NO. 16-_____

In the Supreme Court of the United States

J & K ADMINISTRATIVE MANAGEMENT SERVICES, INCORPORATED; KIMBERLY N. MEYERS,

Petitioners,

–v–

NEFFERTITI ROBINSON, Individually and on Behalf of those Similarly Situated; SANDRA HARRIS; GLORIA TURNER; JOAN STANTON; ANN KNIGHT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC J. MILLNER
COUNSEL FOR PETITIONERS
BOURLAND, WALL & WENZEL, P.C.
301 COMMERCE STREET, STE. 1500
FORT WORTH, TX 76102-4115
(817) 877-1088
EMILLNER@BWWLAW.COM

JULY 18, 2016

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

The Respondents are former employees of Petitioner J&K Administrative Management Services, Inc. ("*J&K*") who each entered into identical bilateral arbitration agreements with J&K to arbitrate "all claims and disputes" such employee has against J&K and "all claims and disputes" J&K has against such employee. The agreement also submitted to arbitration "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim." (App.42a). The agreements contemplate a bilateral arbitration proceeding and are silent regarding the availability of class or collective arbitration or who decides the availability of class or collective arbitration. Nevertheless, in *Robinson v. J&K Administrative Management Services, Inc.*, 817 F.3d 193 (5th Cir. 2016), which is set forth in the Appendix ("App.") hereto at 1a-10a, the Fifth Circuit held that the language in the parties' arbitration agreements was sufficient to defer the question of the availability of class or collective arbitration to the arbitrator. (App.8a-10a).

The question presented is whether an arbitration clause that does not expressly address the availability of class or collective arbitration is sufficient to defer the question of the availability of class or collective arbitration to an arbitrator to decide.

CORPORATE DISCLOSURE STATEMENT

Petitioner J&K Administrative Management Services, Incorporated has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 817 F.3d 193 and is reprinted in the appendix hereto at App.1a-10a. The order of the Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc has not been reported. It is reprinted in the appendix hereto at App.30a-31a.

The *Memorandum Opinion and Order* of the United States District Court for the Northern District of Texas (Lindsay, D.J.) has not been reported. It is reprinted in the appendix hereto at App.11a-21a.

The *Findings, Conclusions, and Recommendation* made by United States Magistrate Judge Renee Harris Tolliver of the United States District Court for the Northern District of Texas has not been reported. It is reprinted in the appendix hereto at App.22a-29a.

JURSIDICTION

The Court of Appeals for the Fifth Circuit entered its opinion and order on March 17, 2016. The Court of Appeals for the Fifth Circuit entered its order denying rehearing and rehearing en banc on April 18, 2016. This Court has jurisdiction to review this matter under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act are set forth at App.32a-35a. Pertinent provisions of the Fair Labor Standards Act are set forth at App.35a-37a.

STATEMENT OF THE CASE

A. The Arbitration Proceeding

On February 18, 2014, Respondent Neffertiti Robinson ("*Robinson*"), a former employee of Petitioner J&K Administrative Management Services, Inc. ("*J&K*"), submitted a Demand for Arbitration to JAMS (the "Arbitration Demand") of alleged minimum wage and overtime claims under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "*FLSA*"), against J&K and Petitioner Kimberly N. Meyers ("*Meyers*"), the President of J&K. J&K and Meyers may be referred to

hereinafter, collectively, as the "*Petitioners*". Robinson alleged in the Arbitration Demand that she is asserting claims on her own behalf (the "*Individual Claims*") and as a collective action on behalf of others she alleges to be similarly situated (the "*Collective Claims*"). JAMS designated the matter as case number 1310021224 (the "*Arbitration Proceeding*").

On February 28, 2014, consents to opt in to the Collective Claims purportedly signed by Respondents Ann Knight ("*Knight*"), Joan Stanton ("*Stanton*"), and Gloria Turner ("*Turner*"), all former employees of J&K, were filed in the Arbitration Proceeding. On March 12, 2014, a consent to opt in to the Collective Claims purportedly signed by Respondent Sandra Harris ("*Harris*"), another former employee of J&K, was filed in the Arbitration Proceeding. Robinson, Knight, Stanton, Turner, and Harris may be referred to hereinafter, collectively, as the "*Respondents*."

B. The Arbitration Provision

Each of the Respondents agreed to the "Election and Arbitration Agreement" related to J&K's Occupational Injury Benefit Plan (the "*Arbitration Provision*"), which is contained in J&K's CAREgiver Handbook & Policy & Procedure Guidelines.

The Arbitration Provision states in pertinent part as follows:

> MUTUAL PROMISES TO RESOLVE CLAIMS BY BINDING ARBITRATION: I recognize that disputes may arise between the Company (or one of its affiliates) and me during or after my employment with the Company. I understand and agree that any

and all such disputes that cannot first be resolved through the Company's internal dispute resolution procedures or mediation must be submitted to binding arbitration.

* * *

CLAIMS SUBJECT TO ARBITRATION: claims and disputes covered by this Agreement include:

(a) all claims and disputes that I may now have or may in the future have against the Company and/or against its successors, subsidiaries and affiliates and/or any or [sic] their officers, directors, shareholders, partners, owners, employees and agents, or against any Company employee benefit plan (including the Plan) or the pan's [sic] administrators or fiduciaries, and

(b) all claims and disputes that the Company and/or its successors, subsidiaries and affiliates and/or any of their officers, directors, shareholders, partners, owners and any Company employee benefit plans (including the Plan) may now have or may in the future have against me, my spouse, children, heirs, parents and/or legal representatives.

The types of claims covered by this Agreement include, but are not limited to, any and all:

(a) claims for wages or other compensation; claims for breach of any contract, covenant or warranty (express or implied);

* * *

(f) claims for a violation of any other federal, state or other governmental law, statute, regulation or ordinance; and

(g) claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim.

(App.40a-42a).

The parties have not agreed to the arbitration of disputes on a class or collective basis. The Arbitration Provision never mentions class or collective arbitration. It also does not include claims between J&K and any employee other than the employee who signed his or her specific agreement. To state it another way, the Arbitration Provision is an agreement to submit certain claims to bilateral arbitration, not class or collective arbitration.

C. The District Court Action

On March 16, 2014, Robinson filed Plaintiff's Original Complaint to Compel Arbitration (the "*Complaint*") in Civil Action No. 3:14-CV-00956-L styled Neffertiti Robinson, individually and on behalf of those similarly situated v. J&K Administrative Management Services, Inc. and Kimberly N. Meyers (the "*District Court Action*") in the United States District Court for the Northern District of Texas, Dallas Division (the "*District Court*"). In the Complaint, Robinson sought to compel the arbitration of both the Individual Claims and the Collective Claims with JAMS.

On April 7, 2014, Petitioners filed an Answer to Robinson's claims in the District Court Action. Petitioners also added the other Respondents to the District Court Action as Third Party Defendants and included a Counterclaim and Third-Party Claim for Declaratory Judgment and Application for Injunctive Relief, for Order Compelling Separate Arbitrations, and for Appointment of Arbitrators (the "*Counterclaim*"). In the Counterclaim, Petitioners asserted claims against Respondents seeking, among other things:

1. A judgment declaring that (1) Robinson is precluded from pursuing the Collective Claims or any other class or collective action claims in arbitration, whether with JAMS or otherwise, (2) Knight, Stanton, Turner, and Harris are precluded from asserting claims in the Arbitration Proceeding and must each assert any claims they may have, respectively, in separate, individual arbitrations, because Petitioners have not agreed to the arbitration of disputes on a class or collective basis; and (3) JAMS lacks the authority to hear any of the claims asserted by the Respondents because no agreement exists between Petitioners and any of the Respondents to submit claims specifically to JAMS for arbitration, the Arbitration Provision does not specify an arbitrator or a method for selecting an arbitrator, no other agreement has been reached between Petitioners and any of the Respondents to submit any of the Respondents' claims to JAMS for arbitration, and no court order presently exists desig-

nating or appointing JAMS as the arbitrator of any of the Respondents' claims;

2. A permanent injunction enjoining the Respondents from pursuing the Collective Claims or any other class or collective action claims against Petitioners in arbitration, whether with JAMS or otherwise; precluding Knight, Stanton, Turner, and Harris from pursuing their claims in the Arbitration Proceeding; staying the arbitration of the Collective Claims; staying the arbitration of claims by Knight, Stanton, Turner, and Harris in the Arbitration Proceeding; and staying the arbitration of the Arbitration Proceeding by JAMS;

3. An order compelling each of the Respondents to submit their respective claims to separate, individual arbitrations; and

4. An order designating and appointing separate arbitrators to hear the arbitration of Robinson's Individual Claims, Knight's claims, Stanton's claims, Turner's claims, and Harris's claims, respectively.

