Appeal No. B236084

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

KINECTA ALTERNATIVE FINANCIAL SOLUTIONS, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES,
Respondent,

KIM MALONE, for herself and all others similarly situated,
Real Parties in Interest.

Superior Court Case No. BC448676
Hon. Abraham Khan

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING RETURN OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDATE OR PROHIBITION OR OTHER APPROPRIATE RELIEF

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January 6, 2012

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INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public.

Public Citizen supports legislative efforts to reform mandatory arbitration because forced arbitration, which has become ubiquitous in consumer transactions, deprives consumers of the chance to hold corporations accountable in court. Absent such reform, class arbitration is, in many cases, the only practical mechanism within the mandatory-arbitration regime by which aggrieved parties can realistically obtain relief. Where the scale of the alleged wrongdoing is great, and the transactions complex, one-on-one arbitration may be economically impractical or, at best, inefficient. That result is even more likely in matters involving large numbers of consumer transactions, where each transaction may involve a relatively small amount of money. Accordingly, where class arbitration is unavailable, not only may resource-rich corporate defendants evade justice in the courts, they may evade justice altogether.

Although the Federal Arbitration Act (FAA) in many cases constrains the availability of class arbitration, *see AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 130 S. Ct. 1758, it neither entirely displaces state-law contract principles applicable to the interpretation of arbitration agreements, nor prevents parties from contracting for the application of state arbitration laws that may be more open to class arbitration. In cases such as this one,

involving the application of state-law contract principles to agreements that specify the application of state arbitration statutes, Public Citizen believes that it is important that state courts understand that federal law does not dictate an outcome that forecloses the beneficial use of class proceedings as contemplated by applicable state statutory and case law. Public Citizen therefore submits this brief in support of the real party in interest defending the ruling below.

ARGUMENT

In this case, petitioner Kinecta seeks to overturn the Superior Court's ruling allowing an arbitration to proceed on a classwide basis (if the arbitrator ultimately determines that a class arbitration is appropriate). Kinecta's argument that the Supreme Court's decision in *Stolt-Nielsen* requires reversal of the Superior Court's order is incorrect for three independent, though related, reasons. First, *Stolt-Nielsen* does not announce a principle of federal law that preempts the application of state contract law to interpret contracts that do not explicitly address classwide arbitration. It does not even address preemption of state principles of contract interpretation, and it is based on Section 4 of the FAA, 9 U.S.C. § 4, which has been held not to preempt state law. Second, even if *Stolt-Nielsen*'s construction of the FAA might otherwise apply here, the arbitration agreement in this case reflects the parties' permissible choice to apply the procedures of the California Arbitration Act, which allow classwide arbitration even where a contract does not expressly call for it, and the U.S. Supreme Court has held that when the parties to a contract elect to have its application governed by the procedures called for by state arbitration statutes rather than by the FAA, courts must respect that

choice. Third, and alternatively, if *Stolt-Nielsen*'s holding that the FAA does not permit classwide arbitration under an arbitration clause that is "silent" concerning class proceedings were applicable here, the arbitration clause at issue is not "silent" on that question, because its incorporation by reference of the procedures available under the California Arbitration Act necessarily includes classwide arbitration, which the California statute has repeatedly been held to authorize.

I. *Stolt-Nielsen* Does Not Preempt State Decisional Law Interpreting a Contract to Permit Class Arbitration Where the Contract Does Not Expressly Prohibit Class Arbitration.

Kinecta seeks to apply the holding in *Stolt-Nielsen* interpreting the FAA as banning class arbitration where the contract is "silent" about the availability of class proceedings. Kinecta's position rests on the theory that the FAA preempts California laws that prevent enforcement of compulsory arbitration agreements, citing *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740 (holding that the FAA preempts decisional law invalidating arbitration agreements that preclude class arbitration), *Preston v. Ferrer* (2008) 552 U.S. 346 (holding that the FAA preempts state laws requiring disputes to be adjudicated by an agency), and *Perry v. Thomas* (1987) 482 U.S. 483 (holding that the FAA preempts a California law banning compulsory arbitration in the labor context).

