AMERICAN ARBITRATION ASSOCIATION

VANESSA BALDWIN RENEE KAHMANN CRYSTAL M. MEJIA On behalf of each of themselves and all others similarly situated CLAIMANTS, v. FOREVER 21, INC. AND FOREVER 21 RETAIL, INC. RESPONDENTS.	Case No. 53-160-000071-13 **ARBITRATOR DECISION ON CLAUSE CONSTRUCTION**

I. Procedural Background

This case began with a Complaint filed on December 3, 2012 in the United States District Court for the Northern District of Ohio as Case No. 1:12-cv-02967. The Complaint, filed by Vanessa Baldwin ("Baldwin") on behalf of herself and all others similarly situated, included an averment that it was a collective action against Forever 21, Inc. for violating the Fair Labor Standards Act ("FLSA") by "failing to pay Plaintiff and other similarly-situated employees for meal periods during which they performed work." Complaint at ¶1. Part of the relief sought by the Complaint was "an order permitting this litigation to proceed as a collective action." Complaint at p. 5. On December 4, 2012, Baldwin notified the court that

Forever 21 employees Renee Kahmann ("Kahmann") and Crystal Mejia ("Mejia") had executed and filed Consent Forms to join the action as party Plaintiffs pursuant to 29 U.S.C. §216(b).[1]

On January 23, 2013, the parties submitted a Stipulation to Stay Action Pending Arbitration in which they agreed that the dispute was covered by a August 15, 2008 Agreement to Arbitrate between Baldwin and Forever 21, Inc. providing that final and binding arbitration was the exclusive means of resolving any dispute or controversy arising out of or in any way related to any "Dispute." The action was stayed on January 24, 2013.

On February 19, 2013, Baldwin, Kahmann, and Mejia (collectively, "Claimants") filed a Demand for Arbitration and a Complaint "on behalf of each of themselves and all others similarly situated" encompassing their claims against Forever 21, Inc. and Forever 21 Retail, Inc. ("Forever 21" or "Respondents") for violating the FLSA. The gravamen of the FLSA claim is that Forever 21 failed to pay Claimants and other similarly-situated employees for meal periods during which they performed work. Respondents objected and argued that Claimants could not bring a collective action because the arbitration agreement did not authorize arbitration of class or collective actions.

[1] 29 U.S.C. §216(b) authorizes collective actions for FLSA claims and provides that no employee can become a party plaintiff in any such collective action unless he files written consent with the court.

Both Claimants and Respondents submitted briefs on the issue of Clause Construction along with supporting case law. An oral hearing was held on July 30, 2013, during which both parties presented argument. Thereafter, the parties also submitted supplemental authority for the Arbitrator's consideration.

II. Issue for Review

The sole issue for the Arbitrator is whether the Agreement to Arbitrate ("Arbitration Agreement" or "Agreement") signed by the Claimants permits the arbitration of FLSA collective action claims.[2]

III. Arguments of the Parties

Each of the Claimants signed an Agreement to Arbitrate with Forever 21 which included the following provisions:

- "It is the desire of the parties to this Agreement that, whenever possible, 'Disputes' relating to employment matters will be resolved in an expeditious manner. Each of the parties hereto is voluntarily entering into the Agreement in order to gain the benefits of a speedy, impartial dispute-resolution procedure."

- "The Company and Employee mutually agree that any dispute or controversy arising out of or in any way related to any 'Dispute,' as defined herein, shall be resolved exclusively by final and binding arbitration."

- "For purposes of this Agreement, the term 'Disputes' means and includes any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee."

[2] The Arbitrator has not been asked to make any determinations as to the merits of the underlying claims or the remedies available to participants in such collective actions.

- "This Agreement does not cover claims that Employee may have for worker's compensation benefits or unemployment compensation benefits. Nothing herein shall preclude Employee from reporting information to or testifying before the United States Equal Employment Opportunity Commission, or similar state agency, the National Labor Relations Board; provided, however, that in the even[t] that any federal or state administrative agency or any other person brings any claim or action for monetary relief on Employee's behalf, Employee waives the right to recover or receive any such monetary relief in such claim or action, and agrees to seek relief exclusively through arbitration pursuant to this Agreement. Nothing herein shall be construed to waive any right, that either party is prohibited [from] waiving under applicable law."