On April 17, 2014, Robinson filed Plaintiff Neffertiti Robinson's Motion to Compel Arbitration and Supporting Brief ("*Robinson's Motion*") seeking to have the District Court compel the arbitration of both the Individual Claims and the Collective Claims, allow the arbitrator to determine if arbitration can proceed as a collective action, appoint JAMS as the arbitrator, and direct that the arbitration be conducted pursuant to the JAMS Employment Arbitration Rules & Procedures and the

JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. At the same time, the other Respondents filed Third Party Defendants' Motion to Compel Arbitration and Supporting Brief ("*Third Party Defendants' Motion*") adopting the arguments in Robinson's Motion. Robinson's Motion and the Third Party Defendants' Motion may be referred to hereinafter, collectively, as the "*Motions*."

The District Court referred the Counterclaim and the Motions to United States Magistrate Judge Renee Harris Toliver (the "*Magistrate*") for hearing, if necessary, and for the Magistrate to submit to the District Court proposed findings and recommendations for disposition.

On May 8, 2014, Petitioners filed a Response to the Motions and a supporting Appendix. Respondents filed replies to the Response on May 14, 2014. No hearing was conducted on either the Counterclaim or the Motions.

On February 17, 2015, the Magistrate entered Findings, Conclusions, and Recommendations (the "*Findings*") denying the Counterclaim and granting the Motions. (App.22a-29a). Citing to the Fifth Circuit's decision in *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), the Magistrate concluded that the availability of class or collective arbitration was a procedural question that was presumptively for an arbitrator to decide. (App.26a-27a). Notwithstanding that conclusion, the Magistrate went on to find, "[T]he arbitration agreement itself, which provides that claims challenging its applicability to particular disputes or claims proceed to arbitration . . . supports

deferring to the arbitrator on the issue of class versus individual arbitration[.]" (App.27a).

Petitioners filed Defendants' Objections to Magistrate's Findings, Conclusions and Recommendations and Brief in Support (the "*Objections*") on March 3, 2015, objecting to the Findings.

The District Court entered a Memorandum Opinion and Order (the "*Order*") on March 24, 2015 overruling the Objections, accepting the Findings as the findings and conclusions of the District Court, and dismissing the District Court Action with prejudice. (App.11a-21a). On the same day, the District Court entered a Judgment pursuant to the terms of the Order (the "*Judgment*").

On April 22, 2015, Petitioners filed Defendants' Notice of Appeal to appeal the Order and the Judgment entered by the District Court.

D. Proceedings at the Fifth Circuit

The appeal of the District Court's Order and Judgment was docketed as Case No. 15-10360 with the U.S. Court of Appeals for the Fifth Circuit. The appeal was submitted to the Fifth Circuit on the record and the parties' briefs without oral argument.

On March 17, 2016, the Fifth Circuit issued its opinion (the "*Opinion*") affirming the District Court's Judgment. (App.1a-10a). Unlike the Magistrate and the District Court, the Fifth Circuit did not believe that its previous decision in *Pedcor Management* required it to treat the question of the availability of class or collective arbitration as a procedural matter to be decided by an arbitrator. (App.5a). Instead, it

treated the question of the availability of class or collective arbitration like a gateway question of arbitrability to be decided by a court unless the parties' agreement espouses an intent to defer the question to an arbitrator. (App.4a-5a). Nevertheless, the Fifth Circuit determined that the language in section (g) of the Arbitration Provision stating "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim" is "unambiguous evidence" of the parties' intent to submit the question of the availability of class or collective arbitration to the arbitrator. (App.8a-10a). The Fifth Circuit entered its judgment on the same day.

The Petitioners filed a Petition for Rehearing En Banc with the Fifth Circuit on March 31, 2016. The Fifth Circuit denied the Petition on April 18, 2016. (App.30a-31a).

E. Basis for Federal Jurisdiction in the Court of First Instance

The District Court had federal question jurisdiction over this proceeding pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S OPINION CONFLICTS WITH OPINIONS OF THE THIRD AND SIXTH CIRCUITS HOLDING THAT AN ARBITRATION CLAUSE THAT DOES NOT EXPRESSLY ADDRESS THE AVAILABILITY OF CLASS OR COLLECTIVE ARBITRATION DOES NOT CLEARLY AND UNMISTAKABLY DEFER THE QUESTION OF THE AVAILABILITY OF CLASS OR COLLECTIVE ARBITRATION TO THE ARBITRATOR

In the Opinion, the Fifth Circuit held that the language in the Arbitration Provision stating "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim" was sufficient to defer the question of the availability of class or collective arbitration to the arbitrator. (App.8a-10a). The Fifth Circuit based this determination on the rule derived from its earlier *Pedcor Management* decision, which the Fifth Circuit stated in the Opinion to be as follows: "[I]f parties agree to submit the issue of arbitrability to the arbitrator, then the availability of class or collective arbitration is a question for the arbitrator instead of the court." (App.8a). This rule and the Fifth Circuit's Opinion conflict with opinions from both the Third and Sixth Circuit Courts of Appeals that found arbitration agreements that did not expressly address the issue of class or collective arbitrability did not clearly and unmistakably defer the determination of the availability of class or collective arbitration to the arbitrator to decide. *See Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 760-66 (3d Cir. 2016); *Huffman v. Hilltop*

Companies, LLC, 747 F.3d 391, 398-99 (6th Cir. 2014); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

The Fifth Circuit treated the question of the availability of class or collective arbitration like a gateway question of arbitrability. (App.4a-5a). The Third and Sixth Circuits also treated it as a gateway question of arbitrability. *See Chesapeake Appalachia*, 809 F.3d at 753; *Opalinski v. Robert Half Intern., Inc.*, 761 F.3d 326, 332 (3d Cir. 2014); *Huffman*, 747 F.3d at 398; *Reed Elsevier*, 734 F.3d at 599. It is well established that while parties may defer gateway questions of arbitrability to an arbitrator, a court must find that there is clear and unmistakable evidence that they did so. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Chesapeake Appalachia*, 809 F.3d at 761 (citing the rule from *First Options*); *Reed Elsevier*, 734 F.3d at 597 (same). Where an agreement is silent or ambiguous on the question of who is to decide issues of arbitrability, those issues are to be left to the court to decide. *See First Options*, 514 U.S. at 944-45; *Davey v. First Command Fin. Services, Inc.*, 4:09-CV-711-A, 2010 WL 446081, at *4-5 (N.D. Tex. Feb. 5, 2010). There is too much risk that an arbitrator would force parties to arbitrate matters they never agreed to submit to arbitration otherwise. *See First Options*, 514 U.S. at 945. These well-established rules led the Third and Sixth Circuits to the opposite conclusion of the Fifth Circuit in the Opinion.

