No. 12-135

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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In *Stolt-Nielsen*, this Court held that "[a]n implicit agreement to authorize class-action arbitration … is not a term that [an] arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). Here, Sutter points to no express language in the parties' contract agreeing (or even referring) to class arbitration; no extrinsic evidence that the parties ever agreed to or contemplated class proceedings; and no background default rule that it might be argued the parties adopted by choosing not to contract around it. His case rests solely on the ground *Stolt-Nielsen* forbids: a general arbitration clause, indistinguishable from any other provision requiring arbitration of "any" or "all" disputes. Under *Stolt-*

Nielsen, that cannot be a sufficient "contractual basis" for concluding that the parties "*agreed to authorize* class arbitration." *Id.* at 1775-1776 & n.10.

Sutter insists (*e.g.*, Br. 20) that the arbitrator here was authorized to interpret the parties' agreement; that he construed it as "intended" to authorize class arbitration; and that a court applying the Federal Arbitration Act may not overrule that determination unless, as in *Stolt-Nielsen*, the claimant's lawyer actually "stipulates" that the parties never really came to any such agreement. In *Stolt-Nielsen* too, however, the parties had expressly directed their arbitrators to determine whether their agreement permitted class arbitration, *see* 130 S. Ct. at 1765, 1772 n.8; and this Court fully recognized the "high hurdle" that the defendants faced in seeking FAA review, *id.* at 1767. The Court nonetheless held that the arbitrators there had "exceeded their powers" within the meaning of 9 U.S.C. § 10(a)(4) by seeking to impose class proceedings based on nothing more than a general arbitration clause. If that decision is to have any continuing force, its reasoning must lead to the same result here.

I. IF THE UNDERLYING FACTS WERE RELEVANT, THEY WOULD FAVOR OXFORD

Sutter begins his brief (at 1-3) with a summary of his underlying claims. Although the merits of those claims are irrelevant to the question presented, Sutter's faulty account of the situation warrants a brief response.

Sutter accuses health insurers of using various practices, "concealed" (Br. 2) in computer programs used to review claims, to short-change physicians who have provided services to patients under the insurers'

plans. When physician claims are examined, however, it often turns out that individual providers or their offices have made mistakes in submitting their claims, or sometimes that their submissions reflect waste, fraud, or abuse. In the federal Medicare and Medicaid programs, for example, improper payments resulting from mistaken or fraudulent coding, billing, or other practices ran to more than $70 billion in fiscal 2010.[1] Accordingly, responsible parties such as Oxford have developed automated systems to process claims efficiently while finding and correcting billing and coding problems, whether inadvertent or intentional.[2]

When either claim submissions or payment decisions are questioned, the resulting discussions or disputes turn on particular facts. As the Eleventh Circuit explained, for example, in the course of decertifying a class in litigation involving state-law claims similar to Sutter's, "each doctor, for each alleged breach of con-

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[1] *See* U.S. Gov't Accountability Office, Highlights, *Medicare and Medicaid Fraud, Waste, and Abuse* (Mar. 9, 2011), *available at* http://www.gao.gov/assets/130/125652.pdf.

[2] The federal government has been an active proponent of such systems. *See generally, e.g.*, Office of Inspector General, Dep't of Health & Human Servs., *Medicare's National Correct Coding Initiative* i-ii (Sept. 2003), *available at* https://oig.hhs.gov/oei/reports/oei-03-02-00770.pdf. Sutter's amicus the American Medical Association points to "modifier 25" as one claim code that Oxford has supposedly "automatically and improperly denied." AMA Br. 10. Notably, when the government studied providers' use of that code, it concluded that "[t]hirty-five percent of claims using modifier 25 that Medicare allowed in 2002 did not meet program requirements, resulting in $538 million in improper payments." Office of Inspector General, Dep't of Health & Human Servs., *Use of Modifier 25*, at i (Nov. 2005), *available at* http://www.healthlawyers.org/SiteCollectionDocuments/Content/ContentGroups/News1/Health_Law_Documents_ASK_/20052/oei-07-03-00470.pdf.

