No.

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stolt-Nielsen, S.A.* v. *AnimalFeeds International Corp.* this Court held that a court could not order arbitration to proceed using class procedures unless there was a "contractual basis" for concluding that the parties have "*agreed* to" class arbitration. 559 U.S. 662, 684 (2010) (emphasis in original). This Court explained that courts may not "presume" such consent from "mere silence on the issue of class arbitration" or "from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687.

The arbitration clause at issue here did not mention class arbitration. A divided Ninth Circuit panel majority (Reinhardt & Wardlaw, JJ.) nonetheless inferred mutual assent to class arbitration from such standard language as the parties' agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings" and a description of the substantive claims subject to arbitration. App., *infra*, 3a-4a.

The question presented is:

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

RULE 29.6 STATEMENT

Petitioner Lamps Plus Holdings, Inc. is the parent corporation to petitioners Lamps Plus, Inc. and Lamps Plus Centennial, Inc. No publicly held corporation owns a 10% or more ownership interest in Lamps Plus, Inc.; Lamps Centennial, Inc.; or Lamps Plus Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively, Lamps Plus) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 701 F. App'x 670. The order of the court of appeals denying rehearing (App., *infra*, 6a) is unreported. The order of the district court denying in part Lamps Plus's motion to compel individual arbitration and instead compelling arbitration on a class-wide basis (App., *infra*, 7a-23a) is unreported, but is available at 2016 WL 9110161.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2017. App., *infra*, 1a. The court of appeals denied a timely petition for rehearing or rehearing en banc on September 11, 2017. App., *infra*, 6a. On November 28, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 10, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the

> Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such 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.

STATEMENT

This Court has repeatedly held that "the differences between bilateral and class-action arbitration are too great" for arbitrators or courts to presume "that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). Because "class arbitration" is "not arbitration as envisioned by the" Federal Arbitration Act (FAA) and "lacks its benefits," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011), arbitrators or courts may not infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687.

But that is exactly what the panel majority of Judges Reinhardt and Wardlaw did below. By infer-

ring an agreement to class arbitration from standard arbitration-clause provisions, the court below equated the agreement to arbitrate with an agreement to arbitrate on a class basis.

Yet this Court has squarely held that the FAA "requires more" (*Stolt-Nielsen*, 559 U.S. at 687): namely, a "contractual basis for concluding" that the parties have in fact "*agreed* to" class arbitration (*id.* at 686). That result follows naturally from the FAA's "rule[] of fundamental importance" that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)); accord *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them.").

As Judge Fernandez succinctly observed in dissent, the decision below is a "palpable evasion of *Stolt-Nielsen*." App., *infra*, 5a. The panel majority simply disregarded numerous terms in the parties' arbitration agreement that plainly contemplate bilateral arbitration, and instead purported to divine contractual consent to class arbitration from language found in virtually any standard arbitration clause.

By providing, for example, that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (App., *infra*, 3a), the contract simply identifies arbitration as the agreed-upon substitute for litigation in court. That and similar contract language does not mean that the arbitration will take place under the same *procedures* available in court, such as the class device. And the majority confused substantive claims and remedies with procedural

rules when it inferred authority for class arbitration from statements that "arbitrable claims are those that 'would have been available to the parties by law'" and that the arbitrator is allowed "to 'award any remedy allowed by applicable law.'" *Id.* at 4a. As the majority itself elsewhere acknowledged, "a class action is a procedural device * * * rather than a separate or distinct claim." *Ibid.* (quotation marks omitted).

Although the panel protested otherwise, its decision involved precisely the type of state-law "interpretive acrobatics" (App., *infra*, 3a) to support its policy preference for class actions that this Court has rejected as incompatible with the FAA, see *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-71 (2015).

By departing from this Court's clear guidance, the panel majority also created a conflict with several other circuits, which have uniformly rejected similar efforts to equate standard arbitration terms with an implicit agreement to class arbitration. Review is thus independently warranted to ensure uniform application of the FAA and underscore that standard language authorizing arbitration of "any and all claims" and waiving the parties' rights to file lawsuits in court does not supply the "contractual basis" needed to "support a finding that the parties agreed to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 687 n.10.

Moreover, the practical consequences of the Ninth Circuit's failure to adhere to this Court's precedents are substantial. If permitted to stand, the decision below will embolden other courts to impose class arbitration on parties that never agreed to it—elevating a policy preference for the class-action de-

vice over the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (quotation marks omitted).

This Court's review is therefore essential. And the panel majority's "palpable evasion" of this Court's precedents (App., *infra*, 5a) is so clear as to warrant summary reversal.

A. The Arbitration Agreement Between Lamps Plus And Varela.

Respondent Frank Varela is an employee of Lamps Plus. App., *infra*, 8a. At the beginning of his employment, Varela and a representative of Lamps Plus signed a standalone arbitration agreement (the "Agreement"). *Id.* at 24a-35a.[1]

The Agreement covers "all claims or controversies ('claims'), past, present or future that I may have against the Company or against its offers, directors, employees or agents * * * or that the Company may have against me." App., *infra*, 24a. The Agreement further provides: "Specifically, the Company and *I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment, or any of the parties' rights and obligations arising under this Agreement." *Id.* at 24a-25a (emphasis added).