In *Reed Elsevier, Inc. v. Crockett*, the Sixth Circuit considered an arbitration clause that provided, in pertinent part, that "any controversy . . . arising out

of or in connection with this Order . . . be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ('AAA')." 74 F.3d at 599. The Sixth Circuit acknowledged that the availability of class arbitration could be interpreted to be a "controversy . . . arising in connection" with the parties' agreement. *Id.* However, the lack of any reference to class arbitration could also be read to conclude that the agreement speaks only to issues of bilateral arbitration. *See id.* From this, the Sixth Circuit concluded, "[A]t 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.*

The Sixth Circuit again addressed the issue in *Huffman v. Hilltop Companies, LLC*, 747 F.3d at 398-99. The arbitration clause in that case stated, in relevant part, "Any Claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration administered by the [AAA] in accordance with its Commercial Arbitration Rules and its Optional Procedures for Large, Complex Commercial Disputes." *Id.* at 393-94. The Sixth Circuit determined that the silence of this provision on whether a court or arbitrator should decide the question of class arbitrability necessarily meant that a court must decide that issue. *See id.* at 398-99.

Earlier this year, the Third Circuit addressed the "who decides" question in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d at 760-66. Like *Reed Elsevier* and *Huffman*, *Chesapeake Appalachia*

involved an arbitration agreement that called for arbitration of the parties' disputes pursuant to the AAA's Commercial Arbitration Rules (the "*AAA Commercial Rules*"). *See id.* at 748-49. The Third Circuit analyzed whether the AAA Commercial Rules incorporated into the parties' agreement clearly and unmistakably deferred the question of the availability of class or collective arbitration to the arbitrator to decide. *See id.* at 760-66. AAA Commercial Rule 7(a) provides:

> 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.

Id. at 749 (quoting AAA Commercial Rule 7(a)). The Third Circuit found this language to be insufficient to delegate the determination of the availability of class or collective arbitration to an arbitrator. *See Chesapeake Appalachia*, 809 F.3d at 748-49; *Reed Elsevier*, 734 F.3d at 598.

The Third Circuit acknowledged that the AAA Commercial Rules did constitute clear and unmistakable evidence of an intent to defer questions of arbitrability in bilateral arbitration to the arbitrator. *Id.* at 763-64. It stated 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." *Id.* at 763 (quoting *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013)). Contrary to what Respondents

may argue, there was no question that the AAA Commercial Rules were incorporated into the agreement at issue in *Chesapeake Appalachia*. *See id*. at 763-64. The Third Circuit was far more skeptical of the arguments of Scout Petroleum that AAA's Supplementary Rules for Class Arbitrations, which provide for an arbitrator to decide whether the arbitration clause at issue permits the arbitration to proceed on behalf of or against a class, was incorporated into a contract that provided for arbitration under "the rules of the American Arbitration Association." *Id*. This argument relied on what the court described as a "daisy-chain of cross references" to arrive at incorporation of the Supplementary Rules. *Id*. at 761. The existence of the Supplementary Rules, which were not referenced by either the arbitration clause in question or the AAA Commercial Rules themselves, was not clear and unmistakable evidence of an intent to defer the question of the availability of class arbitration to the arbitrator to decide. *See id.* at 763-65.

Furthermore, the Third Circuit drew a sharp distinction between the effect of the general deferral language in AAA Commercial Rule 7(a) in bilateral arbitration and its effect in class arbitration. *See id.* It described the AAA Commercial Rules as being "couched in terms of bilateral arbitration proceedings." *Id.* at 762. The Third Circuit stated, "[T]he whole notion of class arbitration implicates a particular set of concerns that are absent in the bilateral context." *Id.* at 764. The fundamental differences between class arbitration and bilateral arbitration were too great. The language that deferred arbitrability to the arbitrator generally in bilateral arbitration was not

clear and unequivocal evidence that the parties agreed to let an arbitrator decide if they "agreed to a fundamentally different type of arbitration not originally envisioned by the [Federal Arbitration Act ('FAA')] itself." *Id.* at 765.

Section (g) of the Arbitration Provision is similar to the deferral language of the AAA Commercial Rules. It is couched in terms of bilateral arbitration like the AAA Commercial Rules. Indeed, before describing the subject matters to which it applies, the Arbitration Provision states, in pertinent part, that it applies to "all claims and disputes that I [the employee] may have or may in the future have against the Company" and "all claims and disputes that the Company . . . may now have or may in the future have against me [the employee.]" While section (g) of the Arbitration Provision may generally defer issues of arbitrability to the arbitrator in bilateral arbitration, it is silent as to class or collective arbitration. The holdings of the Third and Sixth Circuits would require that the District Court decide the availability of collective arbitration under the facts of the present matter. The Fifth Circuit's Opinion reflects a split among the circuits on the question of whether an arbitration clause that does not expressly address the availability of class or collective arbitration clearly and unmistakably defers the question of the availability of class or collective arbitration to the arbitrator to decide, which merits granting certiorari in this matter. *See First Options*, 514 U.S. at 944-45.

II. THE QUESTION OF WHO DECIDES THE AVAILABILITY OF CLASS OR COLLECTIVE ARBITRATION IS ONE OF EXCEPTIONAL IMPORTANCE THAT SHOULD BE CONSIDERED BY THE SUPREME COURT

This issue is important because of the prevalence of arbitration provisions and the number of arbitrations conducted in the United States. Many of those arbitration provisions include clauses generally deferring questions of arbitrability to the arbitrator without addressing class arbitration. The Courts of Appeals are now split as a result of the Fifth Circuit's decision on the effect of these widely used provisions on who will decide the availability of class or collective arbitration.

Recent decisions by this Court highlight the importance of the question of who decides the availability of class or collective arbitration. A clear authorization for class arbitration—and for deferring the question of who decides the availability of class or collective arbitration—is required because the shift from bilateral to class 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." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). It replaces the informality, efficiency, and speed that makes bilateral arbitration advantageous with a slow, costly mechanism "more likely to generate a procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Class arbitration further creates much greater risk to a defendant than bilateral arbitration because "[t]he absence of multilayered

review makes it more likely that errors will go uncontested." *Id.* at 1752. While the risk of a bad decision on a single claim may be outweighed by the potential cost savings, the risk becomes unacceptable when a single bad decision could affect an entire class of claims at once. *See id.* As a result, this Court has recognized, "Arbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 131 S. Ct. at 1752. It has also stated, "[C]lass arbitration was not even envisioned by Congress when it passed the FAA." *Concepcion*, 563 U.S. at 349.

Allowing an arbitrator to decide the availability of class or collective arbitration when the parties have not expressly provided for it presents too great a risk that an arbitrator would force parties to arbitrate matters they never agreed to submit to arbitration. If arbitration clauses like section (g) in the Arbitration Provision and AAA Commercial Rule 7(a), which are commonly used to allow arbitrators to determine questions of arbitrability in bilateral arbitration, are sufficient to allow arbitrators to determine the availability of class and collective arbitration, class and collective arbitration will be rendered available virtually as a matter of course in the Fifth Circuit. Parties who agreed to bilateral arbitration to save time and money in resolving disputes may now be forced to submit to arbitration of class or collective actions with an arbitrator who may not even be a lawyer. Meanwhile, parties in the Third and Sixth Circuits have the protections offered by the judicial system in deciding whether the parties authorized class or collective arbitration. Since class and collective arbitration is "a fundamentally different type of arbitration [than what was] originally envisioned by the

FAA itself[,]" the question of who decides its availability is one of exceptional importance that should be considered by the Court to bring consistency to the law on this question. *See Chesapeake Appalachia*, 809 F.3d at 764.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ERIC J. MILLNER
COUNSEL FOR PETITIONERS
BOURLAND, WALL & WENZEL, P.C.
301 COMMERCE STREET, STE. 1500
FORT WORTH, TX 76102-4115
(817) 877-1088
EMILLNER@BWWLAW.COM

JULY 18, 2016

APPENDIX TABLE OF CONTENTS

OPINION OF THE FIFTH CIRCUIT
(MARCH 17, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEFFERTITI ROBINSON, Individually and on Behalf of those Similarly Situated,

Plaintiff-Appellee,

v.

J & K ADMINISTRATIVE MANAGEMENT SERVICES, INCORPORATED; KIMBERLY M. MEYERS,

Defendants-Appellants,

v.

SANDRA HARRIS; GLORIA TURNER; JOAN STANTON; ANN KNIGHT,

Third Party Defendants-Appellees.