tract (that is, for each alleged underpayment), must prove the services he provided, the request for reimbursement he submitted, the amount to which he was entitled, the amount he actually received, and the insufficiency of the HMO's reasons for denying full payment." *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1264 (11th Cir. 2004); *see id* at 1268 (decertifying class). The fact-specific nature of these claims makes them unsuited to class proceedings. They are, on the other hand, well suited for handling through the complaint resolution process prescribed in Oxford's physician provider agreements (*see* JA 20), or if necessary through bilateral arbitration (*see* JA 15-16).[3]

The present case should have been a relatively simple one about whether Oxford should have paid Sutter more or less for particular services he claimed to have rendered under the provider agreement. *See* Sutter Br. 3. Instead, Sutter sought, and the arbitrator

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[3] Sutter hints in passing (Br. 2) that class procedures are necessary to give physicians any practical means to bring such claims. His amicus makes the argument at length. AMA Br. 8-13, 28-30. But the arbitrator never suggested that he was ruling on this basis. *See, e.g.*, Oxford Br. 4-9 (describing opinions). Had he done so, his ruling would have been even more clearly based on impermissible policy considerations. *See* Oxford Br. 31; *cf. AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011). Moreover, the record shows that, while claims vary in size, if the practices Sutter complains of were illegitimate (which they are not) then some physicians would have claims for hundreds of thousands of dollars. *See* Lathrop Aff. ¶ 4, No. 2:05-cv-02198, Dkt. No. 13-1 (D.N.J. May 31, 2005). While Sutter now says (Br. 2) that his own losses amounted to $1,000 per year (or $8,000 over the putative class period), that calculation appears to exclude more substantial damages Sutter sought earlier in the arbitration. And the AMA's analysis fails to acknowledge that the arbitration clause here allows the arbitrator to allocate all costs and expenses, including attorneys' fees, between the parties at his discretion. JA 16.

imposed, class arbitration procedures to which the parties never agreed. That the case has now entered its second decade is a stark confirmation of this Court's observation that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1751 (2011).

II. ARBITRATORS EXCEED THEIR POWERS BY IMPOSING CLASS ARBITRATION BASED ON NOTHING MORE THAN A GENERAL ARBITRATION CLAUSE

A. *Stolt-Nielsen* Establishes That Section 10 Permits Relief For Parties, Such As Oxford, That Have Been Involuntarily Forced Into Class Arbitration

1. Sutter builds his response largely around the proposition that Oxford is asking this Court to depart radically from established principles of judicial review under the FAA. *See* Sutter Br. 18-25, 38-48. That is not correct. Review under Section 10 is properly limited, and courts generally will not disturb decisions made by arbitrators within the scope of the powers the parties have conferred upon them. In *Stolt-Nielsen*, however, this Court recognized that even the "high hurdle" of Section 10(a)(4) review (130 S. Ct. at 1767) is overcome when an arbitrator imposes class arbitration without a sufficient contractual basis—and that such a basis may not be inferred from the mere existence of the arbitration agreement itself.

This case cannot meaningfully be distinguished from *Stolt-Nielsen*. In each case, parties entered into an agreement with a provision mandating arbitration of any or all disputes. 130 S. Ct. at 1765; JA 15-16. In

each case, a plaintiff or plaintiffs filed a putative class action in court, and the defendant or defendants successfully moved to compel arbitration. 130 S. Ct. at 1765; Pet. App. 2a-3a. In each case, the arbitration claimant argued that the parties' agreement allowed for class arbitration, despite the lack of any textual reference to class proceedings or extrinsic evidence that the parties ever contemplated or agreed to the possibility of class arbitration. In each case, after this Court's plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), the parties agreed to allow arbitrators to determine, in the first instance, whether their agreement allowed for class arbitration, and the class issues ultimately proceeded under the structure prescribed by the Supplementary Rules for class arbitration promulgated by the American Arbitration Association after *Bazzle*. 130 S. Ct. at 1771; JA 30.[4] And in each case, the parties made competing arguments concerning how the arbitration clause should be construed to reflect the intent and understandings of the parties. *See, e.g.*, 130 S. Ct. at 1769 n.6 (summarizing evidence of industry custom and usage); Pet. App. 46a-52a.

