No. ________

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In The
# Supreme Court of the United States

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SCOUT PETROLEUM, LLC, et al.,

*Petitioners,*

v.

CHESAPEAKE APPALACHIA, LLC,

*Respondent.*

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**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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ROBERT L. PRATTER
*Counsel of Record*
STEWART L. COHEN
MICHAEL COREN
JACQUELINE P. GRUHLER
COHEN, PLACITELLA & ROTH, P.C.
2001 Market Street
Philadelphia, PA 19103
215-567-3500
rpratter@cprlaw.com

THOMAS D. KITCH
GREGORY J. STUCKY
DAVID G. SEELY
DANIEL E. LAWRENCE
FLEESON, GOOING, COULSON & KITCH, L.L.C.
1900 EPIC Center
301 N. Main
Wichita, KS 67202
316-267-7361
tkitch@fleeson.com

*Counsel for Petitioners*


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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTIONS PRESENTED

The parties' agreement to arbitrate all disagreements and disputes concerning their oil and gas leases pursuant to the American Arbitration Association ("AAA") rules expressly grants the arbitrator the authority to decide all issues of arbitrability, including the specific authority to decide whether class treatment of such disputes is permitted. The Third Circuit, however, in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016), set forth in the Appendix ("App.") hereto at App. 1, held that the parties' arbitration agreement to resolve disputes and disagreements in accordance with the AAA rules, and the terms of the AAA rules themselves, was not clear and unmistakable evidence sufficient to overcome the presumption that the court, and not the arbitrator, had the power to decide the permissibility of class arbitration. This holding gives rise to the following questions:

1. Does the Third Circuit opinion conflict with decisions of other circuits which hold that arbitration agreements incorporating the AAA rules generally and specifically delegate all issues of arbitrability to the arbitrator, including whether the arbitrator has the authority to decide if class arbitration is permitted?

2. Does the Third Circuit opinion conflict with Supreme Court precedent and other circuits' application of the clear and unmistakable standard in construing the arbitration agreement in a manner which is consistent with other contracts under the Federal Arbitration Act ("FAA") and state law?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners Scout Petroleum, LLC and Scout Petroleum II, LP were defendants in the district court and appellants in the Third Circuit. Respondent, Chesapeake Appalachia, LLC, was the plaintiff in the district court and appellee in the Third Circuit. Scout Petroleum, LLC and Scout Petroleum II, LP have no parent corporation or publicly held corporation owning 10% or more of their stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Third Circuit Court of Appeals issued on January 5, 2016, in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) ("*Scout*"). App. 1.

The Third Circuit's decision conflicts in material ways with decisions by other circuits which have enforced both the general and specific delegations of authority to the arbitrators to decide all issues of arbitrability, including whether class arbitration proceedings are permitted by the parties' contract. The Third Circuit decision also applies a more onerous standard than other circuits for determining whether the parties have delegated the decision-making authority to the arbitrator. Under the Third Circuit's more onerous standard, the plain words of the arbitration agreement and the AAA rules incorporated in the agreement are not sufficient to establish that the parties intended to delegate to the arbitrator the decision on whether class arbitration is permitted. This holding conflicts with Supreme Court precedent on how to construe arbitration agreements, other circuits' decisions, and state law applicable to all contracts.

## OPINIONS BELOW

The United States Third Circuit Court of Appeals opinion is reported at *Chesapeake Appalachia, LLC v.*

*Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016), and reproduced at App. 1. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC*, No. 4:14-CV-0620, 2014 WL 5370683 (M.D. Pa. Oct. 16, 2014), *modified on denial of reconsideration*, 73 F. Supp. 3d 488 (M.D. Pa. 2014), *aff'd sub nom. Chesapeake Appalachia, LLC v. Scout Petroleum LLC*, 809 F.3d 746 (3d Cir. 2016). The district court orders and opinions, and the opinion of the AAA arbitrators, are reproduced at App. 46-109.

## JURISDICTION

The judgment of the Third Circuit was entered on January 5, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

Pertinent sections of the FAA and the AAA rules are set forth at App. 110-116.

## STATEMENT OF THE CASE

Chesapeake Energy Corporation is the second largest natural gas producer in the United States and, through its subsidiary, Chesapeake Appalachia,

LLC ("Chesapeake"), is the lessee under hundreds of oil and gas leases in the Marcellus Shale region of Pennsylvania.[1] Petitioners Scout Petroleum, LLC and Scout Petroleum II, LP (collectively "Scout" or "Petitioners") are among the hundreds of Pennsylvania lessor-royalty owners under individual form leases authored by Chesapeake, which contain an identical gas royalty clause (except for some differing royalty percentages) and an identical arbitration clause. The gas royalty clause provides that Chesapeake shall pay the lessor-royalty owners a certain percentage (typically 12.5%) of the proceeds Chesapeake receives from the sale of gas, minus four specific charges:

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[1] The Marcellus Shale is a geologic horizontal formation found throughout the Allegheny Plateau of the northern Appalachian basin beginning in southern New York, and extending through Pennsylvania, eastern Ohio, western Maryland, most of West Virginia and terminating in Virginia. Technological advances in gas and oil well drilling techniques called hydraulic fracturing, created a natural gas well development boom in Pennsylvania and other states located in the Marcellus Shale region beginning in the mid-2000s. Katherine W. Schmid, *The Marcellus Shale Gas Play – Geology and Production and Water Management, Oh My!*, 42 Pennsylvania Geology 3, 3-4 (Summer 2012), *available at* http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20027757.pdf; *see also* John A. Harper, *The Marcellus Shale – An Old "New" Gas Reservoir in Pennsylvania*, 38 Pennsylvania Geology 2, 2-5, 9-12 (Spring 2008), *available at* http://www.dcnr.state.pa.us/cs/groups/public/documents/document/ dcnr_006811.pdf; John A. Harper & Jamie Kostelnik, *The Marcellus Shale Play in Pennsylvania*, Pennsylvania Geological Survey, Pennsylvania Department of Natural Resources and Conservation, http://www.marcellus.psu.edu/resources/PDFs/DCNR.pdf (last visited March 24, 2016).

transportation, treatment, processing and volume deduction to the point of measurement.

The form leases' arbitration clause provides:

> ARBITRATION. In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

App. 4.

In March 2014, Petitioners instituted a class arbitration against Chesapeake before the AAA on behalf of Scout and a putative class of Pennsylvania lessor-royalty owners who have received royalties from Chesapeake under their form leases. Petitioners contended that Chesapeake had breached the leases by deducting charges for compression, gathering and other charges not authorized by the form leases, and thereby had underpaid royalties to Scout and the other putative class members in exactly the same manner.

Shortly thereafter, Chesapeake filed a declaratory judgment complaint in the United States District Court for the Middle District of Pennsylvania ("Middle District") seeking a declaration that (1) only the district court, and not the arbitrator, may decide if

class arbitration is permitted under the arbitration agreement in the leases, and (2) the arbitration clause does not permit class arbitration. The district court had diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332.

As it happened, another class of lessor-royalty owners, under a different lease form with Chesapeake, also filed an AAA class arbitration against Chesapeake, which Chesapeake had also taken to the Middle District seeking the same form of declaratory judgment it was seeking against Scout. *Chesapeake Appalachia, LLC v. Burkett*, Civil Action No. 3:13-3073 (M.D. Pa. filed Dec. 20, 2013) ("*Burkett*"). The *Scout* and *Burkett* cases were assigned to different judges. After Chesapeake had filed its declaratory judgment action against Petitioners, Scout and Chesapeake agreed to the appointment of a three member arbitration panel consisting of three retired federal district court judges, including a former chief judge of the United States District Court for the Eastern District of Pennsylvania.[2]

In the Middle District *Scout* case, Petitioners filed a motion to dismiss, or in the alternative for stay, and Chesapeake filed a motion for partial summary judgment on count I of its complaint seeking a determination that the district court, and not the arbitrators, had the exclusive authority to decide if a

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[2] The arbitration panels in both *Scout* and *Burkett* were the same three retired federal district court judges.

class arbitration is permitted (the "who decides" question). While these motions were pending in the Middle District, the Third Circuit handed down an opinion in *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015), holding that class arbitration is a "gateway" issue of arbitrability, and that the district court – not the arbitrator – is to determine whether the parties' arbitration agreement permits class treatment, unless the agreement "clearly and unmistakably" delegates that decision to the arbitrator. 761 F.3d at 335-36. *Opalinski* represented a change in Third Circuit jurisprudence. Prior to *Opalinski*, the Third Circuit had held that the permissibility of class arbitration was not a question of arbitrability, but rather a procedural question to be decided by the arbitrator, even if the arbitration agreement was silent on class arbitration. *See, e.g.*, *Quilloin v. Tenet Health System Philadelphia, Inc.*, 673 F.3d 221, 232-33 (3d Cir. 2012) (relying on *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684-85 (2010)); *see also Vilches v. Travelers Companies, Inc.*, 413 Fed. Appx. 487, 491 (3d Cir. 2011).

After the *Opalinski* decision, and while the district court motions were pending, Scout and Chesapeake briefed the "who decides" question to the arbitrators. Following a hearing, the arbitrators ruled that they had the authority under the arbitration agreement to determine if a class arbitration was permitted. The arbitration panel specifically considered *Opalinski* and ruled that, unlike the arbitration

agreements in *Opalinski*, the arbitration agreement in the form leases was not silent on class arbitration. To the contrary, the arbitrators found that the parties had agreed to submit all disputes and disagreements to arbitration, and, under the standard rules of contract construction, had clearly and unmistakably delegated the decision on permissibility of class arbitration to the arbitrators, in accordance with the AAA rules that the parties had incorporated in the agreement:

> We conclude that the arbitration contract in this case clearly and unmistakably authorizes the Panel to make the decision about arbitrability. We base our decision on the breadth of the language of the Leases, and the incorporation of the AAA rules which, at the time of the contract's execution, included the Supplementary Rules for Class Arbitrations. Under the standard rules of contract interpretation, the intent of the parties is clear – that they intend to be governed by the Supplementary Rules including the rule requiring the Panel to decide arbitrability.

App. 101. The parties did not brief, and the arbitrators did not then address, the subsequent "clause construction" question of whether class arbitration was permitted by the form leases.

Shortly after the arbitrators' partial award on the "who decides" question, Chesapeake moved the federal district court to vacate the AAA panel decision. In a series of orders and opinions, the *Scout* district

court ruled that the arbitrators did not have authority to determine class arbitrability, and entered an order vacating the arbitrators' decision and granting summary judgment in favor of Chesapeake on the "who decides" question. App. 93. The following day, the *Burkett* district court considered the same question and ruled the opposite way, sustaining the arbitrators' authority to decide on class arbitration. *Chesapeake Appalachia, LLC v. Burkett*, Civil Action No. 3:13-3073, 2014 WL 5312829 (M.D. Pa. Oct. 17, 2014). Thereafter, Petitioners asked the *Scout* district court to reconsider its decision. The district court denied that motion on December 19, 2014 in an opinion and order modifying the October 16, 2014 decision. App. 46-89.

The *Scout* district court certified its opinion for an interlocutory appeal to the Third Circuit under 28 U.S.C. § 1292(b), which the Third Circuit granted on January 21, 2015. Chesapeake also appealed the *Burkett* decision to the Third Circuit, which appeal was subsequently stayed pending a proposed class action settlement in that case, which remains pending. App. 11-12, n.1.

On January 5, 2016, the Third Circuit affirmed the *Scout* district court, holding that Scout had failed to prove that the arbitration agreement clearly and unmistakably delegated to the arbitrators the authority to decide if class arbitration was permitted. App. 16.

## REASONS FOR GRANTING CERTIORARI

This Court has not decided whether the availability of class arbitration is a "gateway" issue of arbitrability, which is presumed to be for judicial determination in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013); *see also Stolt-Nielsen* 559 U.S. at 679; *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003) (plurality opinion holding that the question of class arbitration permissibility is not a gateway question of arbitrability, but an issue the arbitrator should decide under the parties' agreement). However, the Third Circuit so held in *Opalinski*. 761 F.3d at 335-36. Whether or not *Opalinski* correctly predicted this Court's ultimate determination on the question left open by *Bazzle* and its progeny, Scout contends that it met the clear and unmistakable standard. The arbitration agreement between the parties, including the AAA rules incorporated in the agreement, in the most express terms possible, clearly gives the arbitrators the authority to decide if a class arbitration is permitted. The Third Circuit opinion has created a split of authority among the circuits concerning the enforcement of the AAA rules incorporated into arbitration agreements. The Third Circuit in this case has also not applied the standard rules of contract construction to glean the parties' intent on the "who decides" question as required by this Court, followed by other circuits, and in accordance with state law. To the contrary, the Third Circuit has created a more

onerous standard, which does not recognize the terms of the parties' agreement itself and the AAA rules as clear and unmistakable evidence of the parties' intent to have the arbitrator decide whether their contract permits class arbitration. Under the Third Circuit's more onerous standard:

> [I]t is not enough for Scout to establish that the AAA rules provide for arbitrators to decide, *inter alia*, the question of class arbitrability, and that, in turn, these rules are incorporated by reference pursuant to state law. It instead must present "clear and unmistakable evidence" of an agreement to arbitrate this specific question.

App. 33.

This Court has ruled upon arbitrator's decisions on the permissibility of class arbitration, but in the aftermath of the *Bazzle* plurality decision has not decided whether the parties' express agreement to arbitrate all disputes and disagreements in accordance with the AAA rules is sufficient to delegate to the arbitrator the authority to decide if class arbitration is permitted. *Oxford Health*, 133 S. Ct. at 2068 n.2; *see also Stolt-Nielsen*, 559 U.S. at 679. Petitioners are seeking this Court's review of the Third Circuit's more onerous standard and to resolve the split among the circuits on this important question.

## I. THE THIRD CIRCUIT OPINION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS WHICH HOLD THAT AN ARBITRATION AGREEMENT'S INCORPORATION OF THE AAA RULES CLEARLY AND UNMISTAKABLY DELEGATES TO THE ARBITRATOR ALL ISSUES OF ARBITRABILITY, INCLUDING CLASS ARBITRATION PERMISSIBILITY.

The Third Circuit readily agreed with Petitioners that "virtually every Circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." App. 39 (internal citations omitted). The court's opinion, however, does not directly discuss these other circuit courts' opinions or their reasoning, other than two decisions by the Fifth and Eleventh Circuits, discussed *infra* at pp. 17-19, 24-25, with which the Third Circuit disagreed.

In *Awuah v. Coverall North Am., Inc.*, 554 F.3d 7 (1st Cir. 2009), the First Circuit observed that incorporation of AAA Commercial Rule 7(a) constitutes a clear and unmistakable delegation of arbitrability issues to the arbitrator. 554 F.3d at 11. The court noted that, "Rule 7(a) says plainly that the arbitrator may 'rule on his or her own jurisdiction' including any objection to the 'existence, scope or validity of the arbitration agreement.' This is about as 'clear and unmistakable' as language can get. . . ." *Id*. (internal citations omitted).

The Second Circuit, in *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), likewise held that when parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator. 398 F.3d at 208.

In *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671 (5th Cir. 2012), the Fifth Circuit stated that, "[w]e agree with most of our sister Circuits that the express adoption of these [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." 687 F.3d at 675.

The same result was reached by the Eighth Circuit in *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009), where the court said, "we conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." 559 F.3d at 878.

Finally, in *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005), the Eleventh Circuit held that, "[b]y incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the

arbitrator should decide whether the arbitration clause is valid."[3] 432 F.3d at 1332.

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[3] Case law in other circuits, found in both circuit and district court decisions, is consistent with the cases cited above:

Seventh Circuit: *Gilman v. Walters*, 61 F. Supp. 3d 794, 800-01 (S.D. Ind. 2014) (holding that the arbitration provision's incorporation of the AAA Rules is a clear and unmistakable expression of intent by the parties to leave the question of arbitrability to an arbitrator); *see also Price v. NCR Corp.*, 908 F. Supp. 2d 935, 945 (N.D. Ill. 2012) (class arbitration case in which the court found that "the parties' agreement to proceed 'under the AAA's rules' incorporates the Supplementary Rules for Class Arbitrations."); *Yellow Cab Affiliation, Inc. v. New Hampshire Ins. Co.*, No. 10-cv-6896, 2011 WL 307617, at *4 (N.D. Ill. Jan. 28, 2011) ("[B]y specifically incorporating the Commercial Arbitration Rules of the [AAA] into their agreement, the parties clearly and unmistakably evidenced their intention to grant the arbitrator the authority to determine whether their dispute is arbitrable.").

Ninth Circuit: *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (incorporation of the AAA rules into an arbitration provision of an employment agreement constituted clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator); *see also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (contract's incorporation of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules constitutes clear and unmistakable evidence of parties' intent to delegate questions of arbitrability to the arbitral panel); *Accentcare, Inc. v. Jacobs*, No. C 15-03668 JSW, 2015 WL 6847909, at *3-*4 (N.D. Cal. Nov. 9, 2015) (class arbitration case in which the court found incorporation of the AAA Rules was clear and unmistakable, that the AAA Supplementary Rules for Class Arbitration then applied, and the arbitrator was therefore the designated party to determine the "who decides" question); *Marriott Ownership Resorts, Inc. v. Flynn*, Civil No. 14-00372 JMS-RLP, 2014 WL 7076827, at *7-*8 (D. Haw. Dec. 11, 2014) (class

(Continued on following page)

arbitration case in which the court found incorporation of the AAA commercial arbitration rules was clear and unmistakable evidence of an agreement that an arbitrator is to determine availability of class arbitration), *appeal dismissed*, No. 15-15024 (9th Cir. April 9, 2015).

Tenth Circuit: *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867-68 (10th Cir. 1999) (determining that a party is bound by all procedural rules of the AAA when the party incorporates the AAA rules by reference); *see also Getzelman v. Trustwave Holdings, Inc.*, Civil Action No. 13-cv-02987-CMA-KMT, 2014 WL 3809736, at *3 (D. Colo. Aug. 1, 2014) (citing Rule 6(a) of the AAA Rules and holding that "by incorporating the AAA Rules and agreeing to be bound by these rules, the parties 'clearly and unmistakably' evidenced their intent to arbitrate all matters, including the question of arbitrability."); *Chen v. Dillard's Inc.*, No. 12-CV-2366-CM, 2012 WL 4127958, at *2 n.1 (D. Kan. Sept. 19, 2012) ("The incorporation of these [AAA] rules is additional clear and unmistakable evidence that the parties intended for the arbitrator to decide threshold issues of arbitrability.").