No. 15-10360

Appeal from the United States District Court
for the Northern District of Texas

Before: CLEMENT, GRAVES, and COSTA, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

Appellants J&K Administrative Management Services, Inc. and Kimberly N. Meyers appeal the district court's order to compel collective arbitration of Neffertiti Robinson's complaint for unpaid overtime wages. Because the district court correctly applied *Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), to compel arbitration, we AFFIRM.

FACTUAL AND PROCEDURAL HISTORY

J&K Administrative Management Services, Inc. entered into an arbitration agreement with each of its employees. The agreement required arbitration of "claims for wages or other compensation," "claims for a violation of any other federal, state or governmental law, statu[t]e, regulation or ordinance," and "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim."

On January 23, 2014, Neffertiti Robinson, a former employee of J&K, sent a letter and arbitration complaint to J&K's counsel detailing claims for unpaid overtime wages under the Fair Labor Standards Act. After J&K failed to respond, Robinson filed a complaint for arbitration on behalf of herself and other similarly situated employees with JAMS, a private alternative dispute resolution coordinator. JAMS sent a notice of intention to initiate arbitration to J&K, which the company also disregarded. Four other former J&K employees, Sandra Harris, Gloria Turner, Joan Stanton, and Ann Knight, later filed notices of consent to join the collective arbitration.

Upon J&K's failure to respond to the notice of initiation of arbitration, Robinson filed a complaint and motion to compel arbitration of her claims, appoint JAMS as the arbitrator, and allow the arbitrator to determine whether collective arbitration was permitted by the agreement. The district court held, according to *Pedcor Management*, that the question of whether class arbitration is permissible should be decided by the arbitrator, and the agreement confirms that such questions should be deferred to arbitration. It also noted that it did not have to decide whether the agreement authorized collective arbitration, because the arbitrator can and should answer that question. Therefore, the district court ordered the parties to arbitrate the claims under the agreement and dismissed the action with prejudice. J&K now appeals.

DISCUSSION

An order to compel arbitration is reviewed de novo. *Covington v. Aban Offshore Ltd.*, 650 F.3d 556, 558 (5th Cir. 2011). The court "perform[s] a two-step inquiry to determine whether to compel a party to arbitrate: first whether parties agreed to arbitrate and, second, whether federal statute or policy renders the claims nonarbitrable." *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). We "divide the first step into two more questions: whether a valid agreement to arbitrate exists and whether the dispute falls within the agreement." *Id.*

I.

Before turning to the merits of this appeal, it is necessary to examine the parties' competing

interpretations of the relevant law. We therefore begin with J&K's contention that *Pedcor Management* has since been abrogated and should not be applied to Robinson's action to compel arbitration.

A.

Preliminary issues in arbitration cases include gateway disputes, which typically require judicial determination, and procedural questions, which are to be reviewed by the arbitrator. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003) (plurality opinion). The arbitrability of disputes—in other words, the determination of whether the agreement applies to the parties' claims—is generally a gateway issue to be determined by the courts. *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). This issue, however, is deferred to arbitration where the agreement espouses the parties intent to do so. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("[T]he 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'") (internal citations omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.") (internal citation omitted); *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 247 (5th Cir. 1998).

The same is true for the threshold question of whether class or collective arbitration is available under an arbitration agreement. In *Green Tree*

Financial Corp. v. Bazzle, 539 U.S. at 444, the Supreme Court reviewed a decision of the South Carolina Supreme Court holding that, as a matter of South Carolina law, courts must interpret silence as to class procedures as agreement to submit to them. The Supreme Court reversed, concluding in a plurality opinion that since the arbitration agreement in *Green Tree* included "sweeping language concerning the scope of the questions committed to arbitration," the availability of class arbitration should have been submitted to the arbitrator and not adjudicated by the court. *Id.* at 453.

We later adopted *Green Tree*'s reasoning. *See Pedcor Mgmt.*, 343 F.3d at 355. In *Pedcor Management*, a party to an arbitration agreement challenged an order compelling class arbitration. After reviewing *Green Tree*, we determined that the plurality opinion, along with a concurring opinion by Justice Stevens, constituted a majority that required the application of *Green Tree* by this court. *Id.* at 363. But *Pedcor Management* did not, as Robinson argues, stand for the proposition that the availability of class determination must always be decided by the arbitrator. Rather, it held that when 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. *Id.* at 359 (emphasis in original).

B.

J&K contends in two related arguments that *Stolt-Nielsen S.A. v. Animalfeeds International, Corp.*, 559 U.S. 662 (2010), abrogated *Pedcor Management*. First, J&K argues that *Stolt-Nielsen*'s statement that there was no majority opinion in *Green Tree* forbids us from applying *Pedcor Management*. Second, J&K asserts that *Stolt-Nielsen* enunciated a national policy against class arbitration that precludes arbitrators from determining the availability of class or collective procedures. We disagree.

In *Stolt-Nielsen* the Supreme Court clarified that *Green Tree* "did not yield a majority decision on any of the three questions," including the question of "which decision maker (court or arbitrator) should decide whether the contracts in question were 'silent' on the issue of class arbitration." *Id.* at 678-79. Thus, our conclusion in *Pedcor Management*, that the *Green Tree* plurality coupled with Justice Stevens's concurrence answered the question, was not accurate.[1] But, *Stolt-Nielsen* also refused to speak to this issue. *Id.* at 680 ("In fact, however, only the plurality decided that question. But we need not revisit that question

---

[1] Another panel of this court recognized this issue but resolved the case without revisiting *Pedcor Management*. *See Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 634 n.3 (5th Cir. 2012) *abrogated by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) ("In *Pedcor* . . . a panel of this court held that the class arbitration decision should be made by an arbitrator rather than a court. The *Pedcor* panel premised its decision upon *Green Tree* . . . . The Supreme Court in *Stolt-Nielsen*, however, emphasized that, on this point, *Green Tree* was only a plurality decision." (internal quotation marks and citations omitted)).

here."). *Stolt-Nielsen*'s refusal to decide this issue is not sufficient to set aside *Pedcor Management*.

J&K's second contention is equally unavailing. In *Stolt-Nielsen*, the Supreme Court reviewed a petition to vacate an arbitration award that questioned whether a party could be compelled to enter into class arbitration when the agreement is silent on such procedures. The court determined that *Green Tree*'s plurality opinion was not applicable to that dispute because *Green Tree* only answered the question of who decides whether class arbitration is available, not the standard for determining when it is in fact permissible. *Id.* at 679. As a result, the Supreme Court held that while it is clear "that parties may specify with whom they choose to arbitrate their disputes," *id.* at 683, "a party may not be compelled [by an arbitrator or court] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so," *id.* at 684.

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. Therefore, we continue to be bound by *Pedcor Management* under the rule of orderliness. *See, e.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court. Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void.").

J&K nevertheless argues, citing *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 776 (5th Cir. 2003), that the "rule of orderliness is inapplicable where an intervening decision of the Supreme Court or of the en banc Court of Appeals casts doubt on the prior ruling or the analysis employed to arrive at the ruling." In *Hoskins*, this court revisited its precedent because an intervening Supreme Court decision fundamentally changed the focus of the analysis for removal of a federal cause of action. But here, *Stolt-Nielsen* does not fundamentally alter the focus of the analysis of when to submit questions of class or collective arbitrability to arbitration; instead it acknowledges that the Supreme Court has never answered that question. Therefore, the rule of orderliness mandates that *Pedcor Management* is controlling, and we are bound to apply it and its clear rule of law: if parties agree to submit the issue of arbitrability to the arbitrator, then the availability of class or collective arbitration is a question for the arbitrator instead of the court.

Having disposed of these preliminary arguments, we now review the district court's application of *Pedcor Management* to the facts of this case.

II.