The only difference between this case and *Stolt-Nielsen* is that in *Stolt-Nielsen* the claimant's counsel freely acknowledged, in oral argument before the arbitrators, that when the parties referred to their arbitra-

[4] The parties in *Stolt-Nielsen*, whose agreement did not generally call for use of AAA rules, entered into a separate contract expressly directing their arbitrators to address the availability of class arbitration under the framework of the Supplementary Rules. *See* 130 S. Ct. at 1765, 1772 & n.8. Here, the arbitration clause invokes the AAA rules (JA 16), and the Supplementary Rules became applicable when they were adopted in October 2003, shortly after issuance of the arbitrator's initial clause construction award (Pet. App. 43a-53a).

tion clause being "silent" on the question of class arbitration, they meant "not simply … that the clause made no express reference" to class proceedings, but that there had been "no agreement … reached" on that issue. 130 S. Ct. at 1776; *see also* 08-1198 JA 77a. In light of that stipulated lack of actual agreement, the Court held it was necessary to determine what default rule should apply in the absence of an agreement. 130 S. Ct. at 1770, 1772.

The Court ultimately concluded that, because arbitration is inherently a consensual process, "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." 130 S. Ct. at 1775. Moreover, "[a]n *implicit* agreement to authorize class-action arbitration … is *not* a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* (emphases added). Noting the conceded lack of any actual agreement in the case before it, the Court held that by imposing class arbitration the arbitrators had "exceeded their powers" within the meaning of Section 10(a)(4), and thus vacated their award. It reached that conclusion even though "the parties' supplemental agreement [had] expressly assigned this issue to the arbitration panel." *Id.* at 1772.

Thus, even applying no more than standard FAA review, an arbitral award imposing class arbitration must be vacated as *ultra vires* unless it rests on a proper contractual basis—*i.e.*, an actual agreement between the parties contemplating the use of class-action procedures in an appropriate case. And an arbitrator may not find such an agreement—as the arbitrator in this case did—based on nothing more than the agreement to arbitrate itself.

2. Sutter argues that he has not "stipulated" that his agreement with Oxford is "silent" as to class arbitration (Br. 20-21); that Oxford agreed to allow the arbitrator to construe the arbitration clause in the first instance (Br. 26-33); and that the arbitrator said that he grounded his decision in the language of the parties' agreement (Br. 35-36). None of these points succeeds in avoiding *Stolt-Nielsen*.

If *Stolt-Nielsen* applied only in cases where a claimant concedes, after a dispute has arisen, that the parties never reached any actual agreement to permit class proceedings, this Court's decision would be deprived of any force in proceedings challenging the improper imposition of class arbitration under the FAA. *See Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113, 129 n.2 (2d Cir. 2011) (Winter, J., dissenting) (*Stolt-Nielsen*'s application cannot turn on a "*sui generis* and idiosyncratic stipulation of the parties" without making it "an insignificant precedent"). If vacatur is not appropriate even where, as here, the lack of any contractual basis is readily apparent from the face of the parties' arbitration clause and the lack of any further evidence of agreement in the record, then class proceedings may be imposed on the basis of any arbitrator's construction of any arbitration agreement, without any judicial check. That is not narrow review, but no genuine review at all.

The parties' submission of the question to their arbitrator in the first instance also does not preclude any review. In *Stolt-Nielsen*, the Court explained that although the "arbitration panel was charged with deciding … whether the arbitration clause … allowed for class arbitration, … nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the [arbitration clause] itself." 130 S. Ct. at 1772 n.8. The same is true here. Nothing gave the ar-

bitrator in this case the power to impose class arbitration without an adequate contractual basis.

