No. 16-95

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

REPLY BRIEF OF PETITIONERS

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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.

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INTRODUCTION

In their Brief in Opposition, Respondents have attempted to argue away the existence of the circuit split reflected in the Fifth Circuit's Opinion[1], on the one hand, and the opinions of the Third and Sixth Circuits in *Scout Petroleum*, *Reed Elsevier*, and *Huffman*, on the other hand. Respondents' arguments are misplaced. An undeniable split of opinion exists between the Fifth Circuit, on the one hand, and the Third and Sixth Circuits, on the other hand, on the question of 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.

[1] Defined terms used in this Reply shall have the same meaning ascribed to such terms in the Petitioners' *Petition for Writ of Certiorari* filed in the above numbered and styled matter, unless otherwise indicated herein.

REASONS FOR GRANTING THE PETITION

I. A SUBSTANTIAL CIRCUIT SPLIT EXISTS

A. The General Delegation Clause of AAA Commercial Rule 7(a), Which Was Incorporated into the Agreements at Issue in *Scout Petroleum*, *Reed Elsevier*, and *Huffman*, Is Similar in All Relevant Ways to the General Delegation Language in the Arbitration Provision

Respondents do not challenge the similarity between section (g) of the Arbitration Provision and the general delegation clause in Rule 7(a) of the American Arbitration Association's ("AAA") Commercial Arbitration Rules (the "AAA Commercial Rules"). Respondents argue that there is no conflict between the Fifth Circuit's Opinion and the decision of the Third Circuit in *Scout Petroleum* or the decisions of the Sixth Circuit in *Reed Elsevier* and *Huffman* because the arbitration provisions at issue in *Scout Petroleum*, *Reed Elsevier*, and *Huffman* did not, on their face, contain general delegation clauses. Respondents ignore the fact that the agreements in each of those three cases incorporate by reference the general delegation clause in AAA Commercial Rule 7(a).

The arbitration agreements at issue in *Scout Petroleum*, *Reed Elsevier*, and *Huffman* all provided for arbitration under the AAA Commercial Rules. *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). As the Third Circuit recognized in *Scout Petroleum*, "[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." *Scout Petroleum*, 809 F.3d at 763-64 (quoting *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)). The Third Circuit acknowledged that AAA Commercial Rule 7(a) had been incorporated by reference into the leases involved in *Scout Petroleum*. *See id.* at 761. Contrary to what Respondents contend, there was no question about whether the AAA Commercial Rules were part of the parties' agreement. Since the AAA Commercial Rules were part of the parties' agreement, the Third Circuit analyzed them to see if they evidenced an intent to delegate the question of the availability of class arbitration to an arbitrator, stating:

> 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.

Id. at 762. Such an analysis would have been entirely unnecessary if the AAA Commercial Rules were not a part of the parties' agreement through incorporation by reference, just as if it were contained within the agreement document itself.

Despite this clear language in the Third Circuit's opinion, Respondents argue that there was some ambiguity as to whether the AAA Commercial Rules applied in *Scout Petroleum*. The ambiguity was not in whether the AAA Commercial Rules were incorporated into the parties' agreement but in whether the AAA's Supplementary Rules for Class Arbitrations (the "Supplementary Rules"), 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 also incorporated into the parties' agreement. *See id.* at 763-65. The Third Circuit rejected the argument raised by Scout Petroleum that the Supplementary Rules had been incorporated into the agreement and required the arbitrator to decide the availability of class arbitration. *See id.* It described the path required to arrive at incorporation

of the Supplementary Rules as a "daisy-chain of cross references." *Id.* at 761, 763. The Third Circuit found it significant in this regard that neither the arbitration clause in question nor the AAA Commercial Rules themselves referred to the Supplementary Rules. *See id.* at 763. It concluded that the existence of the Supplementary Rules 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.

Respondents' argument that a significant factual difference exists because the delegation clause exists in the body of the Arbitration Provision, whereas AAA Commercial Rule 7(a) was incorporated by reference into the agreements in *Scout Petroleum*, *Reed Elsevier*, and *Huffman*, seeks to elevate form over substance. Respondents seek to distract this Court from the similarity of the general delegation language involved in *Scout Petroleum*, *Reed Elsevier*, and *Huffman* to the general delegation language in the Arbitration Provision. The general delegation language of 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)). Section (g) of the Arbitration Provision provides:

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

* * *

(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 similarity of these two provisions should not be ignored. As a result of the Fifth Circuit's Opinion, language like that used in AAA Commercial Rule 7(a) and section (g) of the Arbitration Provision requires the parties to submit the question of the availability of class or collective arbitration to an arbitrator to decide in the Fifth Circuit, whereas a court would decide the same issue with a different result based on this language in the Third or Sixth Circuits. This is a clear circuit split that should be taken up by the Court.