Section (g) of the arbitration agreement subjects "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim" to arbitration. J&K contends that section (g) does not allow deferral because it is silent as to class arbitration. J&K further contends that the panel may not read section (g) as deferring the

arbitrability question because the agreement applies only between the company and Robinson and may not be read to include arbitration of Harris, Turner, Stanton, and Knight's non-party claims. These arguments, however, are a misguided attempt to bootstrap a preliminary proceeding into judicial review of an arbitration award that does not yet exist. J&K may be right that the agreement does not allow class or collective arbitration, but that is not the issue before the court. The issue is who decides if the arbitration agreement permits class or collective procedures.

Contract language similar to section (g) has been found to authorize deferral of arbitrability issues. In *Green Tree*, the plurality held that language submitting "[a]ll disputes, claims or controversies arising from or relating to this contract" to arbitration, 539 U.S. at 448, was sufficient for deferral, *id.* at 453. Similarly, in *Pedcor Management*, this court concluded that a clause submitting "any dispute . . . in connection with the [a]greement" included determinations of class or collective arbitration. 343 F.3d at 359 (internal quotations omitted). And, in *Rent-A-Center, West, Inc. v. Jackson*, an agreement granting exclusive authority to an arbitrator "to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the] [a]greement," 561 U.S. 63, 66 (2010), was determined to be an unambiguous and proper delegation of authority under the Federal Arbitration Act, *id.* at 75-76.

Section (g) is materially similar to this contract language. It requires that "claims challenging the validity or enforceability of" the agreement must be arbitrated. Therefore, we conclude that section (g) is

unambiguous evidence of the parties intention to submit arbitrability disputes to arbitration and that arbitration was properly compelled.

III.

J&K also asks that we appoint an independent arbitrator to hear Robinson's claims. The district court, however, already appointed JAMS as the arbitral forum when it granted Robinson's motion to compel, which included a request to "appoint JAMS as the arbitrator." Since neither party argues that the district court erred in appointing JAMS as the arbitral forum, any challenges to the appointment have been waived on appeal. Arbitration of Robinson's claims, including whether class procedures are permissible, should proceed as ordered with JAMS as the arbitral forum.

CONCLUSION

The judgment of the district court is AFFIRMED.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (MARCH 24, 2015)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NEFFERTITI ROBINSON, Individually and on Behalf of those Similarly Situated,

Plaintiff/Counter-Defendant,

v.

J&K ADMINISTRATIVE MANAGEMENT SERVICES, INC. and KIMBERLY M. MEYERS,

Defendants/Counter-Claimaints,

v.

SANDRA HARRIS, ET. AL.,

Third Party Defendants.

Civil Action No. 3:14-CV-00956-L

Before: Sam A. LINDSAY, United States District Judge

This case was referred to Magistrate Judge Renee Harris Toliver, who entered Findings, Conclusions, and Recommendation of the United States Magistrate Judge ("Report") on February 17, 2015, recommending that the court deny Defendants' Application for Order Compelling Separate Arbitrations, and for Appointment of Arbitrators, Subject to Motion to Transfer Venue (Doc. 10); grant Plaintiffs' Motion to Compel Arbitration (Doc. 14); and grant Third Party Defendant's Motion to Compel Arbitration (Doc. 15). Defendants filed their Objection to Magistrate's Finding, Conclusions, and Recommendation (Doc. 34), filed March 3, 2015, contending that the magistrate judge incorrectly concluded that the arbitrator, not the court, should decide whether the parties' arbitration agreement allows for collective arbitration.

In deciding whether to grant a motion to compel arbitration, the court must determine whether there is a valid agreement to arbitrate and whether the dispute in question falls within the scope of that arbitration agreement. *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 887 (5th Cir. 2009). The court next evaluates whether "federal statute or policy renders the claims nonarbitrable." *Id.*

Defendants do not dispute that their claims are subject to valid arbitration agreements. Defs.' Obj. 3 ("Defendants do not dispute that J&K and Robinson agreed to submit Robinson's Individual Claims to arbitration. Defendants also do not dispute that J&K entered into identical agreements with the other Employees [Third Party Defendants]."); *see also* Defs.' App. 1-5. Instead, Defendants argue that the court should compel separate arbitrations for Plaintiff

Neffertiti Robinson ("Plaintiff" or "Robinson") and each of the other members in the collective action, including Ann Knight, Joan Stanton, Gloria Turner, and Sandra Harris, who are also third party defendants in this action (collectively, "Third Party Defendants").

Defendants contend that whether the parties must submit to collective arbitration is a decision for the court, not an arbitrator. Defendants further argue that the Fifth Circuit precedent concluding otherwise and relied on by the magistrate judge was wrongly decided and is not binding on this court. *See Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) (determining that an arbitrator should decide whether an action proceeds as a class arbitration). Moreover, Defendants argue that subsequent Supreme Court precedent compels this court to grant Defendants' objection and decide the issue of arbitrability based on the contract between the parties. *See Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662 (2010). Plaintiffs counter that *Pedcor* is binding upon this court and has not been overruled, and that Defendants' protestations to the contrary are creative attempts to avoid the application of binding precedent.

The court finds Defendants' objections unavailing in light of the holding in *Pedcor*. *Pedcor* held that "arbitrators should decide whether class arbitration is available or forbidden . . . ." 343 F.3d at 363. *Pedcor* interpreted the Supreme Court's plurality opinion in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).[1]

---

[1] *Pedcor* determined that the plurality relied on two considerations:

Defendants argue that *Bazzle* creates confusion as to whether arbitrators should decide issues regarding class or collective arbitration. Even so, the Fifth Circuit's interpretation and application of *Bazzle* is unequivocal and binding upon this court. *Pedcor*, 343 F.3d at 359 ("The clarity of [*Bazzle*'s] holding that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration leaves us to decide only whether the instant case is sufficiently analogous to [*Bazzle*] to come within its rule. That the district court ordered a type of class arbitration here is self-evident."). Accordingly, the magistrate judge properly applied *Pedcor* and determined that, under these circumstances, the arbitrator should decide whether the arbitration agreement permits proceeding with the arbitration collectively.

Defendants' argument that *Stolt-Nielsen* abrogates the holding in *Pedcor* is unsupported by the text of the case. Admittedly, *Stolt-Nielsen*'s interpretation of

---

> First, it found that the contract's provision to submit to arbitration "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" reflected the parties' intent to commit a broad scope of questions to arbitration, including the class arbitration question because that issue "relat[ed] to the contract." Second, the plurality reasoned that there exists only a narrow exception for certain gateway matters that parties normally expect a court rather than an arbitrator to decide, which include (1) "whether the parties have a valid arbitration agreement at all" and (2) "whether a concededly binding arbitration clause applies to a certain type of controversy."

343 F.3d at 359.

Justice Stevens's concurrence in *Bazzle* varies from *Pedcor*'s analysis of the same. *Pedcor* determined that "the plurality [consisting of four Justices], *plus Justice Stevens*, i.e., the Court, held that 'this matter of contract interpretation should be for the arbitrator, not the courts, to decide.'" 343 F.3d at 359 (citations omitted) (emphasis added). *Stolt-Nielsen*, in contrast, determined that *Bazzle* did not yield a majority decision on that question. 559 U.S. at 678-79. Nonetheless, even with *Stolt-Nielsen*'s nuanced interpretation of Justice Stevens's concurrence in *Bazzle*, *Pedcor* remains binding precedent and interpreted *Bazzle* to require arbitrators to decide whether arbitration agreements forbid or permit class arbitrations. *See Pedcor*, 343 F.3d at 358 ("[A] plurality of the Court held that '[u]nder the terms of the parties' contracts, the question whether the agreement forbids class arbitration is for the arbitrator to decide.'").

Notably, *Stolt-Nielsen* did not consider whether the court or an arbitrator should decide whether an arbitration provision permits class arbitration. In *Stolt-Nielsen*, the parties had an agreement that expressly assigned that question to the arbitrators. 559 U.S. at 680. The court held that the arbitrator in that action having the authority to determine whether the action should proceed as a class arbitration by nature of the parties' agreement exceeded his authority because there was no contractual basis for proceeding to arbitration as a class. *Id.* at 684 ("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."); *see also Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012) (holding

that the issue of whether an arbitration agreement provided for class arbitration was properly submitted to the arbitrator because the parties agreed to do so, but that the arbitrator exceeded his authority because there was no legal basis for proceeding with the class arbitration), *abrogated by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069 (2013) (summarizing the holding in *Stolt-Nielsen* as one that "overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a 'sufficient' one.").