Finally, there can be no talismanic significance to an arbitrator's assertion that he has construed the parties' agreement and divined their intent. Here, the arbitrator looked at an arbitration agreement saying, in essence, "We agree to arbitrate, not litigate, all disputes," and concluded the parties "must have … intended" to authorize class arbitration. *See* Pet. App. 48a. If that conclusion is simply binding on the courts, then it is not clear why Sutter thinks an arbitrator could not likewise declare that parties whose contract specifies the use of New York law must actually have intended to use California law instead. *See* Sutter Br. 19-20. In both instances, the obvious problem is that "merely saying something is so does not make it so." *Stolt-Nielsen*, 130 S. Ct. at 1769 n.7. If courts cannot apply at least that principle in reviewing class-arbitration awards under Section 10(a)(4), there will be little left of "the basic precept that that arbitration 'is a matter of consent, not coercion.'" *Id.* at 1773 (quoting *Volt Info. Scis., Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

B. Reversal In This Case Will Not Threaten The Finality Of Arbitration Awards

Sutter argues (Br. 15-16) that vacating the arbitrator's decision in this case would be contrary to FAA principles and would cast doubt on the finality of all arbitration awards. In fact, vacatur will best serve the principles of the FAA.

1. Here, as in *Stolt-Nielsen*, no one questions the limited nature of judicial review under the FAA. And here, as in *Stolt-Nielsen*, the facts before the Court do

not test those limits. Where, as here, an arbitrator has pointed neither to any express language in an arbitration clause authorizing class arbitration nor to any extrinsic evidence or background legal rule bearing on the parties' alleged intent to authorize class proceedings, "the conclusion is inescapable" (130 S. Ct. at 1769) that there is no "contractual basis" for ordering class arbitration (*id.* at 1775), and thus "there can be only one possible outcome" (*id.* at 1770).

Given the regrettable frequency with which arbitrators appear to have "interpreted" bare arbitration clauses to authorize class arbitration, and the Second and Third Circuit decisions refusing vacatur on such facts, simply reversing in this case will provide critical guidance to arbitrators and reviewing courts. *See* Pet. 13-16; Pet. 27-28 & nn.13, 14 (collecting cases); *Smith* v. *Cheesecake Factory Restaurants, Inc.*, 2013 WL 494090, at *2-3 (M.D. Tenn. Feb. 8, 2013); *Opalinksi* v. *Robert Half Int'l, Inc.*, 2012 WL 6026674, at *1 & n.1 (D.N.J. Dec. 3, 2012), *appeal held in abeyance pending decision in this case*, No. 12-4444 (3d Cir.). If cases arise where arbitrators can advance more colorable grounds for concluding that parties *actually agreed* to authorize class arbitration, it may be that courts will defer to arbitral resolution of debatable questions, at least if parties have clearly submitted the question to arbitration or have not sought *de novo* review.[5] Those issues can and should be worked out as they arise in concrete cases. At a minimum, however, judicial re-

[5] As Sutter argues at considerable length (Br. 28-33), this case does not squarely present the question whether the availability of class arbitration is a threshold issue of arbitrability that should presumptively be decided (or perhaps reviewed) *de novo* by the courts. There is, however, a substantial argument to be made for that proposition in an appropriate case. *See* Oxford Br. 38 n.9.

view must involve some consideration of the rationale for an award imposing class arbitration in order for a court to apply *Stolt-Nielsen* and determine whether arbitrators have exceeded their powers. *See Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 646 (5th Cir. 2012). And any such consideration confirms that the arbitrator "exceeded [his] powers" here. *See* 9 U.S.C. § 10(a)(4).

2. Sutter argues (Br. 23) that "[p]arties agree to final and binding arbitration ... because they conclude that the risk of error is outweighed by the greater benefits of finality." In the context of class-action arbitration, that argument is astonishingly ironic. As this Court explained in *AT&T Mobility LLC* v. *Concepcion* (which Sutter does not even cite), "[d]efendants are willing to accept the costs of … errors in [individual] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." 131 S. Ct. at 1752. In sharp contrast, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *Id.* Indeed, that is one of the central reasons why, as the Court has observed, it is "hard to believe" that defendants would *ever* agree to class arbitration—"bet[ting] the company with no effective means of review." *Id.* In this context, effective judicial review does not threaten the actual arbitration bargain. On the contrary, it is necessary to preserve the real terms of that bargain, and thus to preserve the willingness of parties to use arbitration at all. *See* Oxford Br. 36-39.