District of Columbia Circuit: *Mercadante v. XE Servs., LLC*, 78 F. Supp. 3d 131, 138-39 (D.D.C. 2015) (holding that incorporation of AAA rules clearly and unmistakably submitted questions of arbitrability to an arbitrator); *see also W & T Travel Servs., LLC v. Priority One Servs., Inc.*, 69 F. Supp. 3d 158, 167-68 (D.D.C. Sept. 25, 2014) ("While the D.C. Circuit has not addressed the issue, courts both within and outside this jurisdiction have held that an arbitration clause adopting the rules of the AAA makes the issue of arbitrability one for the arbitrator, not the court."), *appeal dismissed*, No. 14-7152, 2015 WL 7693578 (D.C. Cir. Nov. 2, 2015); *Haire v. Smith, Currie & Hancock LLP*, 925 F. Supp. 2d 126, 132-33 (D.D.C. 2013) (holding that incorporation of AAA Rules delegated arbitrability to the arbitrator).

Federal Circuit: *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (holding agreement which incorporated AAA Rules, "clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator.").

The plain terms of the AAA rules enforced by the other circuits clearly and unmistakably delegate to the arbitrator the authority to determine all issues of arbitrability.

Rule 1(a) of the AAA Commercial Rules provides:

> 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) under its Commercial Arbitration Rules *or for an arbitration by the AAA of a domestic commercial dispute without specifying particular rules*. . . . Any dispute regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

App. 113 (emphasis added).

Rule 7 of the AAA Commercial Rules states:

> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be

> treated as an agreement independent of the other terms of the contract. . . .
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

App. 113-114.

Similarly, Rule 8 of the AAA Commercial Rules states, in pertinent part: "The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties." App. 114.

All of the cases cited above recognize that when parties to a contract incorporate by reference the AAA rules into their agreement, they have by definition, clearly and unmistakably conferred upon the arbitrator the authority to determine all issues of arbitrability. The Third Circuit, however, rejected all such contrary authority, concluding that "'bilateral arbitration case law' is entitled to relatively little weight in the class arbitrability context." App. 40. Instead, the Third Circuit said that under its more onerous standard it was looking for some other clear and unmistakable evidence of an agreement to arbitrate this specific question. App. 33.

Contrary to the Third Circuit's opinion, nothing in *Stolt-Nielson*, *Oxford Health* or any other Supreme

Court decision, suggests that the AAA Commercial Rules' general delegation of authority to the arbitrator to decide all issues of arbitrability is not sufficient to enable the arbitrator to decide the permissibility of class arbitration. But, even if such general authority were not sufficient, other circuits have held that the AAA Supplementary Rules for Class Arbitrations (the "AAA Supplementary Rules") clearly and unmistakably delegate to the arbitrator the authority to make the *specific* determination whether class arbitration is permitted.

In a further split with the Fifth Circuit decision in *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012), *abrogated in part on other grounds, Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the Third Circuit did not recognize as sufficient the AAA Supplementary Rules, which were adopted in 2003 after *Bazzle* and before Chesapeake had drafted, and the parties had executed, the form leases. The parties' arbitration agreement incorporating the AAA rules includes the Supplementary Rules. AAA Supplementary Rule 1(a) specifically provides that:

> These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to *any* of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against

> a class or purported class, and shall supplement *any other* applicable AAA rules.

App. 114-115 (emphasis added).

Supplementary Rule 3 establishes the specific power of the arbitrator to decide if class arbitration is permitted:

> Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award").

App. 115-116.

The Third Circuit nevertheless opined that the Supplementary Rules do not constitute clear and unmistakable evidence of the parties' agreement to delegate the specific issue of class arbitrability to the arbitrator because the arbitration agreement and the AAA rules constitute "a daisy-chain of cross references." App. 34. However, the "daisy-chain" label does not apply. To the contrary, the provisions in the above quoted Supplementary Rules in one step clearly state that they apply to all arbitrations under, and supplement, any other rules of the AAA. Moreover, in *Stolt-Nielsen*, this Court was not confused by the Third Circuit's claimed "daisy-chain," or the applicability of the Supplementary Rules, when stating that "[Supplementary] Class Rule 3, in accordance with the plurality opinion in [*Green Tree Financial Corp. v.*

*Bazzle*] requires an arbitrator, as a threshold matter, to determine 'whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.'" 559 U.S. at 668 (internal citations omitted).

The Third Circuit's refusal to enforce the Supplementary Rules conflicts directly with the Fifth Circuit's decision in *Reed* which reasoned that "the parties' agreement to the AAA's Commercial Rules also constitutes consent to the Supplementary Rules." 681 F.3d at 635. The Fifth Circuit held, given the substance of Supplementary Rule 3, "[t]he parties' consent to the Supplementary Rules, therefore, constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration." *Id*. at 635-36.[4]

The Third Circuit did not follow the clear weight of authority from other circuits, but instead chose to follow the Sixth Circuit decision in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013). *Reed Elsevier* is not persuasive authority because it misapplies *Stolt-Nielsen* in the same way as the Third Circuit, and only discusses the AAA Rules in the context of deciding clause construction, which was not the issue before the Third Circuit. Moreover, in its passing

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[4] The Third Circuit recognized that the Eleventh Circuit's decision in *Southern Communications Services, Inc. v. Thomas*, 720 F.3d 1352, 1359 n.6 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1001 (2014), was in close accord with the Fifth Circuit's decision in *Reed*. App. 43, n.7.

reference to Supplementary Rule 3, the Sixth Circuit overlooked the indisputable fact that the Supplementary Rules, in the most express terms possible, provide that the arbitrator makes the decision on class arbitration permissibility.

The Third Circuit's ruling creates a conflict among the circuits regarding whether the AAA Commercial Rules clearly and unmistakably delegate general authority to the arbitrator to make all arbitrability decisions, including the permissibility of class arbitration. There is also a more specific conflict between the Third and Fifth Circuits regarding whether the AAA Supplementary Rules clearly and unmistakably delegate specific authority to the arbitrator to make class arbitrability decisions. This Court should resolve these conflicts.

## II. THE THIRD CIRCUIT OPINION CONFLICTS WITH SUPREME COURT PRECEDENT AND OTHER CIRCUITS' APPLICATION OF THE CLEAR AND UNMISTAKABLE STANDARD AND CONSTRUCTION OF ARBITRATION CONTRACTS UNDER THE FEDERAL ARBITRATION ACT ( "FAA") AND STATE LAW.

Section 2 of the FAA provides that:

> A written provision in any . . . contract . . . evidencing a transaction involving commerce . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable,

> save upon such grounds as exist at law or in equity for the revocation of any contract.

App. 110.

Consistent with this statutory command, the Supreme Court has held that arbitration agreements must be "rigorously enforced" according to their terms. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013). Assuming that *Opalinski* correctly decided that who decides permissibility of class arbitration is a question of arbitrability, parties may nevertheless agree to have an arbitrator decide the issue, if the parties' agreement clearly and unmistakably so provides. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). More recently, in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), this Court noted that:

> [T]he delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . This line of cases merely reflects the principle that arbitration is a matter of contract.

561 U.S. at 68-69 (citing *Howsam*, 537 U.S. at 83-85; *Bazzle*, 539 U.S. at 453).

The Third Circuit acknowledges, as it must, that Pennsylvania law requires it to include the incorporated AAA rules in determining the intent of the parties. App. 32-33. The court further states that it is reasonable to conclude that the arbitration agreement authorizes the arbitrator to decide class arbitrability. App. 37-38. However, the Third Circuit refuses to apply the incorporated rules as required by state law, but holds in two passages of its opinion that the words of the arbitration agreement and the incorporated AAA rules themselves are insufficient to establish that the parties agreed to the arbitrator's authority to decide the permissibility of class arbitration:

> [I]t is not enough for Scout to establish that the AAA rules provide for arbitrators to decide, *inter alia*, the question of class arbitrability, and that, in turn, these rules are incorporated by reference pursuant to state law. It instead must present "clear and unmistakable evidence" of an agreement to arbitrate this specific question.

App. 33.

> As a practical matter, the absence of an "incantation" – or the lack of any express reference to class arbitration, the Supplementary Rules, or who decides whether the arbitration agreement permits class arbitration – makes it more difficult to meet such burdens. . . . In fact, the burden that must be met in the present "who decides" context appears even more "onerous" than the equivalent

> burden applicable to the "clause construction" phase. . . . [T]he burden of overcoming the presumption "requires express contractual language unambiguously delegating the question of [class] arbitrability to the arbitrator."

App. 29-30 (citing *Opalinski*, 761 F.3d at 335).

As discussed above at pp. 17-20, the Supplementary Rules' plain, express words are the express contractual language unambiguously delegating the question to the arbitrator to decide. And the Third Circuit decision conflicts with the Fifth Circuit's contrary decisions on this very point.

The Third Circuit based its holding on its reading of *Stolt-Nielsen* as signaling that this Court will not apply the normal rules of contract construction to determine the parties' intent on the question of who decides whether class arbitration is permitted. But, the Third Circuit misread *Stolt-Nielsen*. As confirmed in *Oxford Health*, this Court in *Stolt-Nielsen* was not reviewing the "who decides" question, but instead examining the substance of an arbitration panel's decision to permit class arbitration in which the parties' agreement – unlike the arbitration agreement in *Scout* – said nothing about the issue of class arbitration. *Stolt-Nielsen*, 559 U.S. at 673.

The Third Circuit also failed to recognize that this Court's comments in *Stolt-Nielsen*, on the differences between bilateral and class arbitration, had nothing to do with the binding effect of the AAA rules and the arbitrators' authority to decide class arbitration

permissibility. Instead, this Court found fault with the arbitrators' failure to base their substantive decision permitting class arbitration on some controlling legal authority. This Court reversed the arbitrators' decision in *Stolt-Nielsen* permitting class arbitration because they had based their decision on their own view of sound policy instead of what the contract said. *Id*. at 672, 675.

The Third Circuit has violated the central tenet of *Stolt-Nielsen*'s holding. The court has abandoned the clear and ummistakable standard as it is required to be applied based upon the terms of the agreement and the AAA rules. In reality, the Third Circuit's more onerous standard reflects its policy views on class arbitrations instead of what the contract says.[5]

The Fifth Circuit has recently affirmed its prior rulings that "*Stolt-Nielsen* does not overrule prior Supreme Court and Fifth Circuit decisions requiring questions of arbitrability, including the availability of class mechanisms to be deferred to arbitration by agreement." *Robinson v. J&K Admin. Mgmt. Servs., Inc.*, No. 15-10360, 2016 WL 1077102, at *3 (5th Cir. Mar. 17, 2016). The Fifth Circuit in *Robinson* also rejects the Third Circuit conclusion that *Stolt-Nielsen* enunciated a national policy against class

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[5] The Third Circuit did not address that it had ruled four years earlier, based on its then understanding of *Stolt-Nielsen*, that class arbitration was not a question of arbitrability, but a procedural question to be decided by the arbitrator. *Quilloin*, 673 F.3d at 232-33.

arbitration that precludes arbitrators from determining the availability of class arbitration procedures. *Id.* *Robinson* also affirmed its earlier holding in *Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) that:

> [W]hen an agreement includes broad coverage language, such as a contract clause submitting "*all* disputes, claims or controversies arising from or relating to" the agreement to arbitration, then the availability of class or collective arbitration is an issue arising out of the agreement that should be determined by the arbitrator.

2016 WL 1077102, at *2 (quoting *Pedcor Mgmt.*, 343 F.3d at 359) (emphasis in original).

The Fifth Circuit also follows the plurality opinion in *Bazzle* that the parties' dispute over whether their agreement forbids class arbitration itself is a dispute relating to the underlying contract between the parties that they agreed to have an arbitrator decide. *Bazzle*, 539 U.S. at 451.

Even before the Fifth Circuit decision in *Robinson*, the Third Circuit had disagreed with the Fifth Circuit by observing that the Fifth Circuit in *Reed* did not apply the "onerous" burden standard of proof, which the Third Circuit views applicable to AAA rules incorporation provisions where class arbitration, as opposed to bilateral arbitration, is involved. App. 43, n.7. The Fifth Circuit's decision in *Robinson* confirms

that the two circuits have very different views, and apply different standards, in resolving the question of who decides the permissibility of class arbitration.

The Third Circuit's onerous burden standard of proof for construing the arbitration agreement also warrants this Court's review because it conflicts with this Court's holdings that arbitration agreements must be on the same footing as other contracts under state law and that interpretation of contracts is ordinarily a matter of state law. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015) (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *but see* App. 33, n.5 (rejecting, as inapplicable, Scout's reliance on *DIRECTV, Inc.*). Also, at the time Chesapeake had drafted, and the parties had executed the form leases, Pennsylvania case law had approved class arbitration as a fair and economical means of resolving all disputes under form agreements. *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992). As noted by this Court, "contracts . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the [parties] thereby contracting." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (quoting *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912) (ellipses in original)).

The Third Circuit opinion does not satisfy any of these Supreme Court mandates. Under the generally applicable rules of contract construction in Pennsylvania, and in other states which the other circuits have followed in their decisions discussed *supra* at pp. 11-20, courts must give contract language its plain and ordinary meaning; and courts may not change the terms of a contract under the guise of interpretation. *Wert v. Manorcare of Carlisle, PA, LLC*, 124 A.3d 1248, 1261 (Pa. 2015) (plurality opinion); *see also TruServ Corp. v. Morgan's Tool & Supply Co.*, 39 A.3d 253, 260 (Pa. 2012); *Delaware County v. Delaware County Prison Employees Independent Union*, 713 A.2d 1135, 1138 (Pa. 1998). Moreover, courts cannot ascertain the parties' intent by ignoring parts of the contract, as the Third Circuit has done by rejecting the parties' express agreement to arbitrate all disputes and disagreements in accordance with the AAA rules. *See Murphy v. Duquesne Univ. of The Holy Ghost*, 777 A.2d 418, 432 (Pa. 2001). When the parties have entered into a written agreement, the writing must be taken as the final expression of their intention. In interpreting written agreements, courts may not assume that the language was chosen carelessly or that the parties were ignorant of the meaning of the language employed. Nor can a court hypothetically speculate, as the Third Circuit has done, about the parties' subjective intent in incorporating the AAA rules (App. 38) and in so doing not enforce the agreement as written. *See Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982) (citing *In re Breyer's Estate*, 379 A.2d 1305, 1309 n.5 (Pa. 1977)).

## III. THIS CASE PRESENTS IMPORTANT QUESTIONS THAT SHOULD BE ADDRESSED BY THE SUPREME COURT

The Court should review the Third Circuit's decision that creates a more onerous standard for determining whether an arbitration clause clearly and unmistakably delegated to the arbitrator the decision on the permissibility of class arbitration. The Third Circuit opinion conflicts with this Court's decisions under the FAA on how to apply the clear and unmistakable standard and conflicts with other circuits' decisions and state law applicable to all contracts.

The Third Circuit decision also conflicts with cases decided by the other circuits, and particularly the Fifth Circuit, which have enforced both the general and specific delegations of authority to arbitrators in the AAA rules to decide all issues of arbitrability, including whether class arbitrations are permitted by the contract.

This Court's consideration of the issues presented in this petition is necessary to resolve the dispute among the circuits and bring predictability and uniformity in treatment to the many contracting parties who have agreed to resolve their disputes and disagreements in accordance with the AAA rules, which expressly authorize their chosen arbitrators to decide if class arbitration is permitted.

## CONCLUSION

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

Respectfully submitted,

ROBERT L. PRATTER
*Counsel of Record*
STEWART L. COHEN
MICHAEL COREN
JACQUELINE P. GRUHLER
COHEN, PLACITELLA & ROTH, P.C.
2001 Market Street
Philadelphia, PA 19103
215-567-3500
rpratter@cprlaw.com

THOMAS D. KITCH
GREGORY J. STUCKY
DAVID G. SEELY
DANIEL E. LAWRENCE
FLEESON, GOOING, COULSON & KITCH, L.L.C.
1900 EPIC Center
301 N. Main
Wichita, KS 67202
316-267-7361
tkitch@fleeson.com

*Counsel for Petitioners*

**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 15-1275

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CHESAPEAKE APPALACHIA, LLC

v.

SCOUT PETROLEUM, LLC;
SCOUT PETROLEUM II, LP,

Appellants

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 4-14-cv-00620)
District Judge: Hon. Matthew W. Brann

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Argued October 8, 2015

BEFORE: SHWARTZ, KRAUSE,
and COWEN, *Circuit Judges*

(Opinion Filed: January 5, 2016)

Stewart L. Cohen, Esq.

Michael Coren, Esq.
Jacob A. Goldberg, Esq.
Alessandra C. Phillips, Esq.
Robert L. Pratter, Esq. (Argued)
Cohen, Placitella & Roth
2001 Market Street

Two Commerce Square, Suite 2900
Philadelphia, PA 19103

Thomas D. Kitch, Esq.
Daniel E. Lawrence, Esq.
David G. Seely, Esq.
Gregory J. Stucky, Esq.
Fleeson, Gooing Coulson & Kitch
301 North Main Street
1900 Epic Center
Wichita, KS 67202

Counsel for Appellants

Daniel T. Brier, Esq.
Myers, Brier & Kelly
425 Spruce Street
Suite 200
Scranton, PA 18503

Daniel T. Donovan, Esq. (Argued)
Ragan Naresh, Esq.
Kirkland & Ellis
655 15th Street, N.W.
Suite 1200
Washington, DC 20005

Counsel for Appellee

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OPINION OF THE COURT

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COWEN, *Circuit Judge*.

In *Opalinski v. Robert Half International Inc.*, 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015), we held that the availability of class

arbitration constitutes a "question of arbitrability" to be decided by the courts – and not the arbitrators – unless the parties' arbitration agreement "clearly and unmistakably" provides otherwise, *id.* at 329, 335-36.

Scout Petroleum, LLC and Scout II, LP (collectively, "Scout") appeal from the orders of the United States District Court for the Middle District of Pennsylvania granting Chesapeake Appalachia, LLC's ("Chesapeake") motions for summary judgment and for an order vacating a decision by the arbitrators and denying Scout's own motion to dismiss the complaint as well its motion for reconsideration. The oil and gas leases ("Leases") at issue in this appeal state that, in the event of a disagreement between "Lessor" and "Lessee" concerning "this Lease," performance "thereunder," or damages caused by "Lessee's" operations, "all such disputes" shall be resolved by arbitration "in accordance with the rules of the American Arbitration Association." (A247.) Based on the language of the Leases themselves, the nature and contents of the various AAA rules, and the existing case law, we conclude that the Leases do not "clearly and unmistakably" delegate the question of class arbitrability to the arbitrators. Accordingly, we will affirm.

I.

In 2008, Chesapeake entered into various oil and gas leases with landowners in several northeastern Pennsylvania counties. Chesapeake is the "Lessee,"

and the "Lessor" is (or originally was) the respective landowner, e.g., "[t]his Lease made this **10th** day of **January**, 2008, by and between: **William D. Bergey and Joanne M. Bergey, husband and wife** . . . hereinafter collectively called 'Lessor' and **CHESAPEAKE APPALACHIA, L.L.C.,** an Oklahoma limited liability company . . . hereinafter called 'Lessee.'" (A246.) The Leases indicate that they were "prepared by" Chesapeake. (A248.) In 2013, Scout purchased the right to several Leases, and, since then, it has been receiving royalties from Chesapeake.

The Leases include the following arbitration provision:

> ***ARBITRATION.*** In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

(A247.)