A. Claimants' Arguments

Claimants argue that the Arbitration Agreement's definition of "Dispute" is broad enough to encompass collective actions and an intent to allow such actions can be implied from the Agreement's failure to specifically preclude them. They also argue that they should be allowed to bring a collective action because they are asserting claims under the FLSA which specifically provides for collective actions. They also maintain that the language of the Arbitration Agreement must be construed against Respondents and cannot be deemed to constitute a clear and unequivocal waiver by Claimants of their right to bring collective actions where the Agreement does not contain the terms "FLSA" or "collective action." Claimants argue that a waiver of all collective actions is contrary to law and that, even if the language of the Agreement is construed to bar collective actions in

which money damages are sought, their current claim seeks only conditional class certification and does not constitute a claim for money damages.

B. Respondents' Arguments

Respondents argue that consent to collective action arbitration cannot be inferred where there is no express agreement by the parties to allow collective actions. They claim that the Arbitration Agreement's clause permitting arbitration of "any" claims and authorizing the arbitrator to grant "any remedy or relief" does not provide for class or collective action arbitrations. To the contrary, Respondents argue that the Agreement expressly bars any collective action arbitrations. They argue that, pursuant to *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*[3] and *AT&T Mobility, LLC v. Concepcion*,[4] one cannot require a party to arbitrate class claims under the Federal Arbitration Act ("FAA") unless that party affirmatively agreed to do so. Respondents also argue that the language of the Arbitration Agreement demonstrates a specific intent to preclude collective actions, that the Claimants have waived their right to pursue collective actions, and that such waivers do not violate the FLSA or the National Labor Relations Act ("NLRA").

[3] 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010).
[4] 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

IV. Analysis

When interpreting an arbitration agreement, principles of state contract law apply.[5] In addition, the FAA must also be considered.[6] In *Volt Info. Sciences, Inc. v. Board of Trustees*,[7] the Supreme Court recognized that "[b]ecause courts are to treat agreements to arbitrate as all other contracts, they must apply general principles of contract interpretation to the interpretation of an agreement covered by the FAA."[8] When construing a contract, the goal is to determine and effectuate the intent of the parties.[9] "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement."[10] In this case, the Arbitration Agreement neither specifically authorizes nor specifically precludes collective arbitrations.

General principles of contract construction

Claimants argue that under general principles of contract law, the parties' Agreement to Arbitrate must be construed against the drafter, Respondent. Where there is doubt or ambiguity in the language of a contract, it will be

[5] *Stolt-Nielsen v. AnimalFeeds Int'l Corp*, 559 U.S. 662, 130 S.Ct. 1758, 1773, 176 L.Ed.2d 605 (2010).
[6] *Id.*
[7] 489 U.S. 468, 475, 103 L.Ed.2d 488, 109 S.Ct. 1248 (1989).
[8] *Id.* at 475.
[9] *Graham v. Drydock Coal Company*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996).
[10] *Id.*

construed strictly against the party who prepared it.[11] "[H]e who speaks must speak plainly or the other party may explain to his own advantage."[12]

Claimants argue that the Agreement specifically provides that some disputes, specifically workers compensation or unemployment benefits, are not covered by the Agreement, and since Respondents failed to expressly preclude collective actions when drafting the Agreement, they are implicitly included in the Agreement. In fact, both the language of the Arbitration Agreement in this case and general principles of contract law support a finding that collective arbitration was contemplated by the parties.

Incorporation of the AAA arbitration rules

The Arbitration Agreements signed by Claimants Vanessa Baldwin and Renee Kahmann both provide that arbitration of disputes shall be held in Los Angeles, California "pursuant to the Model Rules for Arbitration of Employment Disputes of the American Arbitration Association then in effect."[13] While the Arbitration Agreement of Crystal Mejia does not contain the exact same language, it references those same rules.[14]

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[11] *Smith, Admr., v. Eliza Jennings Home*, 176 Ohio St. 351, 199 N.E.2d 733 (1964). *See*, also *PNC Bank, N.A. v. May*, 8th Dist. No. 98071, 2012-Ohio-4291, 2012 Ohio App. LEXIS 3768, ¶7 citing *Franck v. Ry. Express Agency, Inc.*, 159 Ohio St. 343, 345-346, 112 N.E.2d 381 (1953).

[12] *McKay Machine Co. v. Rodman*, 11 Ohio St. 2d 77, 80, 228 N.E.2d 304 (1967).

[13] See Baldwin Agreement to Arbitrate at p. 1 and Kahmann Agreement to Arbitrate at p. 1.