III. THERE IS NO CONTRACTUAL BASIS FOR CLASS ARBITRATION IN THIS CASE

Finally, although Sutter attempts to defend the arbitrator's conclusion on the merits (Br. 48-56), he fails to show how a court applying even the most deferential standard of review could conclude that the arbitrator here had any "contractual basis" for finding that the parties "*agreed to authorize* class arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776 & n.10.

1. Like the arbitrator, Sutter points to nothing in the language of the parties' arbitration agreement that deals expressly with class arbitration. Nor, like the arbitrator, does he point to any course of dealing, other extrinsic evidence, or applicable background rule even suggesting that Oxford ever affirmatively agreed to authorize potential class proceedings. Like the arbitrator, he relies instead on an inferential analysis based on contractual language that on its face does nothing more than direct all disputes out of litigation and into arbitration.

As to that language, Sutter does not contest that what he terms the "mandatory arbitration provision," which requires arbitration of "all disputes," is simply a variant of standard language common to many arbitration agreements. *See* Oxford Br. 22-23. As Oxford's opening brief explains (at 23-24 & n.4), the accompanying language expressly prohibiting litigation—what Sutter terms the "no-civil-action provision" (Br. 4)—merely reinforces the "mandatory arbitration" language by providing indisputably clear notice of its necessary effect, and thus ensuring its enforceability under state law.[6] Together or separately, the two clauses of

[6] As Oxford observed (at 23), provisions spelling out the prohibition on court actions are common. They were, for example,

this single sentence make one point: All disputes arising under the agreement will go to arbitration, not to court. That amounts to nothing more than the parties "simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. 1775. And under *Stolt-Nielsen*, such an agreement is not one from which an arbitrator may infer "[a]n implicit agreement to authorize class arbitration." *Id.*

2. Tellingly, Sutter resorts in part to misrepresenting Oxford's previous positions. He argues (Br. 48-49), for example, that Oxford previously advocated the construction of the arbitration provision adopted by the arbitrator—that any type of proceeding barred from court by the first clause of the agreement may be replicated in arbitration under the second. But the statements Sutter relies on, mostly drawn from state court proceedings in 2002, show no such thing. Oxford has never argued that any of Sutter's claims could properly be subject to class arbitration.

Oxford's argument in response to Sutter's original state court complaint was exactly what one would expect: "Sutter ha[d] agreed to arbitrate his disputes with Oxford," and thus could not maintain an action in court. *See* Oxford's Memo. of Law Supporting Motion to Stay and/or Dismiss in Part, at 1, No. ESX-L-6644-02 (N.J. Super. Ct. July 26, 2002). In the course of explaining why both statutory and contractual claims—*not* both "class" and "individual" claims—should be sent to arbitration, Oxford referred to sending Sutter's entire "action" (rather than the parties' "dispute") to arbi-

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part of the agreements here; in the two other federal appellate cases considering the question presented (*id.*); and in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595 (1960), which Sutter cites extensively.

tration. Sutter cannot twist counsel's phrasing into some sort of admission that the parties' arbitration agreement authorized class proceedings.[7]

Similarly, Sutter argues that, during a 2004 hearing before the arbitrator on class certification, Oxford suggested that if the arbitrator declined to certify a class then Sutter might have "a basis for reopening the state-court class action." Br. 49 & n.28. Again, Oxford said nothing of the sort. In an addendum to this brief, Oxford has reprinted the relevant portion of the transcript Sutter cites. As is quite clear in context, all counsel noted was that if the arbitrator ruled in Oxford's favor on class certification, under the AAA Supplementary Rules Sutter might choose to return to the state court that had referred the matter to arbitration to file a new proceeding *challenging the arbitrator's decision*—and Oxford could then remove that proceeding to federal court. Add. 4a. Conversely, Oxford argued, if the arbitrator decided to certify a class, Oxford could petition a federal court for review. *Id.* Counsel's point had to do with whether state or federal law would ultimately apply on review of the arbitrator's class certification decision, and therefore what law the arbitrator