Over the years, the AAA has adopted and amended several rules applicable to various kinds of arbitration and mediation proceedings. Active Rules, American Arbitration Association, https://www.adr.org/aaa/faces/rules/searchrules/rulesearchresult?x_rule_status=A (last visited Nov. 10, 2015). The AAA website lists more

than fifty sets of active rules, including the Commercial Arbitration Rules and Mediation Procedures ("Commercial Rules") as well as the Supplementary Rules for Class Arbitrations ("Supplementary Rules"). *Id.*

The AAA's "Commercial Arbitration and Mediation Procedures" publication is nearly fifty pages long and includes fifty-eight different "Commercial Rules." These rules are couched in terms of individual or "bilateral" arbitration proceedings as opposed to proceedings on behalf of a class. They also generally address basic procedural issues. For example, there are rules governing the requirements for filing demands and answers, mediation, the arbitration proceeding's locale, pre-hearing production of information, basic guidelines for how the hearing should be conducted, and the timing, form, and scope of the arbitrator's award. Commercial Rule 1 ("Agreement of Parties") provides in relevant part that:

> **(a)** 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) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission

> Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(A93.) Commercial Rule 7 governs the "Jurisdiction" of the arbitrator:

> **(a)** The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> **(b)** The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> **(c)** A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on

> such objections as a preliminary matter or as part of the final award.

(A96.) Commercial Rule 8 ("Interpretation and Application of Rules") states, inter alia, that the arbitrator "shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties." (A97.)

The Supplementary Rules governing class arbitration went into effect in 2003. Entitled "**Applicability**," Supplementary Rule 1 states:

> (a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.
>
> (b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any

prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

(A136.) Supplementary Rule 3 is entitled "**Construction of the Arbitration Clause**":

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or

> some part of them, until the arbitrator is informed of the ruling of the court.
>
> In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

(A137.) Under Supplementary Rule 4 ("**Class Certification**"), the arbitrator, if satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration pursuant to Supplementary Rule 3, determines whether the proceeding should go forward as a class arbitration.

On March 17, 2014, Scout filed an arbitration demand against Chesapeake on behalf of itself and similarly situated lessors, alleging that Chesapeake paid insufficient royalties. In the answering statement it filed with the AAA, Chesapeake objected to class arbitration on the grounds that "[it] did not agree to resolve disputes arising out of the leases at issue in 'class arbitration,' nor did Chesapeake agree to submit the question of class arbitrability – i.e., whether claimants may proceed on a class basis in arbitration – to an arbitrator." (A1128.)

Chesapeake filed a declaratory judgment action on April 1, 2014. It specifically sought a judgment declaring that: (1) the District Court, and not the arbitrators, must decide whether class arbitration is available, which implicates the "who decides" question

or inquiry; and (2) the Leases do not permit class arbitration, i.e., the so-called "clause construction" inquiry. Scout asked Judge Brann to reassign the case to Judge Mannion of the Middle District of Pennsylvania. It claimed that Judge Mannion had already been assigned three related cases involving Chesapeake's oil and gas leases, including *Chesapeake Appalachia, L.L.C. v. Burkett*. This request was not granted. Chesapeake moved for summary judgment on the "who decides" question, and Scout filed a motion to dismiss the complaint (or, in the alternative, for a stay pending the completion of the arbitration).

On July 30, 2014, we issued our opinion in *Opalinski*. According to the District Court, the *Opalinski* Court changed the state of the law in this Circuit by holding, "for the first time, that 'the availability of classwide arbitration is a substantive "question of arbitrability" to be decided by a court absent clear agreement otherwise.'" *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC*, 73 F. Supp. 3d 488, 499 (M.D. Pa. 2014) (quoting *Opalinski*, 761 F.3d at 329).

It appears that the parties had agreed to the appointment of three retired federal judges as the AAA arbitration panel. On October 6, 2014, the arbitrators issued a decision entitled "**CLAUSE CONSTRUCTION DECISION RE: *WHETHER A COURT OR THE PANEL MAY DECIDE CLASS ARBITRABILITY***." (A144.) Although they expressed some skepticism about our opinion in *Opalinski*, the

arbitrators purportedly applied our holding that class arbitrability constitutes a gateway question for the courts to decide unless there is a clear agreement to the contrary. According to the arbitrators, "the arbitration contract in this case clearly and unmistakably authorizes [them] to make the decision about arbitrability." (A149.) The arbitrators directed Scout and Chesapeake to brief the issue of whether the arbitration agreement precludes class arbitration.

Chesapeake filed motions to vacate the arbitrators' decision and to stay the arbitration proceeding until the District Court resolved Chesapeake's motions. The District Court entered an order on October 16, 2014, granting Chesapeake's motion for summary judgment and its motion to vacate the arbitrators' decision, denying Scout's motion to dismiss, and denying as moot Chesapeake's motion to stay. In particular, the District Court found the decision of the arbitrators "to be contrary to *Opalinski*." *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC*, No. 4:14-CV-0620, 2014 WL 5370683, at *1 (M.D. Pa. Oct. 16, 2014). "The next day, Judge Mannion of the Middle District entered an opinion concerning the same legal questions presented to the Court below, and under the same Chesapeake lease arbitration language, but reached the opposite result to the October 16, 2014 Order."[1] (Appellants' Brief at 8 (citing *Chesapeake*

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[1] Chesapeake appealed from Judge Mannion's order (No. 14-4311). It appears that the parties in *Burkett* have reached a settlement in connection with another proceeding pending in the
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*Appalachia LLC v. Burkett*, Civil Action No. 3:13-3073, 2014 WL 5312829 (M.D. Pa. Oct. 17, 2014)).) Scout filed a motion for reconsideration. It also moved to recuse Judge Brann and to vacate the October 16, 2014 order. On December 10, 2014, the District Court heard oral argument on these motions.

In a December 19, 2014 order, the District Court denied Scout's motions and amended its October 16, 2014 order to incorporate the District Court's memorandum opinion "issued today's date as the reasoning in support of that Order." (A36.) The District Court also certified this matter for appeal pursuant to 28 U.S.C. § 1292(b) and stayed the action pending appeal.

In its memorandum opinion, the District Court concluded that "[t]he contract here is silent or ambiguous as to class arbitration, far from the 'clear and unmistakable' allowance needed for an arbitrator, and not a court, to turn to the clause construction question." *Scout*, 73 F. Supp. 3d at 501. In reaching this conclusion, it relied in particular on this Court's opinion in *Opalinski* as well as the Sixth Circuit's decision in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014). Judge Brann further explained that the approach adopted by Judge Mannion in *Burkett* "is

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Middle District of Pennsylvania (*Demchak Partners Ltd. P'ship v. Chesapeake Appalachia, L.L.C.*). The *Burkett* appeal has been held in abeyance pending judicial approval of this settlement.

not in accord with existing and binding case law." *Scout*, 73 F. Supp. 3d at 500.

On December 24, 2014, Scout filed a petition for permission to appeal under § 1292(b). This Court granted its petition on January 21, 2015. On March 4, 2015, Judge Keeley of the United States District Court for the Northern District of West Virginia concluded in *Chesapeake Appalachia, LLC v. Suppa*, 91 F. Supp. 3d 853 (N.D. W. Va. 2015), that "[the court], not an arbitrator, will decide whether the parties agreed to classwide arbitration in the subject leases," *id.* at 864. In another Chesapeake oil and gas lease case, Northern District of West Virginia Judge Stamp reached the same conclusion. *Bird v. Turner*, Civil Action No. 5:14CV97, 2015 WL 5168575, at *7-*9 (N.D. W. Va. Sept. 1, 2015), *appeal filed*, No. 15-2152 (4th Cir. Sept. 30, 2015).

II.

The District Court possessed diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332.[2] This

[2] Chesapeake and Scout Petroleum are limited liability companies, while Scout Petroleum II is organized as a limited partnership. We asked the parties to submit affidavits setting forth the citizenship of their respective members and partners. *See, e.g.*, *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010) (stating that citizenship of limited liability company is determined by citizenship of its members); *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 184-85 (3d Cir. 2008) (stating that citizenship of limited partnership is determined by

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Court has appellate jurisdiction pursuant to § 1292(b) and 9 U.S.C. § 16.

We review de novo the District Court's orders granting Chesapeake's summary judgment motion and its motion to vacate the arbitrators' decision and denying Scout's motion to dismiss the complaint. *See, e.g.*, *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014), *cert. denied sub nom. Allston v. Lower Merion Sch. Dist.*, 135 S. Ct. 1738 (2015); *Opalinski*, 761 F.3d at 330; *Eid v. Thompson*, 740 F.3d 118, 122 (3d Cir.), *cert. denied*, 135 S. Ct. 175 (2014). Its order denying Scout's motion for reconsideration is reviewed for abuse of discretion. *See, e.g.*, *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1203 (3d Cir. 1995).

## III.

Although enacted by Congress ninety years ago, the meaning and effects of the Federal Arbitration Act ("FAA") continue to generate a great deal of controversy. Arbitration clauses are included in a wide variety of contracts, including consumer contracts, employment agreements, and oil and gas leases. In turn, it often must be decided whether class arbitration is available under the parties' arbitration agreement. In this appeal, we must determine "who"

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citizenship of partners). In light of these sworn statements, we find that complete diversity exists in this matter.

is to decide if the Leases permit class arbitration: the courts or the arbitrators.

The availability of class arbitration implicates two questions or inquiries: (1) the "who decides" inquiry; and (2) the "clause construction" inquiry. As we recently explained in *Opalinski*, the "who decides" inquiry, in turn, consists of two basic components:

> The analysis is twofold. We decide whether the availability of classwide arbitration is a "question of arbitrability." *See Howsam v. Dean Witter Reynolds, Inc.*, [537 U.S. 79, 83] (2002) (internal quotation marks and citation omitted). If yes, it is presumed that the issue is "for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* (internal quotation marks, citations, and alteration omitted). If the availability of classwide arbitration is *not* a "question of arbitrability," it is presumptively for the arbitrator to resolve. *See First Options of Chi., Inc. v. Kaplan*, [514 U.S. 938, 944-45] (1994).

*Opalinski*, 761 F.3d at 330. In the "clause construction" inquiry, the court or the arbitrator then decides whether the parties' arbitration agreement permits class arbitration. It is undisputed that *Opalinski* held "that the availability of classwide arbitration is a substantive 'question of arbitrability' to be decided by a court absent clear agreement otherwise." *Id.* at 329. However, the parties vigorously dispute whether or not the Leases clearly and unmistakably delegate this "question of class arbitrability" to the arbitrators.

"The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Id.* at 335 (citing *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 280-81 (3d Cir. 2004)). Scout's entire approach can be summarized in the following terms: (1) the Leases expressly state that the arbitration will be conducted in accordance with "the rules of the American Arbitration Association;" (2) under Pennsylvania law, the arbitration clause incorporates all of the AAA rules into the Leases, which "are part of the parties' agreement as if fully printed *in haec verba* therein" (Appellants' Brief at 27); and (3) the Commercial and Supplementary Rules, as integral parts of the Leases, thereby clearly and unmistakably vest the arbitrators with the jurisdiction to decide the question of class arbitrability. However, we agree with the District Court and Chesapeake that the Leases fail to satisfy this "onerous" burden.

Given the actual language of the Leases themselves, the nature and terms of the various AAA rules, and the existing case law, we determine that the District Court was correct when it concluded that the Leases are "far from the 'clear and unmistakable' allowance needed for" the arbitrators to decide the question of class arbitrability. *Scout*, 73 F. Supp. 3d at 501. We acknowledge that Scout offers one reasonable interpretation of the Leases. As a sophisticated business, Chesapeake could have (and, at least in retrospect, should have) drafted a clearer arbitration

agreement. Nevertheless, it is not our role to ascertain whether one, among various competing interpretations of an arbitration agreement, is reasonable under ordinary principles of contractual interpretation, assess whether in hindsight a better arbitration agreement could have been written, or determine whether the arbitrators possess the power to decide other questions of arbitrability. Instead, the Court must determine whether the Leases clearly and unmistakably delegate the specific question of class arbitrability to the arbitrators. We conclude that the Leases do not meet such an onerous burden.

## A. Prior Case Law

While it has split the district courts,[3] only two circuit courts have had the opportunity to consider

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[3] On the one hand, the *Suppa* court adopted (and expanded on) the District Court's reasoning in this case to conclude that "Chesapeake and the Defendants did not clearly and unmistakably agree to arbitrate the issue of class arbitrability." *Suppa*, 91 F. Supp. 3d at 864. In *Bird*, the district court, having considered the Chesapeake lease and its reference to the AAA rules, was "unconvinced that the parties intended to submit to the arbitrator the question of whether class arbitration is available." *Bird*, 2015 WL 5168575, at *9. There are additional decisions from district courts in this Circuit indicating that arbitration agreements referring to the AAA rules did not clearly and unmistakably delegate the question of class arbitrability to the arbitrators. *See Herzfeld v. 1416 Chancellor, Inc.*, Civil Action No. 14-4966, 2015 WL 4480829, at *5-*6 (E.D. Pa. Jul. 22, 2015), *appeal filed*, No. 15-2835 (3d Cir. Aug. 5, 2015); *Chassen v. Fidelity Nat'l Fin., Inc.*, Civil Action No. 09-291 (PGS) (DEA), 2014 WL 202763, at *6 (D.N.J. Jan. 17, 2014). On the other hand, Scout cites to a

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the specific issue of whether an arbitration agreement referring to the AAA rules clearly and unmistakably delegated the question of class arbitrability to the arbitrators: (1) this Court in *Opalinski*; and (2) the Sixth Circuit in *Reed Elsevier* (and *Huffman v. Hilltop Cos.*, 747 F.3d 391 (6th Cir. 2014)). While the Sixth Circuit indicated that such an agreement failed to meet this "clear and unmistakable" standard, our opinion in *Opalinski* did not address the effect of a reference to the AAA rules on this question. However, we did emphasize the onerous nature of overcoming the presumption in favor of judicial resolution of such questions of arbitrability – which requires express and unambiguous contractual language of delegation as opposed to mere silence or ambiguous contractual language.

Like this Court, the Sixth Circuit initially held that the question of whether an arbitration agreement permits class arbitration constitutes a gateway matter reserved for judicial resolution unless the

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number of district court decisions (including Judge Mannion's opinion in *Burkett*) holding that such arbitration agreements did satisfy this "clear and unmistakable" standard. *See Marriott Ownership Resorts, Inc. v. Sterman*, Case No: 6:14-cv-1400-ORL-41TBS, at 5-10 (M.D. Fla. Jan. 16, 2015); *Marriott Ownership Resorts, Inc. v. Flynn*, Civil No. 14-00372 JMS-RLP, 2014 WL 7076827, at *7-*15 (D. Haw. Dec. 11, 2014); *Burkett*, 2014 WL 5312829, at *1-*9; *Medicine Shoppe Int'l, Inc. v. Edlucy, Inc.*, No. 4:12-CV-161 CAS, 2012 WL 1672489, at *1-*5 (E.D. Mo. May 15, 2012); *Bergman v. Spruce Peak Realty, LLC*, No. 2:11-CV-127, 2011 WL 5523329, at *2-*4 (D. Vt. Nov. 14, 2011); *Yahoo! Inc. v. Iverson*, 836 F. Supp. 2d 1007, 1010-12 (N.D. Cal. 2011).

parties clearly and unmistakably provide otherwise. *Reed Elsevier*, 734 F.3d at 597-99. "[G]uid[ed]" by *Reed Elsevier*'s "persuasive" analysis, *Opalinski*, 761 F.3d at 334, we joined the Sixth Circuit in holding that the availability of class arbitration constitutes a question of arbitrability, *id.* at 335. The arbitration clause at issue in *Reed Elsevier* provided that any controversy, claim, or counterclaim arising out of or connected with the parties' contract will be resolved by binding arbitration under the arbitration provision and " 'the then-current Commercial Rules and supervision of the American Arbitration Association.' " *Reed Elsevier*, 734 F.3d at 599. According to the Sixth Circuit, this language "does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration." *Id.* "Instead it does not mention classwide arbitration at all." *Id.* While it could be argued that the question of class arbitrability constituted a controversy arising in connection with the contract, the agreement – given the complete absence of any reference to class arbitration – "can just as easily be read to speak only to issues related to bilateral arbitration." *Id.* "Thus, at best, the agreement is silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability; and that is not enough to wrest that decision from the courts." *Id.* (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684-85 (2010)). The *Reed Elsevier* court then conducted a "clause construction" analysis, concluding that the arbitration agreement did not provide for class arbitration. *Id.* at 599-600.

In *Huffman*, the Sixth Circuit applied the approach it set out in *Reed Elsevier* to an arbitration agreement providing for arbitration in accordance with the Commercial Rules as well as the AAA's Optional Procedures for Large, Complex Commercial Disputes. *Huffman*, 747 F.3d at 398. "The plaintiffs concede that *Reed Elsevier* is controlling authority. As was the case in *Reed Elsevier*, here the parties' agreement is silent as to whether an arbitrator or a court should determine the question of classwide arbitrability, meaning the determination lies with this court. *See* [*Reed Elsevier*, 734 F.3d at 599]." *Huffman*, 747 F.3d at 398.

Appellees Opalinski and McCabe filed a putative class action against their former employer, Appellant Robert Half International, Inc. ("RHI"), under the Fair Labor Standards Act. *Opalinski*, 761 F.3d at 329. The *Opalinski* Appellees' employment agreements included arbitration clauses stating that "'[a]ny dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement' shall be submitted to arbitration." *Id.* According to our opinion, "[n]either agreement mentions classwide arbitration." *Id.* RHI moved to compel arbitration on an individual basis, and the district court, although it compelled arbitration, held that the propriety of classwide arbitration was to be decided by the arbitrator. *Id.* The arbitrator determined in a partial award that the employment agreements permitted class arbitration. *Id.* The

district court denied RHI's motion to vacate the partial award. *Id.*

In *Opalinski*, "the question before us [was] who decides – that is, should the availability of classwide arbitration have been decided by the arbitrator or by the District Court?" *Id.* In other words, we considered "whether, in the context of an otherwise silent contract, the availability of classwide arbitration is to be decided by a court rather than an arbitrator." *Id.* at 330. Concluding that the district court must decide this question, we reversed the district court's orders and remanded for the district court to determine whether the employment agreements called for class arbitration. *Id.* at 335.

The Court recognized that, even though federal policy favors arbitration agreements, arbitration remains a matter of contract. *Id.* at 331. Because parties cannot be compelled to arbitrate any dispute they have not agreed to submit to arbitration, arbitrators possess the power to decide an issue only if the parties have authorized the arbitrator to do so. *Id.* "Because parties frequently disagree whether a particular dispute is arbitrable, courts play a limited threshold role in determining 'whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "*question of arbitrability.*"'" *Id.* (quoting *Howsam*, 537 U.S. at 83). Questions of arbitrability are limited to a narrow range of gateway issues, including whether the parties are bound by a given arbitration clause and whether an arbitration agreement applies to a particular type of controversy. *Id.* at

331. Questions that the parties would likely expect the arbitrator to decide are not questions of arbitrability. *Id.* These include procedural issues that grow out of the dispute and bear on the final disposition of the proceeding as well as allegations of waiver, delay, or similar defenses. *Id.* After a review of the prior Supreme Court and Third Circuit case law, we observed that whether the availability of class arbitration is a question of arbitrability "remains an open question." *Id.* at 332.