B. *Lowry v. JPMorgan Chase Bank, N.A.* is not Binding Authority

Respondents' reliance on *Lowry v. JPMorgan Chase Bank, N.A.*, 522 Fed. Appx. 281, 283 (6th Cir. 2013), is misplaced. *Lowry* is an unpublished case. In the Sixth Circuit, an unpublished decision is not binding precedent. *See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 283 (6th Cir. 2016). *Lowry* also pre-dates the Sixth Circuit's decisions in both *Reed Elsevier* and *Huffman*, neither of which even cite to *Lowry*. *See Huffman*, 747 F.3d at 395-98; *Reed Elsevier, Inc.*, 734 F.3d at 598-99. As previously explained, the holdings in *Reed Elsevier* and *Huffman*, along with the holding of the Third Circuit in *Scout Petroleum*, lead to the conclusion that general delegation language that is couched in terms of bilateral arbitration and

does not refer to class or collective arbitration does not clearly and unmistakably defer the question of the availability of class arbitration to the arbitrator to decide. *See Scout Petroleum*, 809 F.3d at 760-66; *Huffman*, 747 F.3d at 395-99; *Reed Elsevier*, 734 F.3d at 598-99. Thus, *Reed Elsevier* and *Huffman*, which are binding, published cases, appear to implicitly overrule the holding in *Lowry*.

Even if *Lowry* raised some question about whether a split exists between the Fifth and Sixth Circuits, which Petitioners deny that it does, *Lowry* has no effect on the clear split between the Third Circuit's opinion in *Scout Petroleum* and the Fifth Circuit's Opinion in this matter. Respondents point to no case, and Petitioners have not identified any case, in the Third Circuit approving of or referring to *Lowry* or reaching a similar holding as in *Lowry*. Thus, a clear circuit split exists that the Court should address regardless of the Sixth Circuit's unpublished opinion in *Lowry*.

C. Respondents' Attempt to Distinguish Silence on the Issue of Who Decides the Availability of Class or Collective Arbitration from the Absence of an Express Mention of Who Decides the Availability of Class or Collective Arbitration Fails

Respondents incorrectly argue that a circuit split does not exist because neither the Fifth Circuit's Opinion nor the opinions in *Scout Petroleum*, *Reed Elsevier*, and *Huffman* announced a blanket rule for who decides the availability of class or collective arbitration when faced with a provision that does not expressly address the availability of class or collective

arbitration. (Opp.Br.16-20.) Respondents rely on dicta in the cases in questions in an attempt to draw a distinction between "silence" and the absence of an express mention that simply is not borne out by the decisions of the Third and Sixth Circuits. It ignores the fact that the courts in *Scout Petroleum*, *Reed Elsevier*, and *Huffman* all decided that the parties had not deferred the question of the availability of class or collective arbitration to the arbitrator. *See Scout Petroleum*, 809 F.3d at 760-66; *Huffman*, 747 F.3d at 395-99; *Reed Elsevier*, 734 F.3d at 598-99.

Furthermore, in *Reed Elsevier*, the Sixth Circuit found that the absence of any reference to classwide arbitration rendered the agreement "silent or at least 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." 734 F.3d at 599. Similarly, in *Scout Petroleum* the Third Circuit recognized that, as a practical matter, the absence of any reference to class or collective arbitration makes the burden to demonstrate that the parties clearly and unmistakably delegated the question of the availability of class or collective arbitration more difficult to satisfy since the requisite contractual basis cannot be inferred from the fact that parties agreed to arbitrate or from the fact that the parties failed to prohibit class or collective arbitration. *Scout Petroleum*, 809 F.3d at 759.

The Fifth Circuit, on the other hand, held in the Opinion, "[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." *Robinson v. J & K Admin. Mgmt. Services, Inc.*, 817 F.3d 193, 196 (5th Cir. 2016) (emphasis in original). The Fifth Circuit dismissed out of hand the Petitioners' argument that the Arbitration Provision's silence as to class or collective arbitration meant that the parties had not clearly and unmistakably deferred the question to the arbitrator, finding that argument to be relevant to the determination of the availability of class or collective arbitration but not relevant to the question of who decides class or collective arbitration. *Id.* at 197-98.

There can be no question that the Fifth Circuit's holding is in conflict with the holdings of the Third and Sixth Circuits. Under the Fifth Circuit's holding, the absence of any mention of class or collective arbitration is entirely irrelevant, and an arbitrator is allowed to decide the question of the availability of class or collective arbitration so long as the provision contains language authorizing the arbitration of "all disputes" or "all claims" between the parties. If the same agreement was considered in the Third Circuit or Sixth Circuit, the holdings in *Scout Petroleum, Reed Elsevier*, and *Huffman* would compel the finding that the absence of any mention of class or collective arbitration renders the Arbitration Provision silent, or at least ambiguous, on the question of who decides the availability of class or collective arbitration, which fails to satisfy the requirement that the parties clearly and unmistakably defer the question to an arbitrator. *See Scout Petroleum*, 809 F.3d at 760-66; *Huffman*, 747 F.3d at 395-99; *Reed Elsevier*, 734 F.3d

at 598-99. This is the essence of a circuit split appropriate for this Court to take up on a Writ of Certiorari.