[7] Indeed, if the Court wishes to consider the parties' positions at that time, Sutter's counsel certainly understood that Oxford was not seeking to have a "class action" or any "class claims" sent to arbitration. *See* C.A. App. 131 (stating that Oxford had brought a "motion to compel *individual arbitration*" (emphasis added)). Indeed, Sutter repeatedly argued that "the relief requested by Oxford"—*i.e.*, dismissal of Sutter's complaint and referral of all claims to arbitration—would thwart New Jersey public policy by requiring "individual arbitrations." C.A. App. 135; *see also, e.g.*, C.A. App. 137 n.8 (arguing that arbitration provision in Oxford provider agreement was "designed to negate [class] actions").

should apply in the first instance. The entire discussion is utterly irrelevant to the question presented here.

3. On the merits, Sutter's defense of the arbitrator's reasoning reflects a fundamental misunderstanding of the terms of his agreement with Oxford, the question before the Court, and what it means for a plaintiff who has filed a putative class action in court to have his own dispute referred to arbitration.

To begin with, the parties' clause sends to arbitration all "disputes," not all "civil actions." *See* Oxford Br. 25. Any focus on how the clause, by barring *all* court actions, also bars judicial *class* actions, is beside the point.

In any event, Sutter's argument begins with the premise that the rules applicable in most U.S. courts allow a party to begin an action seeking to assert not only his own claims but also, in a representative capacity, the allegedly similar claims of many otherwise absent parties. That is correct, but it is important to focus on the difference between the claims actually or potentially put at issue and the manner in which the forum's rules allow them to be presented. As this Court has explained, a party's "right to assert [its] own claims in the framework of a class action … is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); *see also* Fed. R. Civ. P. 23; 28 U.S.C. § 2072 (federal rules "shall not abridge, enlarge or modify any substantive right"); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion); *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979); 1 *Newberg on Class Actions* § 1:1 (5th ed. 2011) (class actions are a "procedural device"). That is why Sutter's original state-court

complaint defined a set of substantive legal claims for relief (C.A. App. 164-175), along with a request that the court permit him to litigate those claims both on his own behalf and on behalf of a class of other claimants. Unless and until a class was actually certified, Sutter could act only on his own behalf. He had no power to represent or bind absent members of the putative class. *See Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379-2380 (2011).

Applying the language of the parties' arbitration agreement, the state court sent Sutter's "dispute" with Oxford—*i.e.*, his own set of substantive claims—to arbitration. JA 25-26. Once there, the question became whether in that new forum Sutter could again invoke a procedural mechanism that would allow him to assert allegedly similar claims on behalf of an absent class. The answer to that question is determined by the rules of the arbitral forum—just as if Oxford had removed the case from state to federal court, the availability of class procedures would then have been determined by the applicable federal rules. *See Smith* v. *Bayer Corp.*, 131 S. Ct. at 2382 ("Once removal takes place, Federal Rule 23 governs certification."). And as *Stolt-Nielsen* makes clear, the governing rule in the arbitral forum is that class procedures may not be invoked unless the parties "*agreed to authorize* class arbitration." 130 S. Ct. at 1776.

It is therefore quite correct that the two clauses of the arbitration provision here are parallel and co-extensive in their application to Sutter's claims. Any claim Sutter could frame on his own behalf was both barred from court and permitted in arbitration. Nothing in the provision, however, permits Sutter to invoke in arbitration every *procedure* that would have been available in court, including any ability to seek to ad-

vance allegedly similar claims on behalf of thousands of absent parties. *See* Oxford Br. 26-27; *Reed*, 681 F.3d at 643 ("[T]he central purpose of the arbitration agreement is to *avoid* … provisions [such as a state statute permitting certain class actions], not to incorporate them into the arbitration agreement.").