Ultimately, the court is confronted with a question preliminary to the considerations analyzed in *Stolt-Nielsen*. Before considering whether a contract permits an arbitration to proceed collectively, the court must first determine the appropriate decision maker to interpret that contract, and *Stolt-Nielsen* does not supply an answer to that question.

Defendants contend that *Stolt-Nielsen*'s holding cannot apply equally to the arbitrator and the court, and, therefore, the only possible conclusion to draw from the case is that the question of collective arbitrability is for the court. *Stolt-Nielsen*, however, does not preclude an arbitrator from determining whether a contract allows for collective arbitration. Subsequent Supreme Court cases clarified the holding in *Stolt-Nielsen*, concluding that the Court "overturned the arbitral decision there because it lacked <u>any</u> contractual basis for ordering class procedures, not because it lacked . . . a 'sufficient' one." *Oxford Health Plans*, 133 S. Ct. at 2069.[2] *Stolt-Nielsen* requires the

---

[2] *Oxford Health Plans* elaborated further, stating:

arbitrator to interpret the contract before him or her, and, contrary to Defendant's objection, it does nothing to bar arbitrators from interpreting those contracts. Thus, *Stolt-Nielsen* did not abrogate or overrule *Pedcor*. Accordingly, Defendants' argument that "*Pedcor* was wrongly decided and need not be followed" by this court is without merit. Defs.' Obj. 10. *Pedcor* is binding precedent, and this court has neither the inclination nor the effrontery to disregard it.

Moreover, as emphasized by Plaintiffs and Third Party Defendants, this court applied the holding in *Pedcor* after the *Stolt-Nielson* decision. *See Pacheco v. PCM Const. Servs., LLC*, No. 124057, 2014 WL 145147 (N.D. Tex. Jan. 15, 2014), *aff'd*, No. 14-10193, 2015 WL 690273 (5th Cir. Feb. 19, 2015). *Pacheco* concluded that the plaintiffs in the action could not

---

> Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (internal quotation marks omitted)). Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. *Eastern Associated Coal*, 531 U.S. at 62 (quoting *Misco*, 484 U.S. at 38). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

133 S. Ct. at 2068.

file a peremptory federal class action in an attempt to avoid binding arbitration agreements. *Id.* at *3. It also cited *Pedcor* and stated, "[T]he issue of whether a particular arbitration agreement forbids or allows class arbitration is for the arbitrator to decide, not the court." *Id.* (citations omitted). Accordingly, *Pacheco* confirms the prevailing precedential effect of *Pedcor*.

Additionally, Defendants object to the magistrate judge's conclusion that, notwithstanding the holding in *Pedcor*, the "arbitration agreement itself, which provides that claims challenging its applicability to particular disputes or claims proceed to arbitration . . . supports deferring to the arbitrator on the issue of class versus individual arbitration . . . ." Report 5 (citations omitted).[3] They further object because, while each of the arbitration provisions at issue have identical provisions, there are five separate contracts and that Robinson's Contract with J&K does not provide a basis for arbitrating the collective action's members' claims. Defendants object and argue that, when an agreement is silent, the court should decide the question of arbitrability as a collective action. The holding of *Pedcor* precludes this argument, as the agreement at issue in *Pedcor* had "no express provision in the [arbitration] clause regarding consolidation or class treatment of claims in arbitration." 343 F.3d at 357. Moreover, *Pedcor* involved 408 different plans, noted that the arbitration of each of

---

[3] The language from which the magistrate judge draws this conclusion states that "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute of claim" are covered by the arbitration agreement. Defs.' Obj. App. 5.

the contracts had the identical arbitration provisions, and concluded that, under those circumstances, the arbitrator should decide the issue of class arbitration. 343 F.3d at 357.

Ultimately, the magistrate judge did not err in concluding that the arbitration agreement supports a conclusion that the arbitrator is the proper decision-making authority for the question of collective arbitrability. In particular, the agreement at issue states, "[C]laims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute of claim" are covered by the arbitration agreement. Defs.' Obj. App. 4. *Bazzle* interpreted a similar contract provision. In *Bazzle*, the plurality found that the parties agreed to submit "[a]ll disputes, claims, or controversies arising from or relating to this contract" to arbitration and "the dispute about what the arbitration contract in each case means (*i.e.*, whether it forbids the use of class arbitration procedures) is a dispute 'relating to this contract' and the resulting 'relationships.'" *Bazzle*, 539 U.S. at 452-53 (Breyer, J., plurality). While courts determine the validity of arbitration agreements, whether the contract forbids collective arbitration does not fall within the limited circumstances under which "courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter," because the question involves contract interpretation regarding the "kind of arbitration proceeding the parties agreed to." *Id.* The objections lodged by Defendants do not impact the court's determination that the arbitrator must determine whether the action can proceed collectively. Moreover,

in light of the court's holding, it is not appropriate to proceed with an analysis as to whether the terms in the contract authorize collective arbitration, as the arbitrator can interpret the contracts and answer that question. Accordingly, the court overrules Defendants' Objection to Magistrate's Finding, Conclusions, and Recommendation.

Having reviewed the pleadings, file, and record in this case, and the findings and conclusions of the magistrate judge, the court determines that the magistrate judge's findings and conclusions are correct, and accepts them as those of the court. Accordingly, the court denies Defendants' Application for Order Compelling Separate Arbitrations, and for Appointment of Arbitrators, Subject to Motion to Transfer Venue; grants Plaintiff's Motion to Compel Arbitration; and grants Third Party Defendants' Motion to Compel Arbitration. The court determines that, in accordance with the arbitration agreements signed by Plaintiff and each of the Third Party Defendants, all claims are arbitrable and orders the parties to arbitrate any dispute between them in accordance with those agreements. Having determined that all of the issues raised by the parties must be submitted to binding arbitration, the court dismisses this action with prejudice. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). The reason for dismissal with prejudice is that retaining jurisdiction of the action by the district court serves no purpose because any remedies after arbitration are limited to judicial review as set forth in the Federal Arbitration Act. *Id.* (citation omitted).

It is so ordered this 24th day of March, 2015.

/s/ Sam A. Lindsay
United States District Judge

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (FEBRUARY 17, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NEFFERTITI ROBINSON, Individually and on Behalf of all those Similarly Situated,

Plaintiff/Counter-Defendant,

v.

J&K ADMINISTRATIVE MANAGEMENT SERVICES, INC. and KIMBERLY M. MEYERS,

Defendants/Counter-Claimaints,

v.

SANDRA HARRIS, ET. AL.,

Third-Party Defendants.

Civil Action No. 3:14-CV-00956-L-BK

Before: Renee Harris TOLIVER, United States Magistrate Judge

Pursuant to the District Judge's *Order of Reference*, Doc. 19, the undersigned now considers Defendants' *Application for Order Compelling Separate Arbitrations, and for Appointment of Arbitrators, Subject to Motion to Transfer Venue*, Plaintiff's *Motion to Compel Arbitration*, and Third Party Defendants' *Motion to Compel Arbitration*. For the reasons that follow, it is recommended that Defendants' *Application for Order Compelling Separate Arbitrations, and for Appointment of Arbitrators, Subject to Motion to Transfer Venue,* Doc. 10, be DENIED, Plaintiff's *Motion to Compel Arbitration*, Doc. 14, be GRANTED, and Third Party Defendants' *Motion to Compel Arbitration*, Doc. 15, be GRANTED.