[14] See Mejia Agreement to Arbitrate at p. 2. ("If, in any action to enforce this Agreement, a Court of competent jurisdiction rules that the parties' agreement to arbitrate under the Model Rules for Arbitration of Employment Disputes of the American Arbitration Association is not enforceable ******." (Emphasis added.)

American Arbitration Association's ("AAA") Employment Arbitration Rules and Mediation Procedures (hereinafter "Arb. Rules"), formerly the *National Rules for the Resolution of Employment Disputes*, provide that "the 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') or under its *Employment Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying particular rules."[15] The AAA Policy on Class Arbitrations provides that "AAA administers Class Arbitrations for cases where (1) the underlying agreement specifies that disputes arising out of the parties' agreement should be resolved by arbitration and (2) the agreement is silent with respect to class claims, consolidation, or joinder of claims."[16]

The parties agreed that the Arb. Rules would apply to the arbitration of disputes. As set forth above, the Arb. Rules clearly authorize class arbitration. By agreeing to the use of the Arb. Rules, it can be reasonably inferred that the parties agreed to class arbitration. Even in *Stolt*, the Supreme Court recognized that parties may agree on the rules under which arbitration will proceed.[17]

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[15] See Arb. Rule 1. Rule 1 also provides that "[a]ny arbitration agreements providing for arbitration under [AAA's] *National Rules for the Resolution of Employment Disputes* shall be administered pursuant to these *Employment Arbitration Rules and Mediation Procedures*."

[16] http://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration/classarbitration.

[17] *Stolt*, 130 S.Ct. at 1775. See, also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (U.S. 1974). ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only

Arbitrator is to decide if collective arbitrations are permissible

The parties in this case have agreed to allow the Arbitrator to determine whether the arbitration clause in the Agreement allows for collective action arbitrations. In *Oxford Health Plans LLC vs. Sutter,*[18] the court reviewed an arbitrator's construction of an arbitration clause which provided that "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the AAA with one arbitrator."[19] The parties agreed that the arbitrator should decide whether the contract authorized class arbitration and the arbitrator determined that it did. The arbitrator reasoned that the clause sent to arbitration "'the same universal class of disputes' that it barred the parties from bringing 'as civil actions' in court."[20] Accordingly, he concluded that "on its face, the arbitration clause expresses the parties' intent that class arbitration can be maintained."[21] The Supreme Court held that under such circumstances, a court is powerless under Section 10 (a) (4) of the FAA to undo the arbitrator's finding, even if the court might have reached a different conclusion based on the language of the arbitration agreement. The court concluded that so long as the arbitrator construes the parties' contract in

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the situs of suit but also the procedure to be used in resolving the dispute."

[18] 569 U.S. ____, 133 S. Ct. 2064, 186 L. Ed.2d 113 (2013).

[19] *Oxford*, 133 S. Ct. at 2067.

[20] *Id.*

[21] *Id.*

determining whether or not the agreement provides for class action arbitration, she acts properly and within her authority.[22] (See Claimants' Notice of Supplemental Authority at p. 2).

Waiver

Respondents argue that the holding of *Oxford vs. Sutter* has no applicability here because there is direct evidence in the parties' Arbitration Agreement that the parties intended to preclude arbitration of representative claims. (See Respondents' Response to Claimants' Supplemental Authority at p. 3.) Respondents contend that the following language in the Arbitration Agreement constitutes a collective action waiver:

> Nothing herein shall preclude Employee from reporting information to or testifying before the United States Equal Employment Opportunity Commission, or similar state agency, the National Labor Relations Board; provided, however, that in the even[t] that any federal or state administrative agency or any other person brings any claim or action for monetary relief on Employee's behalf, Employee waives the right to recover or receive any such monetary relief in such claim or action, and agrees to seek relief exclusively through arbitration pursuant to this Agreement.

Agreement at p. 1.

In support of their argument that the above language is a waiver of collective arbitrations,[23] the Respondents cite to *Jones v. Genus Credit Mgmt.*[24]

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[22] *Oxford* at 2071.
[23] See Respondents' Brief at pp. 7-8.
[24] 353 F.Supp.2d 598, 603 (D.Md. 2005).