Sutter argues (Br. 51-52) that if "his" class "claims" could not be brought in arbitration, then the New Jersey court was wrong to dismiss them, even as Sutter's own dispute was sent to arbitration. It seems quite unlikely that, as a matter of state procedure, a New Jersey court would have allowed Sutter to continue litigating as a class representative even after his own claims had been sent to arbitration. *See Caudle* v. *American Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) ("[A] contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants."). For present purposes, however, the dispositive point is that if Sutter wanted to make that argument, he should have made it to the New Jersey court at the time his suit was dismissed. As the present case comes to this Court, there is no question that Sutter's individual claims were properly referred to arbitration. The question presented is whether, in the arbitral forum, Sutter was entitled to transform his individual dispute into a class proceeding.

Finally, Sutter's argument proves far too much. If Sutter's reasoning were correct, then apparently any arbitration clause would *have* to be read to authorize class arbitration if the plaintiff had first filed a putative class action in court. As Sutter concedes (Br. 50), a "no-civil-action" provision simply makes explicit what is already implicit in any clause requiring the parties' disputes be sent to arbitration—namely, that none of those disputes may form the basis of a suit in court.

Thus if, as Sutter argues (Br. 52-53), comprehensively barring litigation and requiring arbitration of any dispute requires the conclusion that the parties agreed to submit "class claims" to arbitration, then nearly all arbitration clauses would have that meaning. That position cannot be squared with *Stolt-Nielsen*'s prohibition on inferring an intent to authorize class arbitration from the fact of the agreement to arbitrate alone. 130 S. Ct. at 1775-1776.

4. Although Sutter protests to the contrary (Br. 54), the best explanation for the arbitrator's contractual "interpretation" was his expressed belief that Sutter must be able to bring his claims as a class action in some forum, and that a contrary result would be "bizarre." *See* Pet. App. 48a. Sutter's attempt to explain away the arbitrator's candid acknowledgment of his motivation fails. *See* Sutter Br. 54.

As the arbitrator himself said, what he felt was "bizarre" was that the parties' arbitration agreement would "mean that class actions are not possible in any forum." Pet. App. 48a. In effect, the arbitrator accepted exactly the argument that Sutter had made to the state court when he resisted arbitration in the first place: limiting him to individual proceedings would violate public policy. *See, e.g.*, C.A. App. 135; *supra* n.7. Yet, individual resolution is the default position that parties accept when they simply agree to arbitrate their disputes. *Stolt-Nielsen* makes clear that, under the FAA, an arbitrator has no authority to override that default rule and impose class proceedings based on his personal views regarding their desirability. And, as Oxford's opening brief explains (at 31-32), such policy considerations cannot provide the "contractual basis" that *Stolt-Nielsen* requires to permit class arbitration.

Similarly, Sutter cannot avoid (Br. 54-56) the arbitrator's statements regarding the breadth of the parties' arbitration clause and the lack of any express exclusion of class actions. Although the arbitrator recited, after *Stolt-Nielsen*, that he had engaged in "a vital exercise to determine what the parties intended" (Pet. App. 38a), in the end all he had to work with was a broad, general arbitration clause that prohibited litigation, required arbitration, and did not expressly exclude class proceedings. Under *Stolt-Nielsen*, that cannot be enough.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2013

ADDENDUM

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ARBITRATION PROCEEDINGS
AMERICAN ARBITRATION ASSOCIATION

In the Matter of the
Arbitration between

JOHN IVAN SUTTER, M.D., P.A.
on behalf of himself and all
others similarly situated,
Claimant,

-and-

OXFORD HEALTH PLANS, INC.,
Respondent.

AAA Case No . 18 193 20593 02

1633 Broadway
New York, New York
Friday, October 29, 2004
10:36 a.m.

BEFORE:

HON. WILLIAM D. BARRETT

* * *

THE ARBITRATOR: You made a point earlier that if you look to the law of the forum and I'm just saying that I think that you certainly are not going to be looking to New York law.

