]

In another case, the arbitration provision stated that "arbitration is the exclusive forum for the resolution" of all disputes and that it is "conducted under the auspices of the [AAA]." *Urbanic v. Travelers Ins.*, No. 10-CV-2368, 2011 WL 1743412, at *6 (D. Colo. May 6, 2011). The district court held that, while the provision "references the AAA, it does not expressly incorporate specific AAA rules"; thus, it does not contain a "'clear and unmistakable' choice of arbitration of the validity of whether the parties agreed to arbitrate." *Id.*

Like the clauses in *Parvataneni* and *Urbanic*, the arbitration clause here does not reference or incorporate the rules of any arbitration body. It is entirely silent as to who should decide arbitrability. This obviously does not represent "clear and unmistakable" evidence of an agreement to arbitrate arbitrability under the standard set forth in *First Options*.

c. Plaintiffs' Attempt to Distinguish *Henderson* from the Present Case Fails.

Because Plaintiffs are unable to disprove Judge Feinerman's analysis they instead submit that *Henderson* is "inapposite." Specifically, Plaintiffs submit the arbitration agreement in *Henderson* is distinguishable from the one here because in *Henderson* the agreement stated arbitration would occur before AAA "or some other similar organization," whereas the clause here states that disputes will be arbitrated "with the services of JAMS." *Henderson*, No. 15 C 3897, 2016 WL 3027895, at *1. This minor detail hardly makes *Henderson* distinguishable and fails to advance Plaintiffs' argument that the parties agreed to arbitrate arbitrability.

[4] Similar to JAMS, AAA contains Rules providing that "[t]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules." AAA Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), R. 1.a.

The clause in *Henderson*, like the one here, "d[id] not explicitly refer to class arbitration at all, let alone to who shall decide whether there can be class arbitration." *Id.* at 7. Judge Feinerman agreed that absent "clear and unambiguous" reference to an arbitration administrator's rules, those rules cannot be incorporated into the agreement. *Id.* "One can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide point' as giving arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* (quoting *First Options*, 514 U.S. at 945). As such, Judge Feinerman cautioned against concluding parties agreed to arbitrate arbitrability where, as here, the clause does not "clearly and unmistakably" indicate intent to do so. *Id.* This Court should follow the reasoning in *Henderson*, and conclude the arbitration clause here does not "clearly and unmistakably" delegate questions of arbitrability to an arbitrator.

III. PLAINTIFFS FAIL TO IDENTIFY *ANY* CONTRACTUAL BASIS FOR CONCLUDING THE PARTIES INTENDED FOR CLASS ARBITRATION

a. Plaintiffs Concede There Is No Express Provision Permitting Class-Wide Arbitration.

Plaintiffs spend most of two pages arguing that *Stolt-Neilson* does not "establish a bright line rule that class arbitration is allowed only under an agreement that 'incants'" class arbitration. (Resp. at 14.) Interestingly, the principal case Plaintiffs rely on for this point is from the Third Circuit, which has since clarified that, "[t]he burden of overcoming the presumption [that courts must decide questions of arbitrability unless the parties clearly and unmistakably provide otherwise] is onerous, as it requires *express* contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Opalinski*, 761 F.3d at 335 (emphasis added) (citing *Howsam*, 537 U.S. at 83). Plaintiffs' insistence on this point is a clear admission that there is no *express* provision in the agreement to permit class arbitration.

b. Plaintiffs Fail to Establish an Implied Agreement to Arbitrate Class-Claims.

Plaintiffs' reliance on *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012), *as amended* (Apr. 4, 2012), *aff'd,* 133 S. Ct. 2064 (2013) (*Sutter*), to propose by drafting a "broad" arbitration agreement, Johnson & Bell "necessarily agreed to arbitrate *class* claims" is sorely misguided. (Resp. at 16) (emphasis original). In fact, *Sutter* hurts, not helps, Plaintiffs' cause. Plaintiffs state in *Sutter*, the court found a "similar" arbitration clause "broad enough to affirm the arbitrator's ruling [holding that the clause] 'embraces all conceivable court actions, including class actions.'" (*Id.*) (citation omitted). This statement is false. The court in *Sutter* made *no assessment* on the correctness of the arbitrator's interpretation, because the parties had agreed to (and did) arbitrate the dispute: "When [the arbitrator] makes a good faith attempt to [interpret the contract], *even serious errors of law or fact* will not subject his award to vacatur." *Id.* at 220 (emphasis added). Further, when *Sutter* reached the Supreme Court, the Court suggested it would have read the clause *differently* from the arbitrator. *Id.* at n.2 ("We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability.' But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures."); *Id.* at 2071 (Alito, J., concurring) ("If we were reviewing the arbitrator's interpretation of the contract *de novo,* we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'").

