No. 09-893

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC,

Petitioner,

v.

VINCENT AND LIZA CONCEPCION,

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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May 7, 2010

This brief addresses two recent developments: the Court's decision in *Stolt-Nielsen S.A. v. Animalfeeds International*, 559 U.S. --- (Apr. 27, 2010), and the order granting certiorari, vacating, and remanding ("GVR") in light of *Stolt-Nielsen* in *American Express Company v. Italian Colors Restaurant*, No. 08-1473 (May 3, 2010).

1. *Stolt-Nielsen*—which discussed neither unconscionability nor FAA preemption—has no bearing on this case and does not undermine any of the reasons for denying review set forth in our brief in opposition.

Stolt-Nielsen concerned whether parties could be compelled to arbitrate on a classwide basis where they had not agreed to do so. That issue is not remotely present in this case, and does not bear on the question presented. Here, there is no dispute that AT&T's agreement forecloses all classwide proceedings. The issue here is not (as in *Stolt-Nielsen*) whether a party may be compelled to participate in class arbitration in the face of an agreement that does not authorize it, but rather whether the agreement itself may be held invalid, under generally applicable state contract law, because it excludes class remedies. *See* 9 U.S.C. § 2 (arbitration agreements are valid and enforceable, "save upon such grounds as exist in law or equity for the revocation of any contract").

The Court did not address that issue in *Stolt-Nielsen*, and no party raised it. Indeed, the Court made clear that the arbitral decision under review there did not rest on general contract law at all. Slip op. at 8 (panel "did not attempt to determine what rule would govern under either maritime or New York law"). And the circumstances of that case—involving a shipping contract between large and sophisticated commercial entities—would not have presented a serious question of unconscionability even if the issue had been raised.

Nor does *Stolt-Nielsen* imply any particular resolution of the question whether the FAA preempts general principles of state contract law that would render unconscionable particular agreements that foreclose class arbitration. That a valid arbitration clause may not be read to impose class arbitration on a party that never contracted to engage in it does not suggest that any arbitration clause that precludes class arbitration is necessarily valid or that declining to enforce such a clause would violate the FAA.

In any event, whatever implications *Stolt-Nielsen* might have for FAA preemption—and, in particular, for the uniform view of the state and federal courts that the FAA does not preempt state contract principles making particular class-action bans unconscionable—should be left for lower courts to unearth in the first instance. Until a court concludes that *Stolt-Nielsen* has some relevance to the question presented, or adopts AT&T's preemption theory, plenary review by this Court would be premature.

2. A GVR order is unwarranted here. Such an order is "potentially appropriate" when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration[.]" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see Wellons v. Hall*, 130 S. Ct. 727, 732 (2010) (Scalia, J., dissenting) (GVR authority is not a general "power to send back for a re-do"). Here, no such "reasonable probability" exists because, as discussed above, *Stolt-Nielsen* has no bearing on the decision below.

Nor does the GVR in *American Express* suggest the appropriateness of a GVR here. *American Express*, like *Stolt-Nielsen*, was an antitrust dispute between com-

mercial entities in which the Second Circuit found class arbitration appropriate. *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009). There, the court held that precluding classwide arbitration under the circumstances was inconsistent with *federal* law. It did not address the validity of the agreement under generally applicable state contract law, and thus did not address the question of FAA preemption.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] The petition in *American Express*, filed in May 2009, was being held for *Stolt-Nielsen* until this week. During that period, the Court denied at least one petition on the question presented here. *See Athens Disposal Co. v. Franco*, 130 S. Ct. 1050 (2010).