Plaintiff filed this action seeking an order to compel arbitration, appoint an arbitrator, and determine the scope of the arbitration related to alleged overtime and minimum wage claims under the Fair Labor Standards Act ("FLSA"). Doc. 7 at 2-3. Plaintiff was hired by Defendant J&K Management Services, Inc. ("J&K") in February of 2011. Doc. 7 at 2. The parties do not dispute that their claims are subject to the "Election and Arbitration Agreement" related to J&K's Occupational Injury Benefit Plan. Doc. 7 at 3. The agreement provides that disputes between the parties must be submitted to binding arbitration, including, *inter alia*, "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim." Doc. 22 at 7. Plaintiff attempted to initiate arbitration with Defendants on January 23, 2014, by filing a Specification of Claims directly with Defendants' counsel. Doc. 13 at 3. In February 2014, Plaintiff filed a Demand

for Arbitration to Judicial Arbitration and Mediation Services ("JAMS"), asserting individual claims and collective claims on behalf of others she alleges to be similarly situated. Doc. 7 at 3. The Third Party Defendants, others formerly employed by J&K, have sought to join in the Plaintiff's collective action. Doc. 7 at 3.

What is disputed is: (1) whether the arbitrator has the authority to decide the claims on a collective or class-wide basis; and (2) whether the decision of whether the claims must be arbitrated on an individual or collective basis is left to the arbitrator. Doc. 7 at 4. Specifically, in Defendant's answer to Plaintiff's complaint, Defendant requests that the Court compel separate arbitrations and appoint different arbitrators for Plaintiff and each of the Third Party Defendants. Doc. 10 at 16. Plaintiff and Third Party Defendants (together, "Movants") argue that the issue of whether the claims must be arbitrated on an individual or collective basis is for the arbitrator to decide. Doc. 14 at 7; Doc. 15 at 2.

Movants assert that the decision of the Court of Appeals for the Fifth Circuit in *Pedcor Management Co. Welfare Benefit Plan v. Nations Personnel of Texas Inc.*, 343 F.3d 355 (2003), is controlling, as the court specifically addressed this issue and resolved it in Movants' favor. Doc. 14 at 7-8. Movants note that this Court has previously applied the *Pedcor* holding in compelling arbitration of claims in which the plaintiffs had sought class certification. Doc. 14 at 8 (citing *Pacheco v. PCM Contr. Servs., LLC*, No. 12-CV-4057, 2014 WL 145147 (N.D. Tex. 2014) (Lindsay, J.)).

Defendants respond that whether the arbitration provision covers class arbitration is an issue to be

decided by the Court. Doc. 21 at 11. Defendants insist that the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), though it did not address who determines class arbitrability, leaves no room for anyone other than the Court to do so. Doc. 21 at 12-13. Defendants contend that the court in *Pedcor* misread *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and "got it wrong." Doc. 21 at 13-14. Defendants thus maintain that *Pedcor* is not binding on this Court. Doc. 21 at 15. Defendants also argue that, under the terms of the arbitration agreement, there is no clear and unmistakable evidence of an agreement between the parties that the arbitrator decide arbitrability issues. Doc. 21 at 16-17. Movants reply that both the specific and general delegation clauses in the agreement reserve the decision of class arbitrability to the arbitrator. Doc. 23 at 5.

The Federal Arbitration Act ("FAA") "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (noting that there is a strong policy in favor of arbitration under the FAA). In deciding whether to grant a motion to compel arbitration, the court first considers whether the parties agreed to arbitrate the dispute at issue. *See Webb v. Investacorp., Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) (per curiam). The court next determines whether there are any legal restraints external to the agreement that would foreclose arbitration of the dispute. *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445-46 (5th Cir. 2001) (per curiam).

The Supreme Court has held that procedural questions, which grow out of the dispute and bear on its final disposition, presumptively are for the arbitrator, not the judge, to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Subsequent to *Howsam*, as to questions pertaining to a requirement for class arbitration, the Supreme Court stated, "[c]onsistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties agreed to authorize class arbitration." *Stolt-Nielsen*, 559 U.S. at 687 (emphasis in original). Where there is "no agreement" on this question, parties cannot be compelled to submit their dispute to class arbitration. *Id.* Tangentially, the Fifth Circuit ruled that "arbitrators should decide whether class arbitration is available or forbidden." *Pedcor*, 343 F.3d at 363. Since *Pedcor*, however, the Fifth Circuit has noted that the question of whether arbitrators should decide whether class arbitration is required has not been settled by the Supreme Court. *Reed v. Fla. Metro. Univ. Inc.*, 681 F.3d 630, 634 & n.3 (5th Cir. 2012), abrogated on other grounds by *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). The appellate court has not, however, reversed its holding in *Pedcor*.

Upon review of the briefs, there are two discrete issues in this case that the parties seemingly conflate: (1) whether the arbitration agreement is silent as to collective action and thus, under *Stolt-Nielsen*, whether class arbitration is even supported; and (2) whether the Court should refer the case to the arbitrator to decide this issue of arbitrability. Defendants argue that the Court should decide whether class arbitration

is even available. Their argument is unsupported, however. Contrary to Defendants' suggestion, the Court in Stolt-Nielsen explicitly declined to reach this issue of who should decide, holding—with no regard to the identity of decision maker—that if the arbitration agreement is silent on the issue, there can be no class arbitration. 559 U.S. at 687. As this precept applies equally to courts and arbitrators who are called upon to construct the terms of an arbitration agreement, *Stolt-Nielsen* does not operate as a reversal of the Fifth Circuit's holding in *Pedcor*. Again, the issue of the appropriate decision maker has yet to be resolved by the Supreme Court. *Reed*, 681 F.3d at 634 & n.3.

Consequently, *Pedcor* remains the law of this Circuit, and this Court is compelled to follow it unless it is overruled by the Fifth Circuit or the Supreme Court. And as discussed previously, *Pedcor* unequivocally held that arbitrators should decide whether class arbitration is available, 343 F.3d at 363. That notwithstanding, the arbitration agreement itself, which provides that claims challenging its applicability to particular disputes or claims proceed to arbitration, Doc. 22 at 7, supports deferring to the arbitrator on the issue of class versus individual arbitration, *see Allen v. Regions Bank*, 389 F. App'x 441, 446 (5th Cir. 2010) (language in the arbitration agreement that any "dispute regarding whether a particular controversy is subject to arbitration . . . shall be decided by the arbitrator(s)" had sufficient clarity to establish that "the arbitration agreement unmistakably commands that disputes as to its applicability are for the arbitrator.").

For the foregoing reasons, it is recommended that Defendants' *Application for Order Compelling*

Separate Arbitrations, and for Appointment of Arbitrators, Subject to Motion to Transfer Venue, Doc. 10, be DENIED, Plaintiff's *Motion to Compel Arbitration*, Doc. 14, be GRANTED, and Third Party Defendants' *Motion to Compel Arbitration*, Doc. 15, be GRANTED.

/s/ Renee Harris Toliver
United States Magistrate Judge

SIGNED February 17, 2015.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636 (b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

/s/ Renee Harris Toliver
United States Magistrate Judge

ORDER OF THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (APRIL 18, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEFFERTITI ROBINSON, Individually and on Behalf of those Similarly Situated,

Plaintiff-Appellee,

v.

J & K ADMINISTRATIVE MANAGEMENT SERVICES, INCORPORATED; KIMBERLY M. MEYERS,

Defendants-Appellants,

v.

SANDRA HARRIS; GLORIA TURNER; JOAN STANTON; ANN KNIGHT,

Third Party Defendants-Appellees.

No. 15-10360

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before: CLEMENT, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ James E. Graves Jr.
United States Circuit Judge

RELEVANT STATUTORY PROVISIONS

9 U.S.C.A. § 2

§ 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.

§ 4. Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the

manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 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.