Similarly, in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), the other case Plaintiffs rely on for the proposition that a "broad" arbitration clause encompasses class arbitration, the Second Circuit reached the same conclusion on appeal as the Supreme Court and Third Circuit in the cases above. Namely, the court found the relevant inquiry was "whether, based on the parties' submissions of the arbitration agreement, the arbitrator had the authority to reach an issue,

not whether the arbitrator decided the issue correctly." *Id.* Thus, contrary to Plaintiffs' contention, *none* of the courts relied on by Plaintiffs agreed that arbitration clauses "similar to the one at issue here" clearly and unmistakably intended for class arbitration. At best, these courts merely recognized that when submitted to the arbitrator, the arbitrator had authority to reach the issue.

It is precisely because the standard for reviewing an arbitrator's decision is so deferential that courts presume that questions of arbitrability—including whether an arbitration provision allows for class arbitration—are for courts, unless an agreement "clearly and unmistakably" delegates that issue to the arbitrator. *Henderson*, No. 15 C 3897, 2016 WL 3027895, at *5 ("Also pertinent to the discussion is the extremely limited judicial review of arbitral decisions, which makes it more likely that errors will go uncorrected, including errors in deciding whether the parties had agreed to class arbitration.").

i. Johnson & Bell did Not Agree to Arbitrate Class Disputes Just by Supposedly Having Agreements with Its Other Clients.[5]

Finally, Plaintiffs submit that "it could not be said" Johnson & Bell was not "aware that class claims could possibly arise under this agreement," because Johnson & Bell has client engagement agreements with all its clients. (Resp. at 17–18.) Plaintiffs cannot seriously believe because Johnson & Bell has agreements with all its clients, it intended "any disputes" between itself and Plaintiffs under *their agreement* to include disputes with Johnson & Bell's entire client base. That logic turns the goal of confidentiality on its head. *Concepcion*, 563 U.S. at 344–45 ("The point of affording parties discretion in designing arbitration processes is to allow . . . for example . . . that proceedings be kept confidential.").

[5] Plaintiffs suggest without basis that Johnson & Bell "uses the same form arbitration agreement with all of its clients," which is unproven and untrue. (Resp. at 9.)

Furthermore, "Illinois courts endeavor to construe contracts as a whole, giving meaning to each provision." *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703 (7th Cir.2003). Indeed, "[c]ontractual provisions must be read in a manner that makes them consistent with each other." *Markin v. Chebemma Inc.*, 526 F. Supp. 2d 890, 894 (N.D. Ill. 2007) (citation omitted). When read in its entirety, Johnson & Bell's Client Engagement Letter with Plaintiffs makes it abundantly clear the agreement specifically relates to the parties only. Paragraph one, for instance, reads in part: "This engagement letter confirms the engagement of Johnson & Bell, Ltd, an Illinois corporation ("J&B"), to represent *you, individually, and Coinabul, LLC, ("you")*, and the basis on which J&B will represent *you*." (Client Engagement Letter, at 1.) Johnson & Bell would not have drafted a private agreement setting out terms of its representation of Plaintiffs alone, having *every provision* in that agreement relate *exclusively* to Plaintiffs, only to then intend in this one clause that the agreement would encompass the whole of Johnson & Bell's existing clients.

Moreover, as explained in the Memorandum, Plaintiffs completely disregard the clear bilateral language in the arbitration clause which limits the scope of potential disputes to those strictly arising "under the agreement" and "between the parties." (Mem. at 16.) Accordingly, Plaintiffs fail to show that there is any implied agreement to arbitrate class disputes.

CONCLUSION

For all the reasons set out above, and in Johnson & Bell's Memorandum, Defendant Johnson & Bell respectfully requests this Court enter an order directing Plaintiffs Jason Shore and Coinabul LLC to arbitrate their claims on an individual basis and enjoining the class arbitration demands filed before JAMS on May 31, 2016 and July 12, 2016.

Respectfully submitted,

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