II. ARBITRATION IS POORLY SUITED TO FLSA COLLECTIVE ACTIONS, JUST AS IT IS POORLY SUITED TO CLASS ACTIONS

Respondents seek to distinguish between a class action under Federal Rule of Civil Procedure 23 (or similar state court rules) and a collective action under the FLSA in yet another misguided attempt to avoid the implications of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and the line of cases that followed it. This distinction is of no consequence to the outcome. Numerous courts have applied the Supreme Court's holding in *Stolt-Nielsen* concerning the arbitration of class actions with equal force to the arbitration of FLSA collective actions. *See, e.g.*, *Opalinski v. Robert Half Intern., Inc.*, 761 F.3d 326, 333-36 (3rd Cir. 2014); *Huffman*, 747 F.3d at 398-99; *Thomas v. Right Choice Staffing Group, LLC*, Civ. Action No. 15-10055, 2015 WL 4078173, at *7 (E.D. Mich. July 6, 2015); *Chambers v. Groome Transp. of Alabama*, 41 F.Supp.3d 1327, 1350 (M.D. Ala. 2014); *Lucas v. Iasis Healthcare LLC*, 8:14-CV-942-T-30TBM, 2014 WL 2520443, at *2 (M.D. Fla. June 4, 2014); *Smith v. BT Conferencing, Inc.*, 3:13-CV-160, 2013 WL 5937313, at *9-*10 (S.D. Ohio Nov. 5, 2013); *Taylor v. Am. Income Life Ins. Co.*, 1:13 CV 31, 2013 WL 2087359, at *4 (N.D. Ohio May 14, 2013); *Porter v. MC Equities, LLC*, 1:12 CV 1186, 2012 WL 3778973, at *4-5 (N.D. Ohio Aug. 30, 2012); *Goodale v. George S. May Intern. Co.*, 10 C 5733, 2011 WL 1337349, at *3 (N.D. Ill. Apr. 5, 2011); *see also Owen v. Bristol*

Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013) (finding that "the FLSA contains no 'contrary congressional command' as required to override the FAA").

Respondents assert that the "opt-in" procedures for a collective action cure all of the problems that have led the courts to look with suspicion on class arbitration. Courts have rejected this distinction and applied the same standards considered for class arbitration in considering the arbitration of collective actions under the FLSA. *See Opalinski*, 761 F.3d at 333-36; *Huffman*, 747 F.3d at 398-99; *Porter*, 2012 WL 3778973, at *4-*5; *Goodale*, 2011 WL 1337349, at *3. In collective arbitration of FLSA claims, the parties still will not enjoy the informality, efficiency, and speed that favor bilateral arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348-49 (2011). Instead, they will be forced to engage in the same expensive, time consuming, and inefficient procedures that would be required if the matter were heard before a court, such as discovery on class certification, conditional certification of a class, discovery on the substantive claims of class members, potential disputes as to the scope of discovery, final certification of the class, and the inherent difficulties of prosecuting and defending multi-plaintiff claims. No cost savings are gained by the parties in submitting to collective arbitration. Even if they were, the savings would be far outweighed by the substantially increased risk of a single bad decision, with limited rights of challenge on appeal, affecting an entire class of claims. *See id.* at 350. All of these risks would accompany the collective arbitration of FLSA claims, just as they would class arbitration. Like class arbi-

tration, collective arbitration "is not arbitration as envisioned by the FAA." *Id.* at 351.

Respondents also argue that, "Even as FLSA collective actions go, this one will be on the small side." Respondents cite to no authority in the record to support this contention. One does wonder why, if the purported class is so small, the Respondents have bothered to file their claims as a collective action. Regardless, the fact that J&K's offices were located only in the Dallas/Fort Worth, Texas area does not lessen the policy concerns that make class or collective actions poorly suited to arbitration. The DFW metropolitan statistical area is the largest metropolitan statistical area in Texas and the fourth largest metropolitan statistical area in the United States. The fact that J&K's operations were limited to the DFW area does not necessarily mean that the purported collective action class is small or, as Respondents argue, "more akin to a consolidated arbitration proceeding than a class arbitration proceeding." Indeed, Respondents are attempting to have the class defined as all of J&K's CAREgivers, which could potentially include hundreds of individuals. Such a class bears with it the same risks that this Court has said make class actions poorly suited to arbitration, such as the time and expense involved, as well as the risk of a single bad decision affecting an entire class of claims. *Id.* at 350-51.

CONCLUSION

For the foregoing reasons and those reasons set forth in the Petition for Writ of Certiorari, the Petitioners pray that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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