(finding arbitration clause requiring plaintiffs to not participate in any class action lawsuit constituted a waiver of plaintiffs' right to assert class claims); and *Brown v. True Blue, Inc.*[25] (finding language that neither party "shall be entitled to join or consolidate claims as a representative or member of a class, representative or collective action" constituted a waiver of right to assert class claims).[26] Claimants counter that this language shows that "the parties contemplated a collective action, where one employee might provide information or testify on behalf of others, but is not seeking to recover monetary relief on the other employee's behalf."[27]

Respondents argue that courts have found that very similar language -- precluding the parties from participating in or recovering from claims or actions brought on their behalf by others -- constitutes a class waiver; however, Respondents' reliance on *Jones* and *Brown* is misguided because both of those cases involved arbitration clauses that explicitly precluded the plaintiffs from participating in any class action or collective action.[28] In contrast, the Agreement in the instant case contains no such express prohibition.

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[25] M.D.Pa. No. 1:10-CV-0514, 2011 U.S. Dist. LEXIS 134523 (Nov. 22, 2011).
[26] See Respondents' Opposition to Claimants' Clause Construction Brief at p. 8.
[27] See Claimants' Opening Brief at p. 14.
[28] See *Brown* at *2 ("[N]either Labor Ready nor I shall be entitled to join or consolidate claims as a representative or member of a class, representative, or collective action"). See, also *Jones* at 603 (Arbitration clause required plaintiffs to "not participate in any class action law suit in connection with any such dispute.")

"A waiver is a voluntary relinquishment of a known right, with the intent to do so with full knowledge of all the facts."[29] In order for a waiver to be effective, the party executing the waiver must be fully informed of the existence of the right being waived, the meaning of the waiver, the effect of the waiver, and a full understanding of the explanation of the waiver.[30] In this case, Respondents have not established that the language of the Arbitration Agreement was sufficient to fully inform the Claimants that they had a right to collective arbitrations, that they were waiving that right, or the effect of such waiver.

It is significant that the language claimed by Respondents to constitute a waiver does not include the words "class arbitrations," "collective arbitrations," or "collective actions." Under the circumstances, there is no basis for a finding that the Agreement fully informed the Claimants that they had the right to pursue collective actions. Even if this Arbitrator was to find that the Claimants had been so informed, the language claimed by Respondents to constitute a waiver states only that the Employee waives the right to recover or receive monetary relief in a claim or action brought by any federal or state administrative agency or any other person on Employee's behalf. As this provision references only "monetary relief," there is no basis for a finding that Claimants knowingly and voluntarily waived the

[29] *RFC Capital Corp. v. Earthlink, Inc.*, 10th Dist. No. 03AP-735, 2004-Ohio-7046, 2004 WL 2980402, ¶58 (Emphasis added).
[30] *Andrew Smith Company v. Paul's Pak, Inc.*, 754 F.Supp.2d 1120, 1131.

right to bring or participate in a collective action seeking any other form of relief. Under the circumstances, Respondents' waiver argument fails.

The impact of *Stolt* and *Concepcion*

Respondents assert that, twice in recent years, the U.S. Supreme Court has held that one cannot require a party to arbitrate class claims under the FAA unless that party affirmatively agreed to do so. Respondents argue that the decisions in *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), are determinative. In *Stolt*, the arbitration clause at issue provided that "[a]ny dispute arising from the making, performance or termination of this Charter Party"[31] would be resolved by arbitration. The *Stolt* Court found that, because the parties stipulated that the arbitration clause was silent with respect to class arbitration and that there was no agreement between them to authorize class arbitration, the parties could not be compelled to submit to class arbitration. "An implicit agreement to authorize class-action arbitration *** is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate." *Stolt* at 1775. (Emphasis added.)

Stolt is, however, distinguishable from the instant matter as the parties in *Stolt* stipulated that the arbitration clause was "silent" with respect to class

[31] A "charter party" is a contract by a ship's owner allowing another person to use it to convey goods.

arbitration.[32] To the contrary, in this case, the Respondents acknowledge that the Agreement is not silent and argue that it expressly bars any collective action.[33]

Furthermore, the court in *Stolt* concluded that the arbitration panel simply imposed its own view of sound policy regarding class arbitration instead of identifying a rule of law that governs in that situation.[34] The court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[35] The court noted, however, "[w]e have no occasion to decide what contractual basis may support a finding that the parties agree to authorize a class-action. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration."[36]

The *Stolt* court made clear that it was leaving <u>open</u> the question of whether there was any contractual basis on which to find that the parties agreed to authorize class action arbitration. *Stolt* at 625, fn. 10. In other words, the *Stolt* court recognized the possibility that consent to class arbitration need not be expressly set forth in the parties' contract.