We held that the availability of classwide arbitration constitutes a question of arbitrability because it implicates "whose claims the arbitrator may adjudicate" as well as "what types of controversies the arbitrator may decide." *Id.* We emphasized the fundamental differences between bilateral and class arbitration and the serious consequences that arise from proceeding with one type rather than the other. *Id.* at 332-34. We also turned for support to the Sixth Circuit's ruling in *Reed Elsevier*, "[t]he only other Circuit Court of Appeals to have squarely resolved the 'who decides' issue." *Id.* at 334. We found its analysis to be "persuasive" and stated that it "guides our own." *Id.* Accordingly, this Court joined the Sixth Circuit in holding that the availability of class arbitration constitutes a question of arbitrability. *Id.* at 335.

The *Opalinski* Court then determined that (in the words of the accompanying heading) "[t]here is no evidence rebutting the presumption that the District Court should decide all questions of arbitrability." *Id.*

(emphasis omitted). This section of our opinion consisted of two paragraphs. First, we explained why we made this determination:

> It is presumed that courts must decide questions of arbitrability "unless the parties clearly and unmistakably provide otherwise." *Howsam*, [537 U.S. at 83] (internal quotation marks and citation omitted). The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator. *See* [*Major League Umpires*], 357 F.3d at 280-81. Silence or ambiguous contractual language is insufficient to rebut the presumption. *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 154-55 (3d Cir. 2001). Here, Opalinski and McCabe's employment agreements provide for arbitration of any dispute or claim arising out of or relating to their employment but are silent as to the availability of classwide arbitration or whether the question should be submitted to the arbitrator. Nothing else in the agreements or record suggests that the parties agreed to submit questions of arbitrability to the arbitrator. Thus, the strong presumption favoring judicial resolution of questions of arbitrability is not undone, and the District Court had to decide whether the arbitration agreements permitted classwide arbitration.

*Id.* at 335. In the next paragraph, we stated that the district court's orders were reversed and that the case was remanded for the district court to determine

whether the employment agreements called for class arbitration. *Id.*

In the end, we offered the following conclusion:

> "Arbitration is fundamentally a creature of contract, and an arbitrator's authority is derived from an agreement to arbitrate." [*Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 194 (3d Cir. 2010) (en banc)] (alteration in original) (internal quotation marks and citation omitted). Here, where we have an agreement to arbitrate individual disputes and no mention of arbitration for a wider group, we believe the parties would have expected a court, not an arbitrator, to determine the availability of class arbitration. This is especially so given the critical differences between individual and class arbitration and the significant consequences of that determination for both whose claims are subject to arbitration and the type of controversy to be arbitrated. Hence we hold that the availability of class arbitration is a "question of arbitrability" for a court to decide unless the parties unmistakably provide otherwise.

*Id.* at 335-36.

Because *Opalinski* did not address the impact of incorporating the AAA rules, it is not binding Circuit precedent disposing of the issue of whether an arbitration agreement referring to the AAA rules clearly and unmistakably delegated the question of class arbitrability to the arbitrators. According to Chesapeake, "[t]his Court decided this very question (*i.e.*,

'who decides' class arbitrability) on the same material facts (*i.e.*, arbitration clauses incorporating the rules of the AAA but silent on class arbitration) and held that in these circumstances, courts, not arbitrators, decide class arbitrability." (Appellee's Brief at 12-13.) However, the *Opalinski* Appellees did not raise any kind of "incorporation" argument – at least until after we issued our opinion. In their unsuccessful petition for rehearing en banc, the *Opalinski* Appellees argued that the incorporation of the AAA rules constituted a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to the arbitrator. Plaintiff-Appellees' Petition for Re-Hearing *En Banc* at 9 & n.5, *Opalinski*, 761 F.3d 326 (No. 12-4444). But, by then, it was too late.[4] *See, e.g.*, *Peter v. Hess Oil V.I. Corp.*, 910 F.2d 1179, 1181 (3d Cir. 1990) (refusing to consider argument raised in rehearing petition but not in appellate briefing where no legitimate excuse was provided for failing to raise argument in timely fashion).

[4] The *Opalinski* Appellees subsequently addressed this "incorporation by reference" issue in their certiorari petition. *See* Petition for a Writ of Certiorari at 3 & n.2, *Opalinski*, 135 S. Ct. 1530 (No. 14-625). However, according to RHI, "Plaintiffs never argued the AAA incorporation issue in either the district court or before the Third Circuit," and they thereby waived the right to seek certiorari as to that issue. Opposition to Petition for a Writ of Certiorari at 19, *Opalinski*, 135 S. Ct. 1530 (No. 14-625). In any event, the Supreme Court denied the petition. *See* *Opalinski*, 135 S. Ct. 1530.

Nevertheless, we did hold (based in part on the Sixth Circuit's own ruling in *Reed Elsevier*) "that the availability of classwide arbitration is a substantive 'question of arbitrability' to be decided by a court absent clear agreement otherwise." *Opalinski*, 761 F.3d at 329. The *Opalinski* Court explained that "[t]he burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Id.* at 335 (citing *Major League Umpires*, 357 F.3d at 280-81). Accordingly, "[s]ilence or ambiguous contractual language is insufficient to rebut the presumption." *Id.* (citing *Deutz AG*, 270 F.3d at 154-55). We now must decide whether the Leases at issue in this appeal really satisfy this onerous burden.

**B. The Leases and the AAA Rules**

Having considered the language of the Leases, the nature and contents of the various AAA Rules, and the prior case law, we conclude that the Leases do not satisfy the onerous burden of overcoming the presumption in favoring of judicial resolution of the question of class arbitrability.

We look to the actual language of the Leases, setting aside for the moment Scout's "incorporation by reference" theory. We find that the Leases are, at least in a certain sense, "silent as to the availability of classwide arbitration or whether the question should be submitted to the arbitrator." *Opalinski*, 761 F.3d at 335. Like the arbitration agreements at issue

in cases like *Opalinski* and *Reed Elsevier*, the Leases do not expressly mention class arbitration, the availability of class arbitration, the Supplementary Rules, "who decides" – the courts or the arbitrators – questions of arbitrability, or whether the arbitrators are to decide the availability of class arbitration under the Leases. *Id.*; *see also Reed Elsevier*, 734 F.3d at 599 ("This language does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration. Instead it does not mention classwide arbitration at all."); *Bird*, 2015 WL 5168575, at *9 ("The agreement does not mention class arbitration or arbitrability."); *Herzfeld*, 2015 WL 4480829, at *5 ("Here, the arbitration clause did not mention class or collective action resolution."); *Suppa*, 91 F. Supp. 3d at 862 ("Like the arbitration clause in this case, however, [the clause in *Opalinski*] was silent with respect to class arbitration.").

We agree with Scout that, in order to undo the presumption in favor of judicial resolution, an arbitration agreement need not include any special "incantation" (like, for example, "the arbitrators shall decide the question of class arbitrability" or "the arbitrators shall decide all questions of arbitrability"). It appears that the concept of "silence" was first used in the "clause construction" context. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the parties "stipulated that the arbitration clause was 'silent' with respect to class arbitration," *id.* at 668. "Counsel for AnimalFeeds explained to the arbitration panel that the term 'silent' did not simply

mean that the clause made no express reference to class arbitration. Rather, he said, '[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.'" *Id.* at 668-69 (citation omitted); *see also*, *e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069 (2013) ("The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration." (citing *Stolt-Nielsen*, 559 U.S. at 668-69)). In our opinion in *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012), *aff'd*, 133 S. Ct. 2064 (2013), we explained that "*Stolt-Nielsen* did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants 'class arbitration' or otherwise expressly provides for aggregate procedures," *id.* at 222 (citing *Stolt-Nielsen*, 130 S. Ct. at 1776 n.10; *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011)). Instead, the Supreme Court established a default rule under which a party may not be compelled to submit to class arbitration unless there is a contractual basis to conclude that the party actually agreed to do so. *Id.*; *see also*, *e.g.*, *Oxford Health Plans*, 133 S. Ct. at 2070 ("Nor, we continued, did the panel attempt to ascertain whether federal or state law established a 'default rule' to take effect absent an agreement." (quoting *Stolt-Nielsen*, 559 U.S. at 673)). We also rejected the suggestion that an arbitration provision is "silent" whenever the words "class arbitration" are not written into the text of the provision itself. *Sutter*, 675 F.3d at 222 n.5. "[J]ust as '[t]he Supreme Court has never held that a

class arbitration clause must explicitly mention that the parties agree to class arbitration in order for a decisionmaker to conclude that the parties consented to class arbitration, [*Yahoo!*, 836 F. Supp. 2d at 1011],'" the parties' failure to use a specific set of words does not automatically bar the courts from finding that the agreement clearly and unmistakably delegated the question of class arbitrability. *Burkett*, 2014 WL 5312829, at *4.

Nevertheless, both the "who decides" and "clause construction" inquiries still impose basic standards that must be satisfied. As a practical matter, the absence of an "incantation" – or the lack of any express reference to class arbitration, the availability of class arbitration, the Supplementary Rules, or who decides whether the arbitration agreement permits class arbitration – makes it more difficult to meet such burdens. As we also recognized in *Sutter*, the requisite contractual basis may not be inferred solely from the fact that the parties agreed to arbitrate or from their failure to prohibit this form of arbitration in their agreement. *Sutter*, 675 F.3d at 221, 224. "'[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.'" *Id.* at 221 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). "It follows that the parties' silence on the question of 'who decides' class arbitrability should not be read as implicitly consenting to submit the question to an arbitrator." *Suppa*,

91 F. Supp. 3d at 864. In fact, the burden that must be met in the present "who decides" context appears even more "onerous" than the equivalent burden applicable to the "clause construction" phase. After all, "[s]ilence or ambiguous contractual language" is not enough; the burden of overcoming the presumption "requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Opalinski*, 761 F.3d at 335 (citations omitted).

"[G]iven the total absence of any reference to classwide arbitration," the Leases "can just as easily be read to speak only to issues related to bilateral arbitration." *Reed Elsevier*, 734 F.3d at 599. We find it significant that the Leases consistently use singular (and defined) terms to describe the respective parties to any arbitration proceeding and the dispute to be arbitrated. The Leases provide that, where there is a disagreement between "Lessor" and "Lessee" concerning "this Lease," performance "thereunder," or damages caused by "Lessee's" operations, "all such disputes" shall be resolved by arbitration "in accordance with the rules of the American Arbitration Association." (A247.) Each "Lease" defines the "Lessor" (e.g., "**William D. Bergey and Joanne M. Bergey, husband and wife**") as well as the "Lessee" ("**CHESAPEAKE APPALACHIA, L.L.C.**"). (A246.) According to Chesapeake, these terms clearly indicate that the parties only intended bilateral arbitration. While Chesapeake may have thereby intended to arbitrate all disagreements with each "Lessor," the

current inquiry implicates a putative class of "Lessors," a group that (as the *Suppa* court noted) the Leases themselves never mention. *Suppa*, 91 F. Supp. 3d at 864.

Scout indicates that this language has no relevance to the present "who decides" inquiry. While Chesapeake criticizes Scout for (as the District Court put it) "skip[ping] directly to the clause construction question in order to answer the threshold 'who decides' question," *Scout*, 73 F. Supp. 3d at 500, Scout claims that it is Chesapeake and the District Court that have ventured into the "clause construction" inquiry. We recognize that the "who decides" and the "clause construction" questions represent separate inquiries, and we do not express any opinion as to whether or not the Leases permit class arbitration. However, the fact that specific terminology or a particular line of reasoning may be relevant to the "clause construction" inquiry (and we do not consider at this juncture how this inquiry should be conducted or its outcome) does not mean that this language or reasoning has no bearing whatsoever on the threshold "who decides" inquiry. For example, *Opalinski* relied on the agreements' "silen[ce] as to the availability of classwide arbitration" to conclude that the strong presumption favoring judicial resolution of questions of arbitrability was not undone. *Opalinski*, 761 F.3d at 335; *see also*, *e.g.*, *Reed Elsevier*, 734 F.3d at 599 ("But given the total absence of any reference to classwide arbitration in this clause, the agreement here can just as easily be read to speak only to issues

related to bilateral arbitration."). Scout also insists that, under *Sutter*, "the incantation of 'class arbitration' in an arbitration agreement is not necessary to permit class arbitration." (Appellants' Brief at 35 (citing *Sutter*, 675 F.3d at 222).) However, *Sutter* and *Stolt-Nielsen* were "clause construction" rulings. *See, e.g.*, *Oxford Health Plans*, 133 S. Ct. at 2068 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.'"); *Stolt-Nielsen*, 559 U.S. at 680 ("But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible."). We nevertheless have looked to these "clause construction" cases for guidance in answering the "who decides" question. We do the same with respect to other considerations relevant to the current inquiry, including express contractual language referring to a singular "Lessor," "Lessee," and "Lease."

In light of the actual language of the Leases, Scout quite understandably emphasizes the contractual reference to arbitration "in accordance with the rules of the American Arbitration Association" (A247), the AAA rules, and the general contractual doctrine of incorporation by reference. Courts usually apply ordinary state law principles governing contract formation to decide whether the parties agree to arbitrate a certain matter. *See, e.g.*, *First Options*, 514 U.S. at 944. It is uncontested that, under Pennsylvania law, "[i]ncorporation by reference is proper where

the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." *Std. Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir. 2003) (footnote omitted).

Nevertheless, the general rule that courts should apply ordinary state law principles is subject to the following qualification: "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 (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). Accordingly, it is not enough for Scout to establish that the AAA rules provide for the arbitrators to decide, inter alia, the question of class arbitrability, and that, in turn, these rules are incorporated by reference pursuant to state law. It instead must present "clear and unmistakable evidence" of an agreement to arbitrate this specific question. As we explained in *Opalinski*, the onerous burden of overcoming the presumption requires express contractual language unambiguously delegating the question – not mere silence or ambiguous contractual language.[5] *See, e.g.*, *Opalinski*, 761 F.3d at 335.

[5] Scout turns for support to the Supreme Court's December 14, 2015 decision in *DIRECTV, Inc. v. Imburgia*, ___ S. Ct. ___, 2015 WL 8546242 (2015). The *DIRECTV* Court concluded that a California court's refusal to enforce an arbitration agreement "does not rest 'upon such grounds as exist . . . for the revocation

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Scout argues that the reference in the Leases to "the rules of the American Arbitration Association" is express contractual language incorporating the content of the Commercial Rules and the Supplementary Rules into the contract and serves as a clear and unmistakable delegation of authority to the arbitrators to decide class arbitrability. We, however, agree with Chesapeake that this case implicates "a daisy-chain of cross-references" – going from the Leases themselves to "the rules of the American Arbitration Association" to the Commercial Rules and, at last, to the Supplementary Rules. (Appellees' Brief at 31.) Having examined the various AAA rules, we believe that the Leases still fail to satisfy the onerous burden of undoing the presumption in favor of judicial resolution of the question of class arbitrability.

Initially, the Leases simply refer, without further explanation, to "the rules of the American Arbitration Association." (A247.) In other words, "[their] reference to the AAA rules is the only link to the submission of arbitrability issues to the arbitrator." *Bird*, 2015 WL 5168575, at *9. Founded in 1926, the AAA has adopted (and amended) numerous rules over many years. The AAA website identifies more than

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of any contract.'" *Id.* at *2 (quoting 9 U.S.C. § 2). The Supreme Court did not consider whether the parties' agreement delegated a question of arbitrability to the arbitrators, and it did not call into question the well-established rule that courts should not assume that the parties agree to arbitrate arbitrability without "'clear and unmistakbl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (quoting *AT&T Techs.*, 475 U.S. at 649).

fifty sets of rules. Active Rules, *supra.* These range from the "AAA Dispute Resolution Board Hearing Rules and Procedures" to the "Supplementary Rules for Fixed Time and Cost Construction Arbitration." *Id.* In turn, the Leases at issue in this case do not expressly refer to the specific "Supplementary Rules" governing class arbitrations or the general "Commercial Rules." *See, e.g.*, *Herzfeld*, 2015 WL 4480829, at *6 ("[W]e cannot find the three-word reference to AAA 'rules and regulations' incorporates a panoply of collective and class action rules applied by AAA once the matter is properly before the arbitrators by consent or waiver.").

While Commercial Rule 7 expressly grants the arbitrator the power to rule on objections concerning the arbitrability of any claim (and Commercial Rule 8 states that the arbitrator shall interpret and apply the rules insofar as they relate to the arbitrator's powers and duties), the Commercial Rules do not mention either class arbitration or the question of class arbitrability. The AAA's "Commercial Rules and Mediation Procedures" publication is nearly fifty pages long and includes fifty-eight different "Commercial Rules." Like the Leases and their references to a singular "Lessor," Lessee," and "Lease," these rules are couched in terms of bilateral arbitration proceedings. In addition, they address various procedural matters. Commercial Rule 4, for example, governs "Filing Requirements," e.g., "[a]rbitration under an arbitration provision in a contract shall be initiated by the initiating party ('claimant') filing

with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration." (A94.) Likewise, Commercial Rule 5 ("Answers and Counterclaims") provides, inter alia, that "[a] respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA." (A95.) The Commercial Rules also address, among other things, when mediation is required, the locale for the arbitration, pre-hearing production of information, basic principles for how the hearing should be conducted, and the timing, form, and scope of the arbitrator's award. These are the basic procedural issues that, as we noted in *Opalinski*, "the parties would likely expect the arbitrator to decide." *Opalinski*, 761 F.3d at 331 (citation omitted). In contrast, the question of class arbitrability "is a substantive gateway question rather than a procedural one." *Id.* at 335.

Given the actual contractual language at issue here as well as the language and nature of the other AAA rules, the Supplementary Rules are not enough for us to conclude that the Leases clearly and unmistakably delegate the question of class arbitrability to the arbitrators. Under Supplementary Rule 1, the Supplementary Rules apply where a party submits a dispute on behalf of a purported class, and Supplementary Rules 3 and 4 indicate that the arbitrator

must determine whether the arbitration agreement permits class arbitration.[6] But, before we can even consider these Supplementary Rules, the "daisy-chain" takes us from the Leases to the otherwise unspecified "rules of the American Arbitration Association" to the Commercial Rules. The Commercial Rules do not even refer to the Supplementary Rules and are phrased in terms of basic procedural issues arising out of bilateral arbitration proceedings.