However, this line of cases only addresses FAA preemption of state laws invalidating express provisions of arbitration contracts. No such authority for preemption exists where, as here, the state law governs the interpretation of contractual silences. In *Stolt-Nielsen*, the arbitration panel failed to consider "whether the FAA, maritime law, *or*

New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent." *Stolt-Nielsen* at 1768-69 (emphasis added). The arbitrators relied not on principles aimed at discerning the meaning of contracts, but on the view that public policy favored class arbitration even where the parties had not agreed to it. The Supreme Court held that such a policy, divorced from any principles governing the interpretation of contracts generally, was inconsistent with the FAA. Nowhere in *Stolt-Nielsen* did the Court purport to hold that the FAA preempted any principle of state contract law concerning the interpretation of contracts. *Stolt-Nielsen* therefore provides no basis for preempting a decision based on state contract law that permits class arbitration absent an express contractual provision.

Indeed, the Supreme Court has twice refused to extend Section 4 of the FAA, which is the provision that establishes affirmative federal authority to enforce (and therefore interpret) the terms of arbitration agreements, to state proceedings. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 477 fn. 6; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 16 fn. 10. Further, Section 2 of the FAA, which has been held to preempt state law, only preempts insofar as it assures that arbitration contracts will 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. The statute thus only preempts state law in order to preserve the validity of arbitration contracts from state discrimination against such agreements, and provides no basis for preempting state law governing the interpretation of contractual silences. Preemption is

therefore especially inappropriate where, as here, the challenged state law actually cuts in favor of allowing arbitration (in this case, class arbitration).

Further, authority from California appeals courts establishes that the FAA does not preempt state decisional law favoring class arbitration in the face of contractual silence. In *Blue Cross of California v. Superior Court* (1998) 67 Cal. App. 4th 42, 60, the Second District Court of Appeal concluded that "when the arbitration agreement between the parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [Federal Arbitration Act]." The court thus distinguished between state laws that contradict the express terms of an arbitration agreement, which are preempted by Section 2 of the FAA, and contractual silences, which are interpreted according to state law. *Id.* at 51. This case falls squarely in the latter category. The decisions on which Kinecta relies do not implicitly overrule *Blue Cross* or directly contradict its reasoning.

II. The Contract Is Governed by the Procedures of the California Arbitration Act, Which Permit Class Arbitration Where a Contract Is Silent.

In any event, Kinecta's reliance on *Stolt-Nielsen* assumes that the FAA, on which *Stolt-Nielsen*'s analysis is based, governs the issue of availability of class arbitration in this case. That assumption, however, is incorrect. The contract at issue states that all employment-related claims between the parties "shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, *in conformity with the procedures of the California Arbitration Act*" (emphasis added). It therefore invokes

the authority of the FAA to establish a basis for binding arbitration of claims (including claims based on a federal statutory right), and then specifies that the California Arbitration Act will govern the procedures according to which the arbitration will be conducted. The United States Supreme Court has affirmed the right of contracting parties to substitute state arbitration rules for the FAA in exactly this manner, noting that procedures that might otherwise be required by the FAA do not apply "where, as here, the parties have agreed to arbitrate in accordance with California law." *Volt,* 489 U.S. at 477. Further, the section of the FAA that preempts state laws, 9 U.S.C. § 2, does not have any impact on in this dispute, because Malone is not seeking to have the arbitration agreement declared invalid but merely seeking to enforce it according to its terms, which include the choice of state-law procedures. As the Supreme Court noted in *Volt*, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt,* 489 U.S. at 476. The parties are entirely free to choose to have their arbitration contract applied under California rather than federal law.

The California Arbitration Act provides statutory authority for judges to permit class arbitration. Cal. Civ. Proc. Code § 1281.3 provides that a party may petition the court to consolidate arbitration proceedings and the court may order such consolidation if certain conditions are met. The United States Supreme Court has singled out California's mechanism for permitting such consolidated arbitration as a helpful complement to the FAA in cases where parties elect to apply California law, noting that:

> [W]e think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration. As indicated, the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments.