MR. DE LEEUW: No. When I say "the law of the forum" I mean the law of the AAA and your Honor is

absolutely correct, there is not a lot of case law under the AAA and not a lot of backup to the standards.

But I'd say two things about the law of the forum. As your Honor points out, the law of the forum is the AAA. New Jersey precedent may be helpful in that regard. Alaska precedent may be helpful in that regard. What I would say is that there are two reasons why I believe that federal precedent should be binding here.

One, the AAA and this is indisputable, is a national organization and it seeks to have uniform national rule. If your Honor were to interpret Rule 4 according to New Jersey state law, as opposed to federal law, to the extent there were any distinctions—I'm not necessarily agreeing that there are—to the extent that there are distinctions, then what would happen is we would start to develop a body of law or practice under the AAA rules that would be different based on different states that arbitrations sit in.

So, that would be, I believe, inappropriate. The AAA constantly tries to maintain a consistent body of national standards. But even putting that issue aside because it's an issue actually that you and Mr. Katz raised earlier, as your Honor points out, the AAA rules require that either party can appeal from a class certification decision. The AAA rules clearly understand that this is a decision that can go to court.

THE ARBITRATOR: It's contemplated that would happen.

MR. DE LEEUW: Here's what may very well happen. If either side decides to appeal your Honor's decision, there's clearly diversity jurisdiction here. In this case, we are talking about a New Jersey class

against a Connecticut company. So, either party could bring the case in federal court. It's likely they would do it in New Jersey federal court. Just as happened with the CIGNA, Health Net and United case, that case would immediately be transferred down to the 11th Circuit as related to the MDL. There is no question that it is, in fact, related. It's identical to those three cases and it's very similar to the class action that was—that's taking the role as a lead case.

So, there is no real doubt if it were to go to federal court and go to the judicial panel and multi-panel litigation, it would go down to the 11th Circuit. In that case, any appeal of this decision going through federal courts would be governed by the 11th Circuit decision, so we'd be right back with what we're taking about is that 11th Circuit decision would be dispositive here.

THE ARBITRATOR: That's really ingenious, but wasn't this case in the New Jersey state court in the first place?

MR. DE LEEUW: Improperly, yes, it was.

THE ARBITRATOR: It wasn't removed then.

MR. DE LEEUW: It was removed out of court into arbitration.

THE ARBITRATOR: But not to federal court on the grounds of diversity.

MR. DE LEEUW: The case was brought improperly. The case was dismissed because it was brought improperly. Judge Bernstein I believe is his name, dismissed the case completely and said this is a case that should have been brought in arbitration. Dr. Sutter chose to disregard his arbitration contract, disregard the obligation to go into arbitration.

Oxford responded very simply, you got to go to arbitration, and so that's why we're here. If either party decides—if your Honor rules that a class is not certifiable, then Mr. Katz may very well choose to go into New Jersey Supreme Court. That would be his choice. It may be Oxford's choice to remove that action. Oxford would have a certain amount of time to remove it and in which case, it would go to the 11th Circuit.

If your Honor were to rule and we don't think there is any basis, that a class is certifiable, Oxford could file an action in federal court in New Jersey and that action would go to the 11th Circuit. So, all I'm saying is that it may very well be that the case is going to go to the 11th Circuit. I don't think that is an issue that needs to hold us up very long because I think either way, whether it goes to the 11th Circuit or whether just as a matter of AAA practice, the AAA should follow a consistent body of law. It's clear here that what we're talking about is that Rule 23 and Rule 4 are identical in all respects.

The New Jersey rule is identical as well. Again, except for the fact that the AAA rule is somewhat more strict in that it doesn't allow these other options for class action. So, either way we're talking about the same standard in the statute or AAA rule. Now, all we're talking about is which cases ought to be looked at as helpful precedent. But what we have here with the 11th Circuit is an Appellate Court decision that I believe, based on both AAA practice and what might happen very well might happen in appeal, would be the dispositive law here, that the standard is the same. I would like to move on to the next issue.

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