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[32] *Stolt-Nielsen v. AnimalFeeds Int'l Corp*, 559 U.S. 662, 130 S.Ct. 1758, 1766, 176 L.Ed.2d 605 (2010).
[33] See Respondents' Clause Construction Brief at 15.
[34] *Id.* at 1770.
[35] *Id.* at 1775.
[36] *Id.* at 1776, fn. 10.

In *Concepcion*, the court upheld an arbitration clause that specifically precluded class arbitrations.[37] The Arbitration Agreement in this case contains no such express prohibition. While favorably citing *Stolt,* the *Concepcion* court acknowledged that an agreement to collective arbitration procedures may arise either from the arbitration agreement itself or "some background principles of contract law that would affect its interpretation."[38]

All terms of the contract are to be given force and effect,[39] and the Parties' Agreement states expressly that "Company and Employee mutually agree that **any** dispute or controversy arising out of or in **any way** related to any 'Dispute' as defined herein, shall be resolved exclusively by final and binding arbitration." Use of this inclusive and generic term "any" on its face indicates that all claims are covered absent a demonstration of exclusion.[40] Other language included in the Agreement is also persuasive of a reading of the term "any" as including an FLSA collective claim. The Agreement defines "Disputes" to mean "any claim or action arising out of or in any way related to the hire, employment, remuneration, separation or termination of Employee." Furthermore, the Agreement provides that "it is the desire of the parties to this Agreement that, whenever possible,

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[37] The challenged clause read "the Arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding."
[38] *Concepcion,* 131 S.Ct. at 1750.
[39] *Opalinski v. Robert Half Int'l Inc.,* D.N.J. No. 10-2069, 2012 U.S. Dist. LEXIS 171815 (Dec. 3, 2012). See Tab 26 of Claimants' authorities.
[40] *See Opalinski* at *8-9.

'Disputes' relating to employment matters will be resolved in an expeditious manner." Nowhere does the Agreement state that one type of FLSA claim (one individually filed) is covered, but another type of FLSA claim (one filed on behalf of others similarly situated) is not covered.[41] Finally, the Agreement expressly excludes certain types of claims from arbitration, such as claims that an employee may have for workers' compensation benefits or unemployment compensation benefits. The fact that the Agreement did not take the extra step to exclude collective actions is further indication of an understanding that collective FLSA claims are intended to be arbitrated pursuant to the Agreement.[42]

Finally, unlike *Stolt*, *Concepcion,* and other cases cited by Respondents, there is language in the Parties' Agreement which can be interpreted as the parties contemplating an employee sending a collective action to arbitration. Specifically, Paragraph 7 of the Agreement provides that "...in the even[t] that ...any other person brings any claim or action for monetary relief on employee's behalf, employee waives the right to recover or receive any such monetary relief in such claim or action and agrees to seek relief exclusively through arbitration pursuant to this Agreement." The inclusion of the limiting phrase "for monetary relief" indicates that claims for other types of relief, such as that sought here – conditional class certification – are not prohibited.

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[41] *Id.* at *9.
[42] *Id.*

If it was Respondents' intent to bar collective actions, Respondents in drafting Paragraph 7 of the Agreement could have easily included language barring collective actions as it explicitly barred unemployment and worker compensation claims.

FLSA Claims

In addition, the Fair Labor Standards Act ("FLSA") under which Claimants have asserted their cause of action, specifically authorizes collective actions.

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.[43]

See, also *Genesis Healthcare Corp. v. Symczyk*,[44] ("Section 16(b) of the FLSA, 52 Stat. 1060, as amended, 29 U.S.C. §216(b), gives employees the right to bring a private cause of action on their own behalf and on behalf of 'other employees similarly situated' for specified violations of the FLSA. A suit brought on behalf of other employees is known as a 'collective action.'"). Arb. R. 39(d) provides that, in an arbitration conducted under AAA rules, "the arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court***." For Claimants' FLSA claim, that would include the opportunity to pursue a collective action.

[43] 29 U.S.C. §216(b).
[44] 133 S.Ct. 1523, 1527, 185 L.Ed.2d 636 (2013).

V. Conclusion

Upon consideration of the entire record including the foregoing facts, the briefs and submissions of the parties, the oral arguments of the parties, and the applicable law, the Arbitrator finds that the Arbitration Agreements signed by the Claimants permit the determination of their FLSA claims in a collective arbitration action.

Peggy Foley Jones

Arbitrator Peggy Foley Jones

8.30.13

Date