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[1] Arbitration is a voluntary term and condition of employment; employees are permitted to opt out of arbitration within 3 days after executing the agreement. App., *infra*, 27a; ER 138. ("ER __" refers to the Excerpts of Record in the court of appeals.) It is undisputed that Varela did not opt out of arbitration. App., *infra*, 10a; ER 138.

The Agreement also informs the employee at the outset that agreeing to arbitration waives his or her right to resolve disputes with Lamps Plus in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

App., *infra*, 24a.

The Agreement specifies that the arbitration will be administered by the American Arbitration Association (AAA) or JAMS (App., *infra*, 25a)—two widely-respected arbitration forums.[2] The arbitrator, once appointed, "is authorized to award any remedy allowed by applicable law." *Id.* at 26a.

B. Proceedings Below.

1. In early 2016, Lamps Plus was the victim of a successful "phishing" attack. An unknown third party spoofed the email address of a high-level Lamps Plus employee and sent an email to an actual Lamps Plus employee requesting employees' W-2 tax forms. ER 152. The employee, thinking she was responding

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[2] It is undisputed that Varela's arbitration agreement includes both the document he signed titled "ARBITRATION PROVISION" (App., *infra*, 24a) as well as "ATTACHMENT A," which sets forth in more detail the "LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES" (*id.* at 29a). See ER 137-138.

to a supervisor's legitimate request, sent copies of current and former employees' 2015 W-2 forms to the third party. App., *infra*, 11a; ER 152.

2. Soon after this attack, respondent Varela filed a putative class action lawsuit in California federal court, asserting statutory and common-law claims related to the data breach. ER 178-202. Lamps Plus moved to "compel arbitration on an individual basis" pursuant to Varela's arbitration agreement. ER 144.

The district court purported to grant the motion, but in fact denied the request for individual arbitration, instead ordering that arbitration take place on a class-wide basis. App., *infra*, 20a-22a. The district court recognized that Varela had entered into a binding arbitration agreement and that his claims in this case fall within the scope of that agreement. *Id.* at 13a-14a. The court further rejected Varela's unconscionability challenges to the enforceability of his agreement. *Id.* at 15a-20a.

On the issue of class arbitration, however, the district court accepted Varela's argument that "the language stating that 'all claims' arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter." App., *infra*, 21a.[3]

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[3] In interpreting the arbitration agreement to authorize class arbitration, the district court also sua sponte questioned whether a waiver of class procedures in arbitration would be enforceable in the employment context. App., *infra*, 22a (citing *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), which was subsequently followed by the Ninth Circuit in *Morris* v.

3. A divided Ninth Circuit panel affirmed the district court's order compelling class rather than individual arbitration. App., *infra*, 1a-5a.

In a per curiam opinion, Judges Reinhardt and Wardlaw discerned "ambiguity" as to whether the parties agreed to class arbitration based on the following language:

- the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";
- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

App., *infra*, 3a.

Based on this language, the majority maintained that "*the most reasonable*[] interpretation of this expansive language is that it authorizes class arbitration." App., *infra*, 3a. And the majority also relied upon the state-law doctrine that contractual ambiguities should be "construed against the drafter." *Id.* at 3a-4a.

Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016)). (This Court granted review in both cases. 137 S. Ct. 809 (2017).)

The Ninth Circuit, however, affirmed solely on the basis that (in the panel's view) the contract authorized class arbitration. App., *infra*, 1a-5a. Indeed, at oral argument, Judge Reinhardt discouraged Varela from relying on *Morris*, stating that it would be "unwise" to do so in light of this Court's grant of certiorari. See Oral Arg. at 17:10-18:10, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011909.

The majority further inferred "support[]" for its interpretation from (1) the *absence* of any reference to class actions in other parts of the arbitration clause; (2) the arbitration clause's coverage of all "claims or controversies" the parties might have against each other; and (3) the provision in the arbitration clause authorizing the arbitrator to "'award any remedy allowed by applicable law.'" App., *infra*, 3a-4a.

Judge Fernandez dissented. His dissent reads in full:

> I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen* * * *.

App., *infra*, 5a (citation omitted).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's clear holdings that the FAA preempts state law that would compel parties to an arbitration agreement to submit to class arbitration without a contractual basis for concluding that the parties agreed to that procedure. By purporting to find such a basis in standard contract language stating that arbitration substitutes for court proceedings and that the parties agreed to arbitrate "all claims or controversies" between them, the panel majority engaged in a "palpable evasion of *Stolt-Nielsen*." App., *infra*, 5a.

This Court could not have been clearer that, in light of the fundamental differences between class and individual arbitration, the FAA prohibits exactly what the panel below did here: inferring "[a]n implicit agreement to authorize class-action arbitration

* * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685; accord *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring) (quoting same). And the panel's implausible interpretation of the contract in favor of its preference for class procedures is the kind of strained reasoning that this Court recently rejected in *Imburgia*, 136 S. Ct. at 468-71.