Because they are susceptible to more than one reasonable interpretation, the Leases do not include the required "express contractual language unambiguously delegating the question of [class] arbitrability to the arbitrator[s]." *Opalinski*, 761 F.3d at 335 (citation omitted). While it is reasonable to interpret

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[6] Chesapeake argues that Supplementary Rule 3 refutes Scout's argument because it states that, "[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." (A137.) This aspect of the rule, however, implicates the "clause construction" inquiry. While the Sixth Circuit relied on this language, it did so in order to determine whether the parties' arbitration agreement authorized class arbitration (and not to answer the threshold "who decides" question). *See Reed Elsevier*, 734 F.3d at 599-600 ("Crockett responds that the arbitration clause refers to the AAA's Commercial Rules, which themselves incorporate the AAA's Supplemental Rules for Class Arbitration. But the Supplemental Rules expressly state that one should 'not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.' ").

the Leases, together with the Commercial Rules (especially Commercial Rule 7) and the Supplementary Rules (specifically Supplementary Rule 3), as granting the arbitrators the power to decide whether class arbitration is available, that is not the only reasonable interpretation. For instance, what if we were to assume that a landowner and an energy company intended to delegate to the arbitrator questions of arbitrability arising out of a bilateral arbitration proceeding between these two parties (i.e., "questions of bilateral arbitrability") – but not the question of class arbitrability? Wouldn't it be reasonable for the parties to draft an arbitration agreement that contains no reference whatsoever to class arbitration, the question of class arbitrability, or the Supplementary Rules but instead provides for arbitration "[i]n the event of a disagreement between Lessor and Lessee concerning this Lease" pursuant to "the rules of the American Arbitration Association"? Or perhaps the parties simply intended for the courts to decide both questions of bilateral arbitrability as well as the question of class arbitrability, consistent with the general presumption in favor of judicial resolution of such questions?

According to Scout, Chesapeake is asking us to adopt an unprecedented approach that would be inconsistent with well-settled "incorporation" principles. We acknowledge that it was Chesapeake that drafted the Leases. As a sophisticated business, it could have, and, at least in retrospect, should have, drafted a clearer arbitration agreement. However, we

must construe ambiguity against Scout and in Chesapeake's favor because "[i]t is presumed that courts must decide questions of arbitrability 'unless the parties clearly and unmistakably provide otherwise.'" *Id.* (citation omitted). "The burden of overcoming the presumption is onerous[.]" *Id.* (citation omitted). We cannot find that this onerous burden has been met merely because Chesapeake failed, for example, "to insert words of limitation or an express waiver of class arbitration" (Appellants' Reply Brief at 15 (citations omitted)). In fact, such a finding would (as the *Suppa* court aptly observed) "turn[ ] the presumption favoring judicial determination of classwide arbitrability on its head." *Suppa*, 91 F. Supp. 3d at 864. "The entire point of the presumption is that an arbitration clause need not expressly exclude questions of arbitrability as outside its scope. . . ." *Id.* (citation omitted).

It appears that "[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (citing *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir.

2005)). Like the District Court and Chesapeake, however, we believe that this "bilateral arbitration dispute case law" is entitled to relatively little weight in the class arbitrability context. *Scout*, 73 F. Supp. 3d at 500. Devoting several pages of its appellate briefing to these bilateral arbitration cases, Scout argues that the incorporation of the AAA rules constitutes clear and unmistakable evidence of intent to delegate authority to the arbitrators to decide all questions of arbitrability, including the specific question of class arbitrability. However, the whole notion of class arbitration implicates a particular set of concerns that are absent in the bilateral context. Although it ultimately chose to rely on these cases, the *Burkett* court admitted that "the above cases do not address the exact issue presented in this action," i.e., "'who decides' class arbitrability." *Burkett*, 2014 WL 5312829, at *7 (footnote omitted) (citation omitted). In concluding that the availability of class arbitration constitutes a question of arbitrability, we turned in *Opalinski* to Supreme Court rulings highlighting the fundamental differences between bilateral arbitration and class arbitration as well as the serious consequences of permitting a class arbitration proceeding to go forward:

> "[(1) a]n arbitrator . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties . . . [; (2)] the presumption of privacy and confidentiality that applies in many bilateral arbitrations [does]

> not apply in class arbitrations[,] thus potentially frustrating the parties' assumptions when they agreed to arbitrate[; (3) t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well[; and (4)] 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."

*Opalinski*, 761 F.3d at 333 (quoting *Stolt-Nielsen*, 559 U.S. at 686-87); *see also*, *e.g.*, *id.* at 333 ("Additionally, as Justice Alito warned in his concurrence in *Oxford Health*, courts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent." (citing *Oxford Health Plans*, 133 S. Ct. at 2071-72 (Alito, J., concurring)). "In *AT&T Mobility LLC v. Concepcion*, [131 S. Ct. 1740 (2011)], the Court similarly emphasized that the 'changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental,' concluding that '[a]rbitration is poorly suited to the higher stakes of class litigation' and that classwide arbitration '*is not arbitration as envisioned by the FAA.*'" *Opalinski*, 761 F.3d at 333-34 (quoting *Concepcion*, 131 S. Ct. at 1750, 1751-53). The legislative history of the FAA – which predates the adoption of Federal Rule of Civil Procedure 23, which governs class actions, by decades – "contains nothing . . . that contemplates the existence of class

arbitration." *Concepcion*, 131 S. Ct. at 1749 n.5. Given these considerations, it is conceivable that a landowner and energy company may have agreed to the Leases because they intended to delegate questions of bilateral arbitrability to the arbitrators – as opposed to the distinctive question of whether they thereby agreed to a fundamentally different type of arbitration not originally envisioned by the FAA itself.

Like the *Burkett* court, Scout asserts that consent to any of the AAA's rules constitutes consent to the Supplementary Rules and that, if a dispute subject to arbitration under these rules involves a purported class, the arbitration must be governed by all the rules, including the Supplementary Rules. *Burkett*, 2014 WL 5312829, at *7. In *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012), *abrogated in part on other grounds, Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the Fifth Circuit refrained from deciding whether the issue of class arbitration constitutes a question of arbitrability, *id.* at 633-36. It did so because, among other things, it believed that "the parties' agreement to the AAA's Commercial Rules also constitutes consent to the Supplementary Rules," *id.* at 635 (footnote omitted), and, given the substance of Supplementary Rule 3, "[t]he parties' consent to the Supplementary Rules, therefore, constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration," *id.* at 635-36. However, we once again note that the current inquiry requires

us to determine whether the Leases clearly and unmistakably delegate the question of class arbitrability to the arbitrators – and not merely whether the parties have somehow "consented" to the Supplementary Rules.[7]

Finally, we find it significant that the Sixth Circuit held that an agreement referring to the AAA rules did not meet the "clear and unmistakable" standard. Admittedly, the *Reed Elsevier* court did not provide a detailed analysis in support of its holding.[8]

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[7] Furthermore, it appears that the parties in *Reed* did not dispute the applicability of the Supplementary Rules. *Reed*, 681 F.3d at 635 n.5 ("The School, in its motion to vacate the clause construction award, in fact represented to the district court that it had agreed to those Rules." (citation omitted)).

In a footnote, the Eleventh Circuit also refrained from deciding whether the availability of class arbitration is a question of arbitrability because the appellant "gave the question of whether the contract allowed for class arbitration to the arbitrator through its choice of rules and by failing to 'dispute th[e] [a]rbitrator's jurisdiction to decide this threshold issue.' " *Southern Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1359 n.6 (11th Cir. 2013) (citation omitted), *cert. denied*, 134 S. Ct. 1001 (2014). The parties agreed to arbitration pursuant to the AAA's Wireless Industry Arbitration Rules. *Id.* at 1355. Like the Fifth Circuit, the Eleventh Circuit did not reference the "onerous" burden that applies in the current context (and also relied on the party's conduct in the proceeding).

[8] As Scout points out, the *Reed Elsevier* court did not quote from or expressly examine the various AAA rules until it conducted its "clause construction" analysis. In fact, the court never specifically mentioned Commercial Rule 7. Scout further insists that the Sixth Circuit mischaracterized Supplementary Rule 3. According to Scout, the circuit court overlooked the first sentence of the rule (which states that "the arbitrator" shall

(Continued on following page)

*See, e.g.*, *Burkett*, 2014 WL 5312829, at *7 ("Further, in considering the arbitration clause in *Reed* [*Elsevier*], the Sixth Circuit looked only to whether there was an express reference to class arbitration in the arbitration clause."). But, given our examination of both the language of the Leases and the nature and contents of the various AAA rules, we see no reason to reach a different conclusion in this case – and create a circuit split. After all, we "join[ed] the Sixth Circuit Court of Appeals in holding that the availability of class arbitration is a 'question of arbitrability.'" *Opalinski*, 761 F.3d at 335. In this appeal, we likewise conclude that the Leases do "not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration." *Reed Elsevier*, 734 F.3d at 599.

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determine whether the arbitration clause permits the arbitration to proceed on behalf of a class) and misstates the final sentence of the rule (providing that, in construing the applicable arbitration clause, "the arbitrator" shall not consider the existence of the Supplementary Rules to be a factor either for or against permitting class arbitration). The Sixth Circuit observed that "the Supplemental Rules expressly state that one should 'not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.'" *Reed Elsevier*, 734 F.3d at 599-60. We do not see how the Sixth Circuit's use of the term "one" in place of "the arbitrator" in the "clause construction" context casts doubt on its prior determination that the question of class arbitrability must be decided by the court.

### C. The Relief Granted

The District Court granted Chesapeake's motions for summary judgment and for the vacatur of the arbitrators' decision and denied Scout's motions to dismiss and for reconsideration. Scout specifically contends that the District Court committed reversible error by vacating the arbitrators' decision holding that the Leases clearly and unmistakably authorize them to decide the question of class arbitrability. Nevertheless, we have determined that the Leases do not clearly and unmistakably delegate this question to the arbitrators. According to Scout, "the Supreme Court in [*Oxford Health Plans*] wrote that a court may review an arbitrator's determination *de novo* only ***absent*** 'clear and unmistakable' evidence that the parties wanted an arbitrator to resolve the dispute." (Appellants' Reply Brief at 18 (citing *Oxford Health Plans*, 133 S. Ct. at 2068 n.2; Appellees' Brief at 12).) Given the absence of "clear and unmistakable" evidence in this case, the District Court appropriately granted the motion to vacate.

IV.

We will affirm the orders of the District Court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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| CHESAPEAKE APPALACHIA, L.L.C.,<br>Plaintiff,<br>v.<br>SCOUT PETROLEUM, LLC, and SCOUT PETROLEUM II, LP,<br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | 4:14-CV-0620<br>(Judge Brann) |

**ORDER**

December 19, 2014

In accordance with the memorandum issued this date, **IT IS HEREBY ORDERED THAT:**

1. The defendants' motions for reconsideration and motion to vacate/recuse are denied. October 30, 2014, ECF No. 50 and December 5, 2014, ECF No. 55.

2. The Court's October 16, 2014 Order, ECF No. 48, is amended to incorporate the Memorandum Opinion issued today's date as the reasoning in support of that Order.

3. Because this is an order that involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation the matter is certified for appeal pursuant to 28 U.S.C. § 1292(b).

4. The action is stayed pending appeal.

BY THE COURT:

/s Matthew W. Brann
Matthew W. Brann
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| CHESAPEAKE APPALACHIA, L.L.C.,<br>Plaintiff,<br>v.<br>SCOUT PETROLEUM, LLC, and SCOUT PETROLEUM II, LP,<br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | 4:14-CV-0620<br>(Judge Brann) |

**MEMORANDUM**

December 19, 2014

## I. BACKGROUND:

The principal basis upon which a court may support its reasoning for granting a motion for reconsideration is an intervening change in the controlling law. In this case, Defendants ask the Court do the opposite and reconsider the undersigned's application of a recent change in the controlling law, and, instead, revert to the former state of the law. The Court cannot ignore the current state of the law in this federal circuit. The motion will be denied.

*Procedural History:*

Plaintiff, Chesapeake Appalachia, LLC, hereinafter "Chesapeake," commenced the instant civil action on April 1, 2014, against defendants, Scout Petroleum, LLC and Scout Petroleum II, LP (hereinafter,

collectively, "Scout"). The two-count complaint was filed after Scout had initiated arbitration proceedings against Chesapeake with the American Arbitration Association (hereinafter "AAA"). Count I is a demand for a declaratory judgment requesting that the court decide whether the court or the arbitrator is tasked to interpret the contract, commonly referred to as the "who decides" question. Count II is a demand for a declaratory judgment contending that the contract does not permit class arbitration, commonly referred to as the "clause construction" question.

On April 4, 2014, three days after the complaint was filed, Chesapeake filed a Motion for Summary Judgment on Count I of the complaint, requesting that this Court enter an Order directing that it is the Court who answers the "who decides" question. On April 29, 2014, Scout filed a Motion to Dismiss requesting, alternatively, that the Court enter an Order holding that an arbitration panel from the American Arbitration Association decide this "who decides" question.

Subsequently, on June 4, 2014, the parties contacted the Court and requested expedited handling of the respective motions. On June 10, 2014, the Court held a telephone conference call with counsel for the parties at the conclusion of which the Court agreed to a reasonably rapid resolution of the pending motions. Accordingly, the Court put to the side other motions on a very full civil docket and commenced the research necessary to resolve the question at hand.

As it happens, the "who decides" issue is an unsettled area of law in the class arbitrability arena. The United States Court of Appeals for the Third Circuit had, prior to July 30, 2014, indicated that the arbitrator should decide such a question, although it was clear that the United States Supreme Court was incrementally shifting its thinking in the direction of concluding that courts, rather than arbitrators, should decide this threshold question. This Court had a finalized Memorandum Opinion and Order, which detailed its approach to this unsettled area of law, ready to docket in early August 2014.

On July 30, 2014, however, the Third Circuit issued a decision that altered the state of the law in this circuit. *See Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014). The Third Circuit has now held that, in the absence of clear and unmistakable evidence to the contrary, the district courts decide the "who decides" issue.

Following the Third Circuit's seminal decision in *Opalinski*, this Court began to draft a new, now revised, Memorandum Opinion and Order on the "who decides" issue. During this time, however, the parties, without either contacting the Court or waiting for the Court to act, proceeded before an arbitration panel on the questions of both who decides as well as the question of arbitrability. The arbitration panel decided that it, not this Court, decides the "who decides" question, and went on to decide the "clause construction" question by determining that the contract permitted class arbitration. On October 14,

2014, Scout notified the Court that the AAA arbitration panel had entered this decision.

In response, also docketed October 14, 2014, Chesapeake filed two further motions – a Motion to Vacate, ECF No. 44, and a Motion to Stay/Expedite, ECF No. 46. By Order dated October 16, 2014, 2014 WL 5370683, the Court summarily Ordered that Plaintff's Motions for Summary Judgment and to Vacate the Arbitration Panel Award be granted and Defendants' Motion to Dismiss be denied citing to the controlling precedent generated three months before in *Opalinski*.

On October 30, 2014 Scout filed a Motion for Reconsideration. ECF No. 50. This motion has now been fully briefed. Subsequently, on December 5, 2014, Scout filed an unexpected Motion to Vacate and for Recusal. ECF No. 55. Following oral argument conducted on December 10, 2014, the matter is now ripe for disposition. For the reasons that follow, the Defendants' motions will be denied.

## II. DISCUSSION:

### A. Motion for Reconsideration Standard

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). A court should grant a motion for reconsideration if the party seeking reconsideration shows: "(1) an intervening change in the

controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

"A motion for reconsideration is not properly grounded on a request that the Court simply rethink a decision it has already made." *Douris v. Schweiker*, 229 F. Supp. 2d 391, 408 (E.D. Pa. 2002). In such a motion, "parties are not free to relitigate issues that the Court has already decided." *United States v. Jasin*, 292 F. Supp. 2d 670, 676 (E.D. Pa. 2003) (internal citation and quotations omitted). "The standard for granting a motion for reconsideration is a stringent one. . . . [A] mere disagreement with the court does not translate into a clear error of law." *Mpala v. Smith*, CIV. 3:CV-06-841, 2007 WL 136750, *2 (M.D. Pa. Jan. 16, 2007) (Kosik, J.) *aff'd*, 241 F. App'x 3 (3d Cir. 2007). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." *Cont'l Cas. Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995).

**B. Allegations in the Complaint**

As noted above, Plaintiff, Chesapeake Appalachia, L.L.C. (hereinafter "Chesapeake"), filed a complaint in the Middle District of Pennsylvania on April 1, 2014. ECF No. 1. The complaint is for declaratory

and injunctive relief against Defendants, Scout Petroleum L.L.C. and Scout Petroleum II, L.P. (hereinafter, collectively, "Scout").

In 2008, Chesapeake entered into various Paid-Up Oil & Gas Leases with landowners in several northeastern Pennsylvania counties to explore for, and produce natural gas from, the landowners property. The leases at issue are typical natural gas leases, in which there is a basic boilerplate form contract, often together with an individually negotiated addendum. In 2013, Scout purchased the right to some of the leases from certain landowners and has been receiving royalties from Chesapeake on the gas produced by Chesapeake.

On March 17, 2014, Scout sought to commence a class arbitration against Chesapeake. Scout's attempt to pursue class arbitration is on behalf of themselves, together with a putative class of thousands of landowners. The claims deal with the calculation of royalties under the terms of the natural gas leases.

The leases contain the following arbitration provision:

> ARBITRATION. In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the

> arbitration shall be borne equally by Lessor and Lessee.

ECF No. 1 at 7 citing Ex. A at SCOUT I-000181. Chesapeake asserts that the above-cited lease term does not provide for, or otherwise contemplate class arbitration; instead it contemplates only individual arbitration. Chesapeake filed the instant action for equitable relief in this Court in order to have the Court declare both that the matter of class arbitration is one for the Court and not the arbitrator to decide, and that class arbitration is not available under the lease.

### C. Analysis

#### *1. Plaintiff's Partial Motion for Summary Judgment and Defendants' Motion to Dismiss*

The rocky path the issue of class arbitrability has traversed over the years began eleven years ago with the United States Supreme Court's plurality decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003). Green Tree Financial Corporation was a commercial lender operating in South Carolina. *Id.* at 447. Green Tree had contracted with the Bazzles (and others[1]) for a residential loan. *Id.* at 447-449. The contract

[1] The Supreme Court also took up this action on appeal from another set of respondents, but for the sake of clarity here, this Court will only refer to the Bazzles.

contained an arbitration clause which stated, in salient part, that "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." *Id.* at 448. A dispute arose, and the Bazzles filed an action in a South Carolina state court asking the court to certify their claims and a class action. *Id.* at 449. Green Tree asked the court to compel arbitration. *Id.* The court granted both requests and the matter proceeded to class arbitration. *Id.* After a loss at arbitration, Green Tree appealed the arbitrator's decision. *Id.* The South Carolina Supreme Court held that the contracts were silent as to class arbitration, and that the contract consequently authorized class arbitration. *Id.* at 450.