Volt, 489 U.S. at 468. The California Supreme Court has determined that this provision of the California Arbitration Act further empowers California courts to order classwide arbitration, reasoning that because an order for class arbitration would intrude considerably less on the contract rights of the parties than an order for consolidated arbitration, "[i]t is unlikely that the state Legislature . . . intended to preclude a court from ordering classwide arbitration in an appropriate case." *Keating v. Superior Court* (1982) 645 P.2d 1192, 1209, *rev'd in part, appeal dismissed in part sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1 (the United States Supreme Court's review of *Keating* did not address the California Supreme Court's interpretation of Cal. Civ. Proc. Code § 1281.3). *See also Blue Cross of California v. Superior Court* (1998) 67 Cal. App. 4th 42, 54 (citing the California Supreme Court's conclusion in *Keating* that "'a court is not without authority' to order classwide arbitration" in supporting an order for class arbitration where the contract was silent on its availability). Thus, by determining that its contract would be governed by the California Arbitration Act, Kinecta affirmatively chose a body of law that explicitly permits the judge to order class arbitration procedures where the contract is silent on their availability. Under *Volt*, that body of law, and not any contrary

implication that might flow from the FAA based on *Stolt-Nielsen* or other decisions applying the FAA, governs this case.

III. By Specifying the Procedures of the California Arbitration Act, the Contract Expressly Permits Class Arbitration.

In the alternative, even assuming that *Stolt-Nielsen*'s construction of the FAA applies to this case, by selecting the California Arbitration Act as the procedural law for enforcing the arbitration agreement, the contract here satisfies *Stolt-Nielsen*'s requirement that the contract reflect the parties' consent to class arbitration procedures. Put another way, although the contract does not use the words "class arbitration," it is not "silent" with respect to the availability of class proceedings as *Stolt-Nielsen* used that term, because the procedural law that it expressly incorporates allows class arbitration.

In *Stolt-Nielsen*, the Supreme Court acknowledged that while consent to class arbitration procedures cannot be inferred from the bare existence of an arbitration agreement, it may be appropriate in some cases to presume that parties that enter into an arbitration agreement implicitly authorize the court to adopt such procedures, given the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Stolt-Nielsen*, 130 S. Ct. at 1775. The Court further noted that the parties in *Stolt-Nielsen* had stipulated that there was no agreement concerning class arbitration, and that the Court therefore "ha[d] no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776. It thus

did not pass on the question of when a contract can be read to authorize the availability of class arbitration.

Here, by specifying that the procedures of the California Arbitration Act will govern the interpretation and application of its arbitration agreement, Kinecta consented to class arbitration. The California Supreme Court plainly established in *Keating* that the California Arbitration Act permits California courts to order class arbitration, and the Second District Court of Appeal determined in *Blue Cross* that this power extends to situations where the contract is does not in so many words address the availability of class arbitration. Kinecta's contract was formed against, and incorporated by reference, this background principle of law under the California Arbitration Act. Thus, by selecting California law as its method of enforcement, Kinecta fulfilled *Stolt-Nielsen*'s requirements by consenting to class arbitration.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of mandate or prohibition.

Respectfully submitted,

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January 6, 2012

CERTIFICATE OF WORD COUNT

The text of this brief consists of 2,401 words, as counted by the Microsoft Word 2010 word process program used to generate the brief.

January 6, 2012

/s/ Eric S. Fish
Eric S. Fish

PROOF OF SERVICE

I am employed in the city of Washington, D.C. I am over the age of 18 years and not a party to this action. My business address is 1600 20th Street NW, Washington, DC 20009. I am readily familiar with the practice of Public Citizen for collecting and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service the same day I submit it for mailing.

On January 6, 2012, I served the foregoing document on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed to each of the following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 6, 2012 in Washington, D.C.

January 6, 2012 /s/ Eric S. Fish

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