§ 11. Same; Modification or Correction; Grounds; Order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

29 U.S.C.A. § 216(b) (West)

(b) Damages; Right of Action; Attorney's Fees and Costs; Termination of Right of Action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the

amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under

section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

ARBITRATION PROVISION

Notice to Employees Concerning Workers' Compensation in Texas

Coverage

Home Instead Senior Care has elected not to obtain workers' compensation insurance coverage. As an employee of a non-covered employer, you are not eligible to receive workers' compensation benefits under the Texas Workers' Compensation Act. However, a non-covered employer can and may provide other benefits to injured employees. You should contact your employer regarding the availability of other benefits or compensation for a work-related injury or illness. In addition, you may have rights under the common law of Texas should you suffer an on the job injury or illness. Your employer is required to provide you with coverage information when you are hired or whenever the employer becomes, or ceases to be, covered by workers' compensation insurance.

Safety Hotline

The Commission has established a 24-hour toll-free telephone number for reporting unsafe conditions in the workplace that may violate occupational health and safety laws. Employees [sic] are prohibited by law from suspending, terminating, or discriminating against any employee because he or she in good faith reports an alleged occupational health or safety violation.

Contact the Division of Workers' Health and Safety at 1-800-452-9595.

Home Instead Senior Care does not have workers' compensation insurance coverage to protect you from damages resulting from work-related Illness or injury. Home Instead Senior Care has elected to use a private insurance company to provide coverage under the guidelines under the common law of Texas. Contact Home Instead Senior Care in the event of any injury received on the job immediately. The office will direct you on how to proceed according to the insurance provider's procedures and requirements.

If an emergency please call 911—do not drive yourself to the hospital. Our insurance provider will direct you to a qualified doctor to determine the best care for your injuries.

ELECTION AND ARBITRATION AGREEMENT

By signing the Occupational Injury Benefit Plan, I, the undersigned employee of J&K Administrative Management Services (hereinafter "the Company"), voluntarily elect to participate in the J&K Administrative Management Services Employee Injury Benefit Plan (hereinafter the "Plan") and agree with the Company to the following

Enrollment in the Plan:

I understand that the Company, as expressly permitted by Texas law, Does not carry workers' compensation insurance for its Texas employees, that it is a "non-subscriber' under the Texas Workers' Compensation Act (hereinafter the "Act"), that it is not required as a non-subscriber to provide any benefits whatsoever for-on-the job injuries, that it has instead voluntarily established the Plan under federal law to

provide certain benefits for on-the-job injuries, and that the Plan is not workers' compensation insurance.

I understand that if I am injured on the job, I am, by signing and agreeing to this Agreement, eligible under the Plan's terms for the medical, disability, death, burial and dismemberment benefits described in the Plan and summarized in the Summary Plan Description. I understand that if I reject this Agreement, I will not be eligible for Plan Benefits.

I understand and agree that the Plan's benefits are not workers' compensation benefits, but are provided without regard to my own fault or negligence, without the necessity of me initiating a lawsuit or arbitration, and without me proving that the Company (or one of its employees) was negligent in causing my injury (or death).

I have received a copy of the Summary Plan Description of the Plan. I understand and agree that, if I am injured on the job at the Company, I will follow the rules and procedures described in the Summary Plan Description.

Mutual Promises to Resolve Claims by Binding Arbitration:

I recognize that disputes may arise between the Company (or one of its affiliates) and me during or after my employment with the Company. I understand and agree that any and all such disputes that cannot first be resolved through the Company's internal dispute resolution procedures or mediation must be submitted to binding arbitration.

I acknowledge and understand that by signing this Agreement I am giving up the right to a jury

trial on all of the claims covered by this Agreement in exchange for eligibility for the Pan's [sic] medical, disability, dismemberment, death and burial benefits and in anticipation of gaining the benefits of a speedy, impartial, mutually-binding procedure for resolving disputes.

This agreement to resolve claims by arbitration is mutually binding upon both me and the Company (and it [sic] affiliates), and it binds and benefits our successors, subsidiaries, assigns, beneficiaries, heirs, children, spouses, parents and legal representatives.

Claims Subject to Arbitration:

Claims and disputes covered by this Agreement include:

(a) all claims and disputes that I may now have or may in the future have against the Company and/or against its successors, subsidiaries and affiliates and/or any or their officers, directors, shareholders, partners, owners, employees and agents, or against any Company employee benefit plan (including the Plan) or the pan's [sic] administrators or fiduciaries, and

(b) all claims and disputes that the Company and/or its successors, subsidiaries and affiliates and/or any of their officers, directors, shareholders, partners, owners and any Company employee benefit plans (including the Plan) may now have or may in the future have against me, my spouse, children, heirs, parents and/or legal representatives.

The types of claims covered by this Agreement include, but are not limited to, any and all:

(a) claims for wages or other compensation; claims for breach of any contract, covenant or warranty (express or implied);

(b) tort claims, including negligence, negligence per se and gross negligence claims (including claims for personal or bodily injury or physical, mental or psychological injury, without regard to whether or not such injury was sustained on the job);

(c) claims for wrongful termination (including retaliatory discharge claims under Chapter 451 of the Texas Labor Code);

(d) claims of harassment or discrimination (including claims based on race, sex, religion, national origin, age, medical condition or disability);

(e) claims for benefits under the Plan or any other employee benefit plan or program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);

(f) claims for a violation of any other federal, state or other governmental law, stature [sic], regulation or ordinance; and

(g) claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim.

Claims Not Subject to Arbitration:

However, the following matters are expressly not covered by this Agreement: (a) any criminal complaint or proceedings, and (b) claims before the Texas Workforce Commission for unemployment benefits.

Complete Agreement:

The Arbitration Procedures in Section IX of the Summary Plan Description (and also in Section 1, Paragraph B of the Plan) are Incorporated by reference into, and made part of, this Agreement the same as if they were all written here.

This Agreement, together with the incorporated Arbitration Procedures in Section IX of the Summary Plan Description, is the complete agreement between the Company and me. It takes the place of any other oral understanding about arbitration, but other written agreements, policies or procedures may also require me to arbitrate any disputes that I may have with the Company. I am not relying on any statements, oral or written, on the subject, effect, enforceability or meaning of this Agreement, except as specifically stated in this Agreement. If any provision of this Agreement is determined to be void or otherwise unenforceable, in whole or in part, such determination shat [sic] not effect the validity of the remainder of this Agreement.

Not an Employment Agreement:

Neither this Agreement, the Plan nor the Summary Plan Description shall ever be construed to create any contract of employment, express or implied. Nor does this Agreement, the Plan or the Summary

Plan Description in any way alter the at-will status of my employment with the Company.

Ratification by Receipt of Plan Benefits:

I AGREE THAT EACH AND EVERY TIME THAT I RECEIVE plan benefits, or have Plan benefits paid to a medical provider on my behalf, I ratify and reaffirm this Agreement the same as if I had signed this agreement again on the date the benefits were paid.

Requirements for Modification or Revocation:

This Agreement will survive the termination of my employment with the Company. This Agreement can only be revoked (except as provided in the paragraph below) or modified by a writing signed by both me and the Company's authorized representative that specifically states an intent to revoke or modify this Agreement, and this requirement of a signed writing cannot itself be waived except by such a signed writing.

Revocation of Acceptance:

If, after accepting this Agreement by signing below, I decide to revoke my acceptance of this Agreement, I may do so only by notifying the Company in writing by certified mail, return receipt requested of my revocation. I understand and agree that I may not revoke my acceptance of this Agreement if the Plan has paid (or become obligated to pay) benefits to or for me. I understand and agree that I may only revoke my acceptance of this Agreement: (a) within five (5) Calendar days after the date of my signature below, or (b) within five (5) calendar days after receiving

written notice of a material reduction in benefits provided by the Plan

Voluntary Agreement:

I acknowledge and agree that I have carefully read this Agreement, that I understand its terms, and that I have entered into this agreement voluntarily and without duress, pressure or coercion from any person and without relying on any promises or representations by the Company other than those contained in this Agreement itself. I am not under the influence of alcohol or any other impairing substance, nor am I under any mental incapacity that would affect me at the time of signing this Agreement. I am aware of the consequences of signing this Agreement and, to the extent that I deem necessary, I have consulted or will consult with an attorney.