A plurality of the United States Supreme Court (Justices Breyer, Scalia, Souter and Ginsburg) held that the issue of whether or not the contracts were silent as to class arbitration was a matter for the arbitrator to decide, not the courts. *Bazzle*, 539 U.S. at 447. The plurality described it as a "preliminary question." *Id.* at 450. The Court stated that "[u]nder the terms of the parties' contracts, the question – whether the agreement forbids class arbitration – is for the arbitrator to decide." *Id.* at 451. The Court found that the parties had agreed that an arbitrator would answer the question of whether a class was authorized under the contract because in the contract the parties agreed that "all disputes, claims, or controversies arising from or relating to this contract or

the relationships which result from this contract." *Id.* The plurality interpreted the contract to mean that the interpretation of the contract was a task intended for the arbitrator, not the courts. As a policy matter, the plurality added that "if there is doubt about that matter – about the 'scope of arbitrable issues' – we should resolve that doubt 'in favor of arbitration.'" *Id.* at 452 *citing Mitsubishi Mothers Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985).

The *Bazzle* plurality went on to explain the "certain limited circumstances" in which the courts will assume that the parties intended the court, and not an arbitrator, "to decide a particular arbitration-related matter." *Bazzle*, 539 U.S. at 452. These circumstances being "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Id.*

The *Bazzle* court stated that whether or not the contract forbids class arbitration did not fall into that narrow exception. *Bazzle*, 539 U.S. at 452. The plurality also stated that the question presented was the "kind of arbitration proceeding the parties agreed to," which was a question of contract interpretation – a matter for the arbitrator, not the courts, to decide. *Id.* at 453.

In order to have a controlling judgment of the court, Justice Stevens concurred in the plurality's decision. *Bazzle*, 539 U.S. at 455. In his three paragraph

concurrence, Justice Stevens stated that the arbitrator, not the South Carolina court, should have interpreted the agreement in the first instance. *Id.* Because his view was in agreement with the plurality decision stating that the arbitrator should have performed the contractual interpretation, he concurred in the judgment in order to have a controlling judgment of the court, although his preferred outcome would be to simply affirm the judgment of the Supreme Court of South Carolina, as he believed that the decision was correct as a matter of law. *Id.*

Chief Justice Rehnquist, together with Justices O'Connor and Kennedy dissented stating that the determination "that arbitration under the contracts could proceed as a class action [sic] even though the contracts do not by their terms permit class-action arbitration . . . is one for the courts, not for the arbitrator." *Bazzle*, 539 U.S. at 455-6. The dissenters went on to write that "the decision of what to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator." *Id.* The dissenting opinion in *Bazzle* would interpret the contract's lack of a clear statement of intent to submit to class arbitration as an agreement not to submit to class arbitration, but only an agreement to submit to bilateral arbitration; the dissent would not coerce the parties to engage in class arbitration.

Justice Thomas, separately dissenting, would have left the decision of the Supreme Court of South Carolina untouched. He concluded that the Federal

Arbitration Act (FAA) would not apply to the proceeding in state court.

A plural majority decision certainly makes the task of the lower courts more difficult. In the area of class arbitrability, the waters were muddied even further as the Supreme Court issued subsequent decisions that eroded the already tenuous pronouncement in *Bazzle*.

In 2010 and 2013, the Supreme Court decided two cases with different questions presented than those considered in *Bazzle.* Nevertheless, in the dicta in those later cases, the Supreme Court poked holes in the *Bazzle* decision. *See Stolt-Nielsen v. Animal Feeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) and *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013). As the United States Court of Appeals for the Sixth Circuit so aptly described it, "[a]lthough the Supreme Court's puzzle of cases on this issue is not yet complete, the Court has sorted the border pieces and filled in much of the background." *Reed Elsevier Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013) *cert. denied sub nom. Crockett v. Reed Elsevier, Inc.*, 134 S. Ct. 2291, 189 L. Ed. 2d 173 (2014).

First, in *Stolt-Nielsen*, *supra*, the Court acknowledged that *Bazzle* had "baffled the parties." 130 S. Ct. at 1772. While *Stolt-Nielsen* presented a different question than did *Bazzle*, the Supreme Court began to undermine *Bazzle's* influence by stating in dictum, "*[O]nly* the plurality decided that question [which

decision maker (court or arbitrator) should decide whether the contracts in question were "silent" on the issue of class arbitration]. But we need not revisit that question here . . . " 130 S. Ct. at 1771-2 (emphasis added).

The question presented to the court in *Stolt-Nielsen* was "whether imposing class arbitration on parties whose arbitration clauses are "silent" on that issue is consistent with the Federal Arbitration Act (FAA)." 130 S. Ct. at 1764. Although at first blush the issue presented appears to be identical to *Bazzle, Stolt-Nielsen* is distinguishable because during the pendency of the litigation, the parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators. *Id.* at 1765. Petitioners appealed the arbitration panel's decision that the action should proceed as a class arbitration. *Id.* at 1766. The *Stolt-Nielsen* court reversed the lower court's decision as it found that the arbitration panel "exceeded its powers" pursuant to § 10(b) of the FAA; the panel had imposed its own view of sound policy regarding class arbitration, rather than simply interpreting and applying the agreement. *Id.* at 1767-8.

The *Stolt-Nielsen* arbitration panel had naturally based much of their reasoning on *Bazzle.* The Supreme Court attempted to provide insight into its rationale in *Bazzle*, stating:

> Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the

> time of the arbitration proceeding. For one thing, the parties 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. But we need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.

*Stolt-Nielsen*, 130 S. Ct. at 1772.

"As we have explained, however, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted." *Stolt-Nielsen*, 130 S. Ct. at 1772. "[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration "is a matter of consent, not coercion." *Id. citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989). "Under the FAA, a party to an arbitration agreement may petition a United States district court for an order directing that "arbitration proceed in the manner provided for in such agreement." *Stolt-Nielsen*, 130 S. Ct. at 1773, *citing* 9 U.S.C. § 4.

"From these principles, it follows 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." *Stolt-Nielsen*, 130 S. Ct. at 1775 (emphasis in original). "An

implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.*

"In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" *Id.* "But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class wide arbitration." *Id.* at 1775-6.

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, the presumption of privacy and confidentiality that applies in many bilateral arbitrations shall not apply in class, thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's

> award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation. We think that 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*, 130 S. Ct. at 1776 (internal citations and quotations omitted).

Following this rather significant decision, the United States Court of Appeals for the Third Circuit, decided three cases that appear to have adopted the *Bazzle* plurality's decision, without expressly holding as such, together with a consideration of the breadth of the *Stolt-Nielsen* decision. These cases are, *Vilches v. The Travelers Companies, Inc.*, 413 Fed. Appx. 487 (3d Cir. 2011) (not-precedential); *Sutter v. Oxford Health Plans*, 675 F.3d 215 (3d Cir. 2012); and *Quilloin v. Tenet HealthSystem*, 673 F.3d 221 (3d Cir. 2012).

In *Vilches*, a group of insurance appraisers filed a class action in state court against their insurance company employer; the district court held that the parties agreement was to arbitrate and ordered bilateral arbitration. 413 Fed. Appx. at 490. The

Third Circuit held that the determination of whether or not the employees could bring the action as a class arbitration was a question for the arbitrator to answer based on the parties' agreements. *Id.* at 489.

When hired, the insurance appraisers agreed to an employment provision that made arbitration the forum for all disputes. *Vilches*, 413 Fed. Appx. at 489. The agreement was silent as to class arbitration. *Id.* In April 2005 (possible as a response to the *Bazzle* decision) defendant Travelers Insurance Company published a revised policy, which explicitly disallowed class arbitration. *Id.* The dispute before the district court concerned whether or not the employees should be bound by this amended policy. *Id.* The district court engaged in an interpretation of the contract and its amended policy and determined that the action could only proceed as a bilateral arbitration. *Id.*

The Third Circuit disagreed with the lower court, stating "[t]he parties agree that any and all disputes arising out of the employment relationship – including the claims asserted here – are to be resolved in binding arbitration . . . the district court should not have decided the issue presented as to the class action waiver . . . we will refer the resolution of this question to arbitration in accordance with governing jurisprudence." *Vilches*, 413 Fed. Appx. at 491. The Third Circuit noted that despite how the parties framed the question presented to the court, "the relevant question here is *what kind of arbitration proceeding* the parties agreed to." *Id. citing Bazzle*, 539 U.S. at 452. The Third Circuit went on to state

"[w]here contractual silence is implicated, "the arbitrator and not a court should decide whether a contract [was] indeed silent" on the issue of class arbitration and "whether a contract with an arbitration clause forbids class arbitration." *Id. citing Stolt-Nielsen*, 130 S. Ct. at 1758. "Accordingly, we must "give effect to the contractual rights and expectations of the parties," and refer the questions of whether class arbitration was agreed upon to the arbitrator. *Id. citing Stolt-Nielsen*, 130 S. Ct. at 1774.

The next decision from the Third Circuit presented the same procedural posture as did *Stolt-Nielsen*. In *Sutter v. Oxford Health Plans* (the prelude to the Supreme Court's *Oxford Health Plans v. Sutter*, ___ U.S. ___, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013)), the district court determined that an arbitrator should determine whether the parties' agreement allowed for class arbitration. 675 F.3d 215, 217 (3d Cir. 2012). The arbitrator construed the clause "no civil action concerning any dispute arising under this agreement shall be instituted before any court" to encompass all court actions, including class actions, and that to carve out an exception for class arbitration would negate the reading of the clause. *Id.* At 218. Oxford appealed the arbitration as an excess of the arbitrator's powers. The *Stolt-Nielsen* decision was handed down and Oxford appealed the decision a second time. *Id.*

The Third Circuit found that none of the factors delineated by the FAA at 9 U.S.C. § 10(a) existed that would allow the court to vacate an arbitration award.

*Sutter*, 675 F.3d at 219. The Third Circuit clarified that "*Stolt-Nielsen* did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants "class arbitration" or otherwise expressly provides for aggregate procedures." *Id.* at 222. "Instead, *Stolt-Nielsen* established a default rule under the Federal Arbitration Act: "[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.* (Internal citation omitted).

The Third Circuit distinguished the *Sutter* arbitration agreement from the *Stolt-Nielsen* agreement, in that it found that the *Sutter* agreement was not silent as to arbitration. *Id.* The Court found that there was a contractual basis for the arbitrator to have concluded that the agreement intended to encompass class arbitration. *Id.* at 223.

Finally, the Third Circuit decided *Quilloin v. Tenet Health System Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012). In that decision, the Third Circuit stated, while citing to *Stolt-Nielsen*, that "[s]ilence regarding class arbitration generally indicates a prohibition against class arbitration, but the actual determination as to whether class action is prohibited is a question of procedure for the arbitrator." *Id.* at 232.

After the Third Circuit adopted what appeared to be the Supreme Court's view that the task of interpreting whether or not a contract requiring arbitration also permits class arbitration is a one for the

arbitrator, the Supreme Court modified that approach even further in its review of *Oxford Health Plans, LLC. v. Sutter* on appeal from the Third Circuit. ___ U.S. ___, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013). The Supreme Court held that the arbitrator's decision that the contract permitted class arbitration survived the limited judicial review set forth in § 10(a)(4) of the FAA. However, despite this singular question presented, the Supreme Court added a remarkable footnote that dilutes the *Bazzle* plurality:

> We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions – which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy" – are presumptively for courts to decide. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter de novo absent "clear[ ] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. *See* 559 U.S., at 680, 130 S.Ct. 1758. 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. *See* Brief for Petitioner 38, n. 9 (conceding this point). Indeed, Oxford submitted that issue to the arbitrator not once, but twice – and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability.

*Id. at* 2068.

The Sixth Circuit was the first circuit court to move toward the anticipated future path of the Supreme Court with its decision in *Reed Elsevier, Inc. v. Crockett* 734 F.3d 594 (6th Cir. 2013), stating that "recently the [Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question [for the courts] rather than a subsidiary one [for the arbitrator]." *Id.* at 598.

In *Crockett*, an attorney, Craig Crockett, signed a contract of adhesion with LexisNexis that contained an arbitration clause. *Crockett*, 734 F.3d at 596. Crockett filed an arbitration demand on behalf of himself and a putative class. *Id.* The arbitration clause was silent, however, as to the availability of classwide arbitration. *Id.*

The Sixth Circuit canvassed the state of the law in holding that "the question of whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved "for judicial

determination unless the parties clearly and unmistakably provide otherwise." *Crockett*, 734 F.3d at 599. These matters are important enough that courts "hesitate to interpret silence or ambiguity" as grounds for giving an arbitrator the power to decide them, because "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.* at 597 *citing First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

As noted above, the Sixth Circuit aptly wrote, "[a]lthough the Supreme Court's puzzle of cases on this issue is not yet complete, the Court has sorted the border pieces and filled in much of the background." *Crockett* 734 F.3d at 597-8. "Thus, the issue before us – whether classwide arbitrability is presumptively for an arbitrator to decide, or presumptively for a judge – remains an open one." *Id.* at 598. The Sixth Circuit went on to observe:

> The Court has stated that "it cannot be presumed the parties consented to [classwide arbitration] by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685, 130 S.Ct. 1758. Indeed, for several reasons, the Court has characterized the differences between bilateral and classwide arbitration as "fundamental." *Id.* at 686, 130 S.Ct. 1758; *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1750, 179 L.Ed.2d 742 (2011) (same). First, arbitration's putative benefits

– "lower costs, greater efficiency and speed," et cetera – "are much less assured" with respect to classwide arbitration, "giving reason to doubt the parties' mutual consent" to that procedure. *Stolt-Nielsen* at 685, 130 S.Ct. 1758; *see also Concepcion*, 131 S.Ct. at 1751 (stating that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"). Second, "[c]onfidentiality becomes more difficult" in classwide arbitrations, *id.* at 1750 – thus "potentially frustrating the parties' assumptions when they agreed to arbitrate." *Stolt-Nielsen*, 559 U.S. at 686, 130 S.Ct. 1758. Third, "the commercial stakes of class-action arbitration are comparable to those of class-action litigation" – indeed, Crockett seeks an award of $500 million here – "even though the scope of judicial review is much more limited[.]" *Id.* at 686-87, 130 S.Ct. 1758. And then there are the due-process concerns: once an arbitration is expanded classwide, "[t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well." *Id.* at 686, 130 S.Ct. 1758. Consequently, the absent parties "must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Concepcion*, 131 S.Ct. at 1751. Indeed, "where absent class members have not been required to opt in, it is difficult to see how an

> arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Oxford Health*, 133 S.Ct. at 2071-72 (Alito, J., concurring). Thus, in sum, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 131 S.Ct at 1752.

*Crockett*, 734 F.3d at 598.

Be that as it may, the "[T]he Third Circuit ha[d] repeatedly recognized that this issue is exclusively for the arbitrator to decide and this Court is bound by that precedent." *Muhammad v. Delaware Title Loans, Inc.*, 2013 U.S. Dist. LEXIS 23634, *2 (D. NJ Feb. 21, 2013) (Bumb, J.) (Internal citations omitted). Until July 30, 2014, this Court would have ineluctably concluded the issue in Defendants' favor, as district courts are "not at liberty to ignore the decisions of the United States Supreme Court and the Third Circuit Court of Appeals." *Williams v. Nabors Drilling USA, LP, et al.*, 2014 U.S. Dist. LEXIS 23841, *21 (W.D. Pa. Feb. 25, 2014) (Conti, C.J.) (Internal citation omitted). In *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014), the Third Circuit held, however, for the first time, that "the availability of classwide arbitration is a substantive "question of arbitrability" to be decided by a court absent clear agreement otherwise." *Id.* at 329. In *Opalinski*, two men brought an action against their former employer for overtime pay. The men had signed employment agreements,

that, like the agreement at issue here, were silent on the availability of class arbitration. The relevant clause reads, "[a]ny dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement" shall be submitted to arbitration. *Id.*

The Third Circuit held that the "availability of class arbitration is a "question of arbitrability" that is a gateway question for "a court to decide unless the parties unmistakably provide otherwise." *Opalinaki*, 761 F.3d at 331-7. In so holding, Judge Ambro, writing for the *Opalinski* Court stated:

> We proceed to the merits of the case and consider whether, in the context of an otherwise silent contract, the availability of classwide arbitration is to be decided by a court rather than an arbitrator. The analysis is two-fold. We decide whether the availability of classwide arbitration is a "question of arbitrability." *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (internal quotation marks and citation omitted). If yes, it is presumed that the issue is "for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* (internal quotation marks, citations, and alteration omitted). If the availability of classwide arbitration is not a "question of arbitrability," it is presumptively for the arbitrator to resolve. See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944-45, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1994).

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83, 123 S.Ct. 588 (internal quotation marks and citation omitted). While federal policy favors arbitration agreements, an arbitrator has the power to decide an issue only if the parties have authorized the arbitrator to do so. Because parties frequently disagree whether a particular dispute is arbitrable, courts play a limited threshold role in determining "whether the parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability[.]" *Id.* at 83, 123 S.Ct. 588 (emphasis in original).
>
> "Questions of arbitrability" are limited to a narrow range of gateway issues. They may include, for example, "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.* at 84, 123 S.Ct. 588. On the other hand, questions that the parties would likely expect the arbitrator to decide are not "questions of arbitrability." Id. Those include "procedural" questions that grow out of the dispute and bear on its final disposition[,]" as well as allegations of waiver, delay, or similar defenses to arbitrability. *Id.*

*Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 330-1 (3d Cir. 2014).

Scout takes issue with this Court's application of *Opalinski* in its October 16, 2014 Order arguing that because the contracts at issue referenced the AAA rules, the contracts were not silent on class arbitration. The Court respectfully suggests that Scout conflates the "who decides" question with the secondary "clause construction" question. The undersigned has not yet reached the clause construction question. This Court has merely held that the contract did not "clearly and unmistakably provide" for class arbitration; accordingly, the Court should undertake the contract interpretation to determine if the contract does or does not allow for class arbitration.

Scout relies on a recent decision from my colleague, the Honorable Malachy E. Mannion, in what appears to be a substantially similar case involving the same plaintiff. *See Chesapeake Appalachia, LLC. v. Burkett*, No. 3:13-CV-3073, 2014 U.S. Dist. LEXIS 148442 (M.D. Pa. Oct. 17, 2014) (Mannion, J).[2] It is respectfully suggested that the position of Judge Mannion and Scout is not in accord with existing and binding case law. Scout urges that the undersigned follow the approach of Judge Mannion in *Burkett*, and rely on cases discussing clause construction to decide the "who decides" question.

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[2] The division in this District between Judge Mannion's recent holding and the decision reached by the undersigned results in this Court granting the request for language certifying an interlocutory appeal.

The cases relied upon by Judge Mannion in *Burkett* (*Qualcomm Inc. v. Nokia Inc.*, 466 F.3d 1366 (Fed. Cir. 2006), *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327 (11th Cir. 2005), *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2nd Cir. 2005)) dealt with the "who decides" question in the context of a bilateral arbitration agreement. Judge Mannion conceded that the cases he cited were not directly on point to the issue at hand. ("While it is true that the above cases do not address the exact issue presented in this action . . . ") *Burkett*, *supra* at 14.

Using bilateral arbitration dispute case law to make a decision in a classwide arbitration dispute case completely ignores the undergirding of the *Opalinski* holding. "Because of the fundamental differences between classwide and individual arbitration, and the consequences of proceeding with one rather than the other, we hold that the availability of classwide arbitration is a substantive "question of arbitrability" to be decided by a court absent clear agreement otherwise." *Opalinski*, 761 F.3d at 329.

Judge Mannion's analysis, and the analysis Scout urges this Court to adopt, ignores or at least misconstrues both *Opalinski* and the post-*Bazzle* Supreme Court holdings; instead it skips directly to the clause construction question in order to answer the threshold "who decides" question. This is not the state of existing case law in the Third Circuit.

Additionally, the *Burkett* decision determined that because the addendum to the lease provided for

the AAA commercial rules and supplementary rules to govern arbitration, this was evidence that the contract "clearly and unmistakably provide[d]" for class arbitration pursuant to *Opalinski*. This is the evidence in the contract in the case at bar that Scout proposes that this Court consider. The undersigned again respectfully suggests that this is an erroneous analysis. The present contract references and incorporates the AAA rules, at a minimum, because the contract provides for bilateral arbitration. What *Burkett* did, and what Scout proposes that this Court do, is take a contract that clearly and unmistakably provides for bilateral arbitration and the rules that will govern bilateral arbitration, and extrapolate that evidence to "clearly and unmistakably provide" for class arbitration. This argument is unpersuasive. The contract here is silent or ambiguous as to class arbitration, far from the "clear and unmistakable" allowance needed for an arbitrator, and not a court, to turn to the clause construction question.

Moreover, this is precisely the argument the Sixth Circuit rejected in *Crockett*, a decision that the *Opalinski* Court relies upon in no small part. In rejecting Crockett's argument, the Sixth Circuit stated, in pertinent part:

> Crockett cannot make that showing [of clear and unmistakable agreement for class-wide arbitration] here. The Plan's arbitration clause provides, in relevant part:

> 2. Arbitration
>
> Except as provided below, any controversy, claim or counterclaim (whether characterized as permissive or compulsory) arising out of or in connection with this Order (including any amendment or addenda thereto), whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation) will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ("AAA").
>
> The clause also provides: "Issues of arbitrability will be determined in accordance and solely with the federal substantive and procedural laws relating to arbitration[.]"

This language does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration. Instead it does not mention classwide arbitration at all. It is true that the clause provides that "any controversy . . . arising out of or in connection with this Order" shall be resolved by binding arbitration; and one might argue that the question whether an arbitrator should decide classwide arbitrability is a "controversy . . . arising . . . in connection with" Crockett's order. That, indeed, was the interpretation that the plurality gave to analogous language in

*Bazzle*. *See* 539 U.S. at 448, 123 S.Ct. 2402 (plurality opinion). But given the total absence of any reference to classwide arbitration in this clause, the agreement here can just as easily be read to speak only to issues related to bilateral arbitration. Thus, at best, the agreement is silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability; and that is not enough to wrest that decision from the courts. *Stolt-Nielsen*, 559 U.S. at 684-85, 130 S.Ct. 1758. We therefore agree with the district court that the question whether Crockett and LexisNexis agreed to arbitrate must "be decided by the court, not the arbitrator." *AT&T Techs.*, 475 U.S. at 649, 106 S.Ct. 1415. And so we turn to that question next.

The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it. A second reason, as the district court correctly observed, is that the clause limits its scope to claims "arising from or in connection with this Order," as opposed to other customers' orders. Crockett responds that the arbitration clause refers to the AAA's Commercial Rules, which themselves incorporate the AAA's Supplemental Rules for Class Arbitration. But the Supplemental Rules expressly state that one should "not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." Crockett also responds that the agreement

> does not expressly exclude the possibility of classwide arbitration, which is true enough. But the agreement does not include it either, which is what the agreement needs to do in order for us to force that momentous consequence upon the parties here.

*Crockett*, 734 F.3d at 599-600.

The absence of clear and unmistakable evidence discussed in *Opalinski* (and *Crockett*) caused the undersigned to grant Plaintiff's partial motion for summary judgment on Count I of the complaint. This Court has not decided the secondary question of clause construction, as there has been no procedural mechanism through which the Court has had the opportunity to decide whether or not the contract allows for class arbitration.

*2. Plaintiff's Motion to Vacate*

The decision of the arbitrators was vacated by this Court pursuant to 9 U.S.C. § 10(a)(4) because they exceeded their authority. The "task of an arbitrator is to interpret and enforce a contract" *Stolt-Nielsen*, 130 U.S. at 1767, and determining "whether an agreement provides for classwide arbitration is a question of arbitrability to be decided by the District Court." *Opalinski*, 761 F.3d at 332.

Scout's further argument that it was somehow denied due process also fails. Scout has been "given more than a full opportunity to be heard." *United States v. Brownlee*, No. 2:11-CR-00101, 2014 WL

4721828, at *2 (W.D. Pa. Sept. 22, 2014). This Court has read every word of Scout's extensive briefs and exhibits on this singular "who decides" issue. The Court offered the parties the opportunity for oral argument during the June 10, 2014 telephone conference call with the parties. This was declined. The Court subsequently held oral argument, at Scout's request, on December 10, 2014.

*3. Defendants' Request for Certification of Interlocutory Appeal*

Because Judge Mannion in *Burkett* and I have reached diametrically opposing conclusions on what appear to be identical issues relating to class arbitrability, this Court will certify the matter for appeal of the undersigned's October 16, 2014 Order pursuant to 28 U.S.C. § 1292(b).

*4. Defendants' Motion to Vacate and for Recusal*

The undersigned came directly to the bench of this Court from the private practice of law. On December 3, 2014, Scout faxed to the Court a three sentence letter with an advertisement attached that indicated that my former law firm of twenty-two years, Brann, Williams, Caldwell & Sheetz, is serving as local counsel for a Texas law firm, the McDonald Law Firm. McDonald is apparently soliciting Chesapeake leaseholders for possible class action lawsuit against Chesapeake. My former law firm, which includes as

its partners both my father and brother, is *not* a participant in the instant action. Curiously, although it is Chesapeake that my former law firm has prospectively targeted as a potential adverse party, it is Scout who has filed the motion for recusal.

Scout hinges its request for recusal on two statutory bases. First, Scout asks for recusal based on the "general" provision of 28 U.S.C. § 455, the statute titled "Disqualification of justice, judge, or magistrate [magistrate judge]" which states, in pertinent part, "Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Second, Scout lists as a basis for recusal the more specific section,

> He shall also disqualify himself in the following circumstances[, h]e or his spouse, or a person within the third degree[3] of relationship to either of them, or the spouse of such a person [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(5)(iii). In addition to the statutory basis for recusal, Scout asserts that my presiding over this matter creates the appearance of impropriety in

[3] The degree of relationship is calculated by our civil law system, in which father and brother are both within the degrees of affinity contemplated by this statute. Specifically, my father and I have a first degree relationship, and my brother and I have a second degree relationship.

violation of the Code of Conduct for United States Judges.

As it has in the primary matter before the Court, addressed at length above, Scout overlooks precedential decisions in order to advance a position it prefers.

A party's request for the recusal of a judge is unusual. Judges are, by and large, circumspect about their public and private reputations. Judges are impartial arbiters of the law, and suggestions or requests, however respectfully stated, that they would act otherwise is worrisome. A claim under Section 455 "must be supported by a factual basis, and recusal is not required based on unsupported, irrational, or highly tenuous speculation." *In re Linerboard Antitrust Litigation*, 361 F. App'x 392, 400 (3d Cir. 2010) (unpublished).

As Scout is quick to point out, the United States Court of Appeals for the Fifth Circuit has developed a *per se* rule for recusal when the relative of a judge is a partner at a law firm that represents one of the parties, although not the fact pattern here. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980). However, the Fifth Circuit is the only circuit to have taken this draconian approach. "Other circuits, however, have adopted a more lenient approach. For example, the Second Circuit allowed a judge to proceed on a case where a partner on the case was married to the judge's sister-in-law." Jeffrey M. Hayes, To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem, 33 J. Legal Prof. 85,

95 (2008), *see also Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 83-84 (2d Cir. 1996) ("We reject the Fifth Circuit's rule of automatic recusal."); *In re Kansas Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1364 (8th Cir. 1996); *Southwestern Bell Telephone Co. v. F.C.C.*, 153 F.3d 520, 522 (8th Cir. 1998); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991), cert. denied, 503 U.S. 981 (1992); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1568 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 1076.

Chief Justice William H. Rehnquist was faced with an nearly identical set of circumstances in *Microsoft Corp. v. United States*, 530 U.S. 1301, 121 S. Ct. 25, 147 L. Ed. 2d 1048 (2000). While I in no way mean to compare myself to Chief Justice Rehnquist, I cite at length to the late Chief Justice's statement, as it is analogous to the question at hand. *Microsoft* involves a relative in the first degree of consanguinity who is a partner at a law firm. Although, in *Microsoft*, Chief Justice Rehnquist's son actually represented Microsoft Corporation in other matters. Here, the Court is faced with the odd situation of a party demanding recusal of a judge because the judge's relatives are partners at a law firm who may in some fashion represent in the future the interests *against* the non-moving party here (but not in the instant litigation).

Chief Justice Rehnquist wrote in *Microsoft v. United States*, as follows:

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm, and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific instances in which disqualification is required, including those instances where the child of a Justice "is known . . . to have an interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm's usual rates. Even assuming that my son's non-pecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude

that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with § 455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under § 455(a) "is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. *See ibid.; In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1309 (CA2 1988). I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's Microsoft matters. Therefore I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son's representation and the matters before this Court relate to Microsoft's potential antitrust liability. A decision by this Court as to Microsoft's antitrust liability could have a significant effect

> on Microsoft's exposure to antitrust suits in other courts. But, by virtue of this Court's position atop the federal judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to § 455(a) seems contrary to the "reasonable person" standard which it embraces. I think that an objective observer, informed of these facts, would not conclude that my participation in the pending Microsoft matters gives rise to an appearance of partiality.

*Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S. Ct. 25, 147 L. Ed. 2d 1048 (2000).

If either my father or brother had entered their appearances for any party in the case at bar, I would have promptly recused had the case been assigned to me. Likewise, had my former law firm entered an appearance for any party in the instant litigation, I would have promptly recused, as my association with the firm ended slightly less than two years ago and included a financial buyout which was not completely effected until August 2013. At this stage of my federal judicial career, these ties might well create the

appearance of impropriety shortly after the conclusion of a two decade professional relationship.

It would seem pretty far afield to suggest, however, that even an appearance of impropriety, let along impropriety itself, exists when a judge's close relatives are partners in a law firm, formerly the judge's law firm, who *may* at some date in the future represent the interests of an unknown person or entity in litigation in an undetermined court impacted by the judge's determination today on the proper procedural approach to class arbitrability. No reasonable or informed person could conclude that my partiality in this case could be drawn into question concerning such hypothetical litigation. A reasonable or informed person, including a reviewer of this memorandum opinion, might, in fact, conclude that the recusal request was contrived.

Finally, the Defendant suggests that my father and brother have "interests" that may be affected by this Court's decision today regarding this pending issue of class arbitrability. It is not at all clear to the undersigned what these "interests" might be. The Code of Conduct for United States Judges appears to conclude that "interests" are typically financial interests, which could be impacted, adversely or favorably, by a judge's decision. While judges are required to be aware of their own financial affairs and those of other members of their household, including spouses and children, they are not required to be aware, or made aware, of the financial interests of parents or siblings. Moreover, "[t]he financial

interest in the subject matter in controversy must be direct, rather than speculative or remote." *Tare v. Bank of America*, 2008 WL 4372785 at *4 (D.N.J. Sept. 19, 2008). Any non-pecuniary interests don't appear to be relevant in light of the remoteness of any potential litigation which may or may not be affected by any rulings in the case at hand.

The Court is skeptical, then, of the Defendant's actual basis for recusal in this case. It would seem, instead, that this is, at heart, a desire for judge shopping, masquerading as an alarmed recitation of a recusal request. The Court is deducing this for several reasons. First, this is Scout's second attempt to have this case transferred to a different judge. See ECF No. 20. Second, not only is Scout asking the undersigned to recuse, it is also asking for the extraordinary remedy of vacating prior orders. Third, this pending motion was filed at the eleventh hour, three business days before an oral argument on Scout's motion for reconsideration – an argument that had been scheduled more than a month before. Fourth, the motion to recuse was filed by Scout, the party who has interests in line with my former firm; it was not filed Chesapeake, the party whose interests may prove adverse to those of my former firm. The undersigned suspects that Scout may be shopping about, in hopes that Judge Mannion, or another judge who may analyze the case law in the same manner, is assigned to the case so that Scout receives a different outcome from what it previously received

from the undersigned on October 16, 2014 and probably, if truth be told, expects to receive in this opinion.

As Judge Richard Posner noted recently: "[T]here is[ ] a serious problem of judge shopping in the disordered realm of class action litigation." *Smentek v. Dart*, 683 F.3d 373, 376 (7th Cir. 2012) (Posner, J.). Scout is therefore admonished that "[j]udge-shopping clearly constitutes conduct which abuses the judicial process." Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998). "The district court's inherent power to impose dismissal or other appropriate sanctions therefore must include the authority to dismiss a case for judge-shopping." *Id.*

Lastly, Scout's request that the Court vacate it's October 16, 2014 Order is denied. Federal Rule of Civil Procedure [ ] 59(e) provides, "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." This Rule has been interpreted to permit a motion to vacate a judgment in addition to a motion to alter or amend it." *Daker v. Warren*, No. 1:10-CV-03815-RWS, 2012 WL 2403437, at *4 (N.D. Ga. June 25, 2012) *citing* 11 Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure § 2810.1 (2d ed.); *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Scout's motion to vacate was docketed some twenty-two days after the twenty-eight day entry of judgment deadline. Furthermore, "reconsideration of a judgment pursuant to Rule 59(e) is committed to the sound discretion of the district court, *Am. Home Assur. Co. v. Glenn Estess & Assocs.,*

*Inc.*, 763 F.2d 1237, 1238-39 (11th Cir.1985), but it is "an extraordinary remedy which should be used sparingly." *Daker* at *4 (N.D. Ga. June 25, 2012) *citing* 11 Wright & Miller, Federal Practice and Procedure § 2810.1.

Scout's unusual request of vacation of this Court's October 16, 2014 Order is both untimely and further evidences Scout's hope that another judge would re-decide the matter in its favor, despite controlling precedent to the contrary.

## III. CONCLUSION:

The defendants' motions for reconsideration and to vacate/recuse are denied. I will amend my prior Order granting Chesapeake's Motion for Partial Summary Judgment and denying Scout's Motion to Dismiss to incorporate this Memorandum Opinion as the reasoning in support of that Order and will grant defendants' request for certification of interlocutory appeal of the Court's October 16, 2014 Order.

The action will be stayed pending decision by the United States Court of Appeals for the Third Circuit.

BY THE COURT:

/s Matthew W. Brann
Matthew W. Brann
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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| CHESAPEAKE APPALACHIA, L.L.C., | : | 4:14-CV-0620 |
| Plaintiff, | : | (Judge Brann) |
| v. | : | |
| SCOUT PETROLEUM, LLC, and SCOUT PETROLEUM II, LP, | : | |
| Defendants. | : | |

**ORDER**

October 16, 2014

On April 1, 2014, plaintiff Chesapeake Appalachia, LLC (hereinafter "Chesapeake"), instituted the instant complaint against defendants Scout Petroleum, LLC and Scout Petroleum II, LP (hereinafter collectively "Scout"). The complaint was filed after Scout had initiated arbitration proceedings against Chesapeake with the American Arbitration Association (hereinafter "AAA")

Three days later, on April 4, 2014, Chesapeake filed a Motion for Summary Judgement on Count I of the complaint, requesting that the Court enter an Order that the Court, and not an arbitration panel, decide whether or not a contract entered into between the parties is arbitrable as a class proceeding.

On April 29, 2014, Scout filed a Motion to Dismiss requesting that the Court enter an Order holding that an arbitration panel from the American Arbitration Association decide this "who decides" question.

Subsequently, on June 4, 2014, the parties contacted the Court and requested expedited handling of the respective motions. On June 10, 2014, the Court and the parties held a telephone conference call and the Court agreed to expedited handling of the pending motions. Accordingly, the Court put to the side other motions on its very full civil docket and commenced the research necessary to resolve the question before it.

The "who decides" issue is an unsettled area of law in the class arbitrability arena. The United States Court of Appeals for the Third Circuit had previously indicated that the arbitrator should decide such a question, although it was clear that the United States Supreme Court was incrementally shifting in the direction of concluding that courts should decide this threshold issue. The Court had a finalized Memorandum Opinion and Order, which detailed this unsettled area of law, ready to docket on July 31, 2014.

Coincidentally, on that date, as the parties are well aware, the Third Circuit issued a decision that altered the state of the law in this Circuit. *See Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d

Cir. 2014). The Third Circuit has now held that the courts decide the "who decides" issue.

Accordingly, this Court has been drafting a revised Memorandum Opinion and Order on the "who decides" issue. During this time, however, the parties, without either contacting the Court or waiting for the Court to act, proceeded before the arbitration panel on the questions of both who decides and the question of arbitrability. The arbitration panel decided that it, not the Court decides, and also decided that the contract permitted class arbitration. On October 14, 2014, Scout notified the Court that the AAA arbitration panel had entered this decision, which the Court finds to be contrary to *Opalinski.*

In response, also docketed October 14, 2014, Chesapeake filed two further motions – a Motion to Vacate, ECF No. 44, and a Motion to Stay/Expedite, ECF No. 46. The Court also received a call from defense counsel inquiring about these two motions.

The Court had every expectation of crafting a detailed opinion as to why *Opalinski* was clearly controlling precedent that it would follow in rendering its decision on this matter. However, given the parties extreme sense of urgency in resolving the underlying issue, the calculation of royalty payments pursuant to the terms of certain gas leases, together with the fact parties seem unwilling to permit the Court time to fully detail and explain its decision, the instant Order shall be entered without further commentary.

**IT IS HEREBY ORDERED THAT:**

1. Plaintiff's Motion for Summary Judgment on Count I is GRANTED. ECF No. 8. The Court will decide whether class arbitration is permissible pursuant to the terms of the leases.
2. Defendants' Motion to Dismiss is DENIED. ECF No. 26.
3. Plaintiff's Motion to Vacate the Arbitration Panel's Clause Construction Decision is GRANTED. ECF No. 44.
4. Plaintiff's Motion to Stay/Vacate is DENIED as moot. ECF No. 46.

BY THE COURT:

/s Matthew W. Brann
Matthew W. Brann
United States District Judge

**AMERICAN ARBITRATION ASSOCIATION**

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|---|---|
| **SCOUT PETROLEUM LLC and SCOUT PETROLEUM II LP,**<br>**Claimants**<br>**v.**<br>**CHESAPEAKE APPALACHIA, L.L.C.**<br>**Respondent.** | **AAA Case No. 14-115-339-14** |

## CLAUSE CONSTRUCTION DECISION RE: WHETHER A COURT OR THE PANEL MAY DECIDE CLASS ARBITRABILITY

This decision addresses the issue of who decides the threshold question of class arbitrability, the United States District Court or this Panel. Chesapeake Appalachia, L.L.C. ("Chesapeake") argues that because this is a "question of arbitrability," the Court is the decisionmaker. Claimants Scout Petroleum LLC and Scout Petroleum II LP (collectively "Claimants" or "Scout") argue that this issue is for the Panel to decide because the relevant agreements incorporate the American Arbitration Association ("AAA") Rules which require the Panel to determine class arbitrability.

The parties provided the Panel with opening briefs on the question. Before the issue could be decided, Chesapeake filed a Notice of Supplementary Authority with regard to "who decides" in light of the

Third Circuit's decision in *Opalinski et al. v. Robert Half International Inc.,* No. 12-cv-4444, ___ F.3d ___, 2014 WL 3733685 (3d Cir. July 30, 2014). A hearing was held on September 19, 2014.[1]

After reviewing the submissions of the parties, the Panel concludes that it has the authority to decide class arbitrability, based on the language of the agreement in this case and the applicable law. We find that *Opalinski* and the other cases cited to us by Chesapeake are distinguishable.

The Panel will next decide two other questions, first, whether the arbitration agreement precludes class arbitration and if it does not, whether this arbitration may proceed on a class basis and its scope. Scout is to brief the first question within twenty days of this order; Chesapeake is to respond twenty days after receiving Scout's brief.

**Procedural Background:**

Claimants are Delaware entities which own interests under oil and gas leases in Pennsylvania's Marcellus Shale Formation. (Demand ¶ 4.) They entered into various leases with Chesapeake for the extraction of oil and gas, called "TTPVL Form Leases" (the "Leases"). (*Id.* ¶ 1.) The Leases grant Chesapeake the right to extract oil and gas from Claimants' properties in exchange for well-defined royalty payments.

[1] Judge Gertner participated by telephone.

(*Id.* ¶¶ 13-14.) More specifically, the Leases require Chesapeake to pay Claimants:

> an amount equal to one-eighth (1/8) of the revenue realized by Lessee for all gas and the constituents thereof produced and marketed from the Leasehold, less the cost to transport, treat, and process the gas and any losses in volumes to the point of measurement that determines the revenue realized by Lessee.

(*Id.* ¶ 2.) Scout claims that Chesapeake, in violation of this provision, has been taking royalty deductions for prohibited costs, such as costs relating to "compression," "gathering," and costs identified as "third party." (*Id.* ¶¶ 14-15.)

On March 17, 2014, Scout filed a demand for class action arbitration proceedings that is now before this Panel. The demand alleges Breach of Contract (Count One); Estoppel/Course of Conduct (Count Two); Failure to Pay Royalties on Natural Gas Liquids (Count Three); and Declaratory Award (Count Four). The demand for class arbitration was based on the following provision in the Leases:

> In the event of a disagreement between Lessor and Lessee concerning this lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined in arbitration in accordance with the rules of the American Arbitration Association. All fees and costs

> associated with the arbitration shall be borne equally by the Lessor and Lessees.

(Demand at ¶ 6). At the time the Agreement became effective, on July 21, 2008, the "rules of the American Arbitration Association" to which the Agreement referred included the Supplementary Rules which explicitly governed class arbitration. (The Supplementary Rules had become effective on October 28, 2003.) Supplementary Rule 1(a) provides: "These [Supplementary Rules] shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ('AAA') where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules."

Scout seeks to represent a class of similarly situated Chesapeake Lessors, all of whom were obliged to sign the Leases with an arbitration provision incorporating the AAA rules. (Demand ¶ 18(a)). Scout suggests that the issue – a recalculation of the royalty formula – is uniquely suited for class treatment.

Chesapeake filed an Answer on April 7, 2014, and objects to submitting the question of class arbitrability to this Panel.

Two weeks after being served with the Demand, Chesapeake filed a declaratory judgment action, *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*, Civ. No. 4:14-cv-00620 (M.D. Pa. April 1, 2014), seeking a judgment that the Court, not the Panel,

decide whether class arbitration is available under the arbitration agreement, and further, that the Court conclude that class arbitration is not so available. On April 4, 2014, Chesapeake moved for summary judgment. On April 29, 2014, Scout moved to dismiss or stay the federal action, arguing that the Panel has the authority to decide class arbitrability under the plain terms of the Leases. All motions before the federal court are briefed and ripe for disposition.

**Merits**

**A. Legal Standard**

This is a rapidly evolving area of the law, with multiple cases heard by the Supreme Court and the lower federal courts over the last eight years, often pointing in different directions. On the one hand, there is the long standing and strong federal policy in favor of arbitration. 9 U.S.C. § 1 et seq. At the same time, the case law reflects concerns about class arbitration: in particular, its cost, its complexity, its provisions for confidentiality and notice issues with regard to absent class members.

Those concerns precipitated the 2003 adoption of the American Arbitration Association's Supplementary Rules for Class Arbitration. The Supplementary Rules make it clear that class arbitrability is a

decision for the arbitrators in the first instance.[2] The arbitrators must determine "in a reasoned, partial final award on the construction of the arbitration clause," whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class, a determination subject to judicial review.[3] Indeed, the Rules have a built-in pause provision, staying all proceedings for at least 30 days following the issuance of the Clause Construction Award to enable any party to move in an appropriate court for an order confirming or vacating the Award.[4] If any party advises the arbitrator within the 30-day stay period that it has sought judicial review, the arbitrator has discretion to continue the stay of the order in whole or in part until the court issues a ruling.[5] The Rules also address questions of the class definition, notice to the class, and the confidentiality of the proceedings. Indeed, the Supplementary Rules virtually track Rule 23 of the Federal Rules of Civil Procedure.

Chesapeake cites to *Reed Elsevier, Inc., ex rel. LexisNexis Div. v. Crockett*, 734 F. 3d 594 (6th Cir. 2013) and *Opalinski* which, focusing on the nature of class action arbitrations, require a different approach than that set forth in the AAA Rules. While an arbitration agreement generally commits all of the issues

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[2] Am. Arb. Assoc., Supplementary Rules For Class Arbitration ¶ 3.

[3] Id.

[4] Id.

[5] Id.

to the arbitrator with the narrow exception of "questions of arbitrability," *Green Tree Fin. Corp. v. Bazzle*, 439 U.S. 444, 451 (2003), the courts in *Opalinski* and *Reed Elsevier* held that class arbitrability is "gateway issue," presumptively reserved for the court, "unless there is clear agreement otherwise." *Opalinski*, *supra* at 326.

Neither decision addressed the impact of the AAA's Supplementary Rules on this legal framework. And while dicta in recent Supreme Court decisions point in both directions – sometimes supporting Chesapeake, sometimes supporting Scout – the Court has not yet addressed the matter of who decides class arbitrability. Nevertheless, we are bound by the Third Circuit's formulation of the standard in *Opalinski* – class arbitrability as a question for the Court "unless there is a clear agreement otherwise."

The central question is whether the *Opalinski* standard has been met in this case. Chesapeake insists that it has not. Chesapeake comes to that conclusion by imposing an additional requirement to that spelled out in *Opalinski*, one expressly rejected by recent Supreme Court decisions. Chesapeake suggests that only explicit contract language will rebut the presumption that the question of class arbitrability is for the court. Since the words "class action" are nowhere in the Leases, there is no explicit authorization for the arbitrators to decide the threshold question, and, thus, according to Chesapeake, the Court must decide the issue.

We reject this interpretation of the factual requirements to satisfy *Opalinski*. We conclude that the arbitration contract in this case clearly and unmistakably authorizes the Panel to make the decision about arbitrability. We base our decision upon the breadth of language of the Leases, and the incorporation of the AAA rules which, at the time of the contract's execution, included the Supplementary Rules for Class Arbitrations. Under the standard rules of contract interpretation, the intent of the parties is clear – that they intend to be governed by the Supplementary Rules including the rule requiring the Panel to decide arbitrability.

### B. Contract Interpretation; Incorporation of the AAA Rules

Pennsylvania law of contract interpretation governs. Pennsylvania law is straightforward: It requires the Panel to determine the intent of the contracting parties. Where, as here, there is a written contract, "the intent of the parties is the writing itself." *The Insurance Adjustment Bureau, Inc. v. Allstate Insurance Company*, 588 Pa. 470, 480 (2006). The agreement is to be construed against the drafter. If the terms are "clear and unambiguous," the intent of the parties is reflected in the agreement. Where the terms are ambiguous, "parol evidence is admissible to explain or clarify or resolve the ambiguity." *Id.* at 481 (citing *Steuart v. McChesney*, 578 Pa. 82, 91 (2004)).

The arbitration agreement provides:

> In the event of a disagreement between Lessor and Lessee concerning this lease, performance thereunder, or damages caused by Lessee's operations, *the resolution of all such disputes shall be determined in arbitration in accordance with the rules of the American Arbitration Association.* All fees and costs associated with the arbitration shall be borne equally by the Lessor and Lessees.

(Demand at ¶ 6) (Italics supplied). At the time the Agreement became effective, the "rules of the American Arbitration Association" included the Supplementary Rules which explicitly governed arbitration on behalf of or against a class or purported class . . . " AAA Supp. Rule 1(a).

Rule 7 states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Rule 3 authorizes this Panel to "to determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." To be sure, Rule 3 also provides that the "existence" of a class arbitration provision should not be considered by the arbitrator as a factor in favor of or against permitting arbitration. But the *existence* of Rule 3's provisions is not the basis for this decision on "who decides" class

arbitrability. It is the parties' *inclusion of* the AAA rules in the Agreement, which in 2008 necessarily included the Supplementary Rules for Class Arbitrations.[6] Moreover, to the extent Rule 3 applies at all, it is limited to the arbitrator's decision on whether the clause permits class arbitration (i.e. the clause construction phase). It does not suggest that an arbitrator should ignore AAA rules when deciding the threshold question of "who decides" class arbitrability.

Other courts within the Third Circuit have held that the incorporation of these rules is "clear and unmistakable evidence" that the parties agreed to submit arbitrability questions to the arbitrators. *See, e.g. Silec Cable S.A.S. v. Alcoa Fjardaal Sf* 2012 U.S. Dist. Lexis 167020, at * 55 (W.D. Pa. Nov. 26, 2012); *Ins. Newsnet.com, Inc. v. Pardine*, 1:11-cv-00286, 2011 WL 3423081, at *3 (M.D. Pa. August 4, 2011); *Way Services Inc.v. Adecco North America, LLC*, No. 06-cv-2109, 2007 WL 1775393, at *3 (E.D. Pa. June 18, 2007) (same); *see also MACTEC Dev. Corp. v. EnCap Golf Holdings, LLC (In re EnCap Golf Holdings, LLC)*, No. 08-5178, 2009 WL 2488266, at *4 (D.N.J. Aug. 10, 2009) ("the fact that the Lexington Policy incorporates the AAA Construction Rules and that

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[6] The arbitrator in *Rich v. Rent-a-Center, Inc.* found that the reference to the AAA rules was not sufficient to buttress a claim for class arbitrability. However, in that case the relevant arbitration document preceded the Supplementary Rules by at least seven years. *Todd Rich v. Rent-A-Center Inc.*, AAA No. 11-160-01833-04 (August 18, 2005) (Hon. Bechtle, Arb.)

Rule 8 of these rules provides that the arbitrator shall have the authority to determine jurisdiction constitutes clear and unmistakable evidence"). Likewise, other circuit courts have agreed. *See, e.g. In Contec v. Remote Solution Co.*, 398 F. 3d 205, 208, 211 (2d Cir. 2005); *Terminix Int'l Corp., LP v. Palmer Ranch Ltd P'ship*, 432 F. 3d 1327, 1332 (11th Cir. 2005); *Apollo Computer, Inc. v. Berg*, 886 F. 2d 469 (1st Cir. 1989).

Nor does *Opalinski* suggest otherwise. The agreements at issue in *Opalinski* were entered into before the adoption of AAA's Supplementary Rules for Class Actions. Indeed, the *Opalinski* agreements mentioned only that arbitration will be conducted pursuant to the "commercial arbitration rules of the American Arbitration Association" which at that time did not provide for class arbitration.

Scout argues that while *Opalinski's* agreements predated the AAA's Supplementary Rules, the Sixth Circuit's decision in *Reed Elsevier* post dated them. The Sixth Circuit held that the incorporation of AAA rules into an arbitration agreement is not clear and unmistakable evidence that the parties agreed to submit the question of class arbitrability to the arbitrator. However, the Court did not directly address the contract interpretation question with which we deal – whether the specific incorporation of those rules (and of the Supplementary Rules) had an impact on the interpretation of the arbitration clause. Nor did they consider the impact of the Supplementary Rules in addressing the Court's concerns about

class action arbitration. Instead, the Court characterized the Claimant's argument about the Rules as just another version of the argument which the Supreme Court disapproved of in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), namely that class treatment can be inferred solely from the agreement to arbitrate. That is not the argument Scout makes here, nor is it the basis of our decision.[7]

Significantly, district courts and circuit courts in other jurisdictions have come to the same conclusions as the Panel. In *Reed v. Fla. Metro. Univ.*, 681 F.3d 630 (5th Cir. 2012),[8] the plaintiff filed for class

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[7] It should also be noted that the language of the *Reid Elsevier* agreement is relatively narrow, which the Court acknowledged. It provides;

> " . . . any controversy, claim or counterclaim (whether characterized as permissive or compulsory) arising out of *or in connection with this Order* (including any amendment or addenda thereto), whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation) will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ("AAA")."

*Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

[8] The Fifth Circuit affirmed the arbitrator's determination that it had the authority to decide arbitrability based on the incorporation of the Supplementary rules. It disagreed with the arbitrator's substantive determination that class action treatment was appropriate under the parties' agreement, and reversed the district court's decision confirming the award. The latter finding was abrogated by *Oxford Health Plans LLC v.*

(Continued on following page)

arbitration, which the defendant opposed. The parties' arbitration agreement provided that any arbitration would be conducted pursuant to AAA Commercial Rules. *Id.* at 632-33. The Fifth Circuit first noted that the AAA Commercial Rules do not contain class arbitration procedures, but rather such procedures are provided in the separate Supplementary Rules. Nevertheless, the Fifth Circuit held that "consent to any of the AAA's substantive rules also includes consent to the Supplementary Rules." *Id.* at 635. Therefore, the parties had in effect incorporated AAA Supplementary Rule 3, which directs the issue of class arbitrability to the arbitrator. The Fifth Circuit concluded that "the parties' consent to the Supplementary Rules . . . constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration." *Id.* at 636.[9]

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*Sutter*, 133 S.Ct. 2064 (2013) which addressed the scope of judicial review of an arbitrator's decision under 9 U.S.C. § 10(a).

[9] Various other courts have come to the same conclusion specifically about the "who decides" question when faced with similar facts, both before and after *Reid Elsevier. See, e.g.*, *Price v. NCR Corp.*, 908 F. Supp. 2d 935, 945-46 (N.D. Ill. 2012) ("By adopting AAA Supplementary Rule 3 in their Agreement, the parties agreed that an arbitrator, and not this Court, would determine whether the Agreement authorizes class arbitration."); *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1012 (N.D. Cal. 2011) ("The Court agrees with Iversen that the incorporation by reference of the AAA Supplementary Rules as they existed at the time Yahoo and Iversen entered into their contract constitutes 'clear and unmistakable' agreement to have the

(Continued on following page)

### C. Failure to explicitly refer to class arbitration as a matter for the Panel

Principally relying on *Stolt-Nielsen S.A. v. Animal-Feeds Intl Corp.*, 559 U.S. 662 (2010), Chesapeake argues that without an explicit reference to the arbitrator determining arbitrability, the Leases cannot meet *Opalinski's* "clear agreement" test. *Stolt-Nielsen*, however, is distinguishable. First, it did not address the question of who decides arbitrability. That decision was made in the first instance by the Panel. To the extent that *Stolt-Nielsen* communicated a more rigorous textual approach to when class arbitrations are authorized – unless the agreement says "class," it does not authorize class arbitration – the Court expressly eschewed any particular methodology. "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class action arbitration." *Id.* at 686 n. 10.

Since the parties in *Stolt-Nielsen* had stipulated that they had reached "no agreement" on the question of class arbitration, 559 U.S. at 668-69, the

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arbitrator decide questions regarding the arbitrability of class-wide claims.").

And some have disagreed with the threshold finding of both *Reid Elsevier* and *Opalinski* that arbitrability is a gateway issue. *Harrison v. Legal Helpers Debt Resolution LLC*, 2014 WL 4185814, * 3 (D. Minn. August 22, 2014) (dicta).

arbitrators had no occasion to consider the contract's language or the parties' intent. Rather the Panel proceeded to "impose[ ] [their] own view of sound policy" as to what they considered to be the best rule under the circumstances. *Id.* at 670, 672-74. In so doing, the Supreme Court held, the arbitrators exceeded their powers. In contrast, the Panel's task here is well within its authority – to evaluate the language of the document to glean the parties' intent on the question of who decides arbitrability.[10]

### D. Conclusion

The Panel concludes that it must decide the availability of class arbitration and orders the briefing

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[10] Finally, a rule of explicitness would obviously eliminate another tool of contract interpretation, namely the rule that if the contract is ambiguous the Panel can look to extrinsic evidence to determine the parties' intent. (This is so even with respect to an integrated agreement. *See* Restatement (Second) of Contracts § 212 (2014)). Chesapeake has not included class action waivers in leases pre- or postdating the Scout leases, even after *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) when it could have done so. Chesapeake knew of the existence of class action waivers in mandatory arbitration and chose not to insist on them.

schedule described above on the next question, whether the agreement precludes class arbitration.

By the Arbitrators:

/s/ Louis C. Bechtle
October 6, 2014 Honorable Louis C. Bechtle (Ret.)(Chair)

/s/ Bruce Kauffman
Honorable Bruce Kauffman (Ret.)

/s/ Nancy Gertner
Honorable Nancy Gertner (Ret.)

## TITLE 9 – ARBITRATION

*This title was enacted by act*
*July 30, 1947, ch. 392, § 1, 61 Stat. 669*

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## CHAPTER 1 – GENERAL PROVISIONS

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### § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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.

### § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such

arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

* * *

**§ 10. Same; vacation; grounds; rehearing**

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

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**AAA COMMERCIAL ARBITRATION RULES**

- AAA Commercial Rule 1 – Agreement of Parties

  (a) 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) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

- AAA Commercial Rule 7 – Jurisdiction

  (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

  (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the

contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

- AAA Commercial Rule 8 – Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

## AAA SUPPLEMENTARY RULES FOR CLASS ARBITRATION

- AAA Supplementary Rule for Class Arbitration 1 – Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association

("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

* * *

- AAA Supplementary Rule for Class Arbitration 3 – Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction

Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

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