Moreover, the Ninth Circuit's "palpable evasion of *Stolt-Nielsen*" created a conflict with an unbroken line of decisions by other circuits. Those courts of appeals have rejected similar efforts to transform standard arbitration terms, such as those relied on by the Ninth Circuit here, into an "implicit" agreement to class arbitration.

This case is an ideal vehicle to address the question presented. It arises out of federal court; the question presented was the sole basis for the decision below; and the parties have not disputed that a court—rather than an arbitrator—should decide whether the arbitration clause permits class procedures. That judicial determination can thus be reviewed de novo, without the constraints imposed by the FAA's limited grounds for review of an arbitrator's decisions. See *Oxford Health*, 569 U.S. at 571-73.

Finally, the decision below represents yet another effort by a court hostile to bilateral arbitration—the type of arbitration "envisioned by the FAA" (*Concepcion*, 563 U.S. at 351)—to circumvent this Court's arbitration precedents. This Court has repeatedly intervened—often summarily—to reject similar evasions. See, *e.g., Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421 (2017); *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 568

U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam).

Here, too, review and reversal of the decision below is warranted to preserve the integrity of this Court's precedents and ensure nationwide uniformity on a question of fundamental importance.

A. The Decision Below Contravenes The FAA And Defies This Court's Precedents.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House*, 534 U.S. 279, 289 (2002) (quotation marks omitted). This Court has thus stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

An agreement to arbitrate on an individual basis, or "bilateral arbitration," is the form of arbitration "envisioned by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). As this Court has explained on multiple occasions, in bilateral arbitration the "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Ibid.* (quoting *Stolt-Nielsen*, 559 U.S. at 685); see also

14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

By contrast, "class arbitration" is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). That is because "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." *Id.* at 348. In addition, "class arbitration greatly increases risks to defendants," because "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" in light of the limited judicial review available. *Id.* at 350.

Because "the relative benefits of class-action arbitration are much less assured," this Court held in *Stolt-Nielsen* that before "a party may * * * be compelled under the FAA to submit to class arbitration," there must be a "contractual basis for concluding" that the parties have "*agreed* to" that procedure. 559 U.S. at 684, 686. This Court further made clear that courts may *not* "presume" such consent from "mere silence on the issue of class-arbitration" or infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687. Instead, as a matter of substantive federal law, "the FAA requires more." *Id.* at 687. In light of the parties' stipulation in that case

"that there was 'no agreement' on the issue of class-action arbitration," however, this Court left open the question of "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 687 n.10.

2. The panel majority's opinion cannot be squared with the settled principles just discussed. The panel purported to recognize these principles. App., *infra*, 2a. But it then proceeded to ignore them by resolving the question left open in *Stolt-Nielsen* in a manner fundamentally incompatible with *Stolt-Nielsen* itself. None of the provisions relied on by the panel majority even remotely supports an inference that the parties "agreed to authorize" class arbitration.

At the outset, the panel relied on the Agreement's statement that the employee's agreement to arbitrate is a "waiver of 'any right I may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company'" and of "'any right I may have to resolve employment disputes through trial by judge or jury.'" App., *infra*, 3a (emphasis added). But as this Court recently reiterated, "a waiver of the right to go to court and to receive a jury trial" is "*the primary characteristic* of an arbitration agreement." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427 (emphasis added).

The panel's reasoning thus renders *Stolt-Nielsen* a nullity. If contractual language describing this "primary characteristic" were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration. Yet this Court has clearly held that "the FAA requires more" than "the fact of the parties' agreement to arbitrate" to

support an "implicit agreement to authorize class-action arbitration." 559 U.S. at 685.

Similarly, the passage of the Agreement here stating that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (App., *infra*, 3a) simply means that arbitration replaces litigation in court. It does not mean that the arbitration will duplicate the *procedures* available in court, such as the class device.[4]

Indeed, under the majority's approach, that language would also entitle a party to demand that the arbitration process include other court procedures unless the agreement expressly disclaims them, including "the Federal Rules of Civil Procedure" and "a discovery process rivaling that in litigation." *Concepcion*, 563 U.S. at 351. But those procedures, like the class-action device, also are "not arbitration as envisioned by the FAA" and "lack[] its benefits." *Ibid.* General language stating the obvious proposition that binding arbitration is a substitute for court proceedings cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Id.* at 344 (emphasis added).

The panel majority next brushed aside the multiple portions of the Agreement demonstrating the parties' intent to engage in traditional, bilateral arbitration. For example, the Agreement limits the scope of the claims covered by arbitration to "claims or controversies" that "*I* may have against the Company

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[4] See, *e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "in lieu of" as "[i]nstead of or in place of"); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY (Deluxe ed. 1996) (similarly defining "in lieu of" as "instead of" or "in place of").

* * * or that the Company * * * may have against *me*" "aris[ing] in connection with *my* employment, or any of the parties' rights and obligations arising under *this Agreement*." App., *infra*, 24a-25a (emphasis added).

Yet the majority concluded that this language was irrelevant because "Varela's claims against the company include those that could be brought as part of a class." *Id.* at 4a. And it further reasoned that the Agreement's authorization of arbitration for claims that "'would have been available to the parties by law'" "obviously include[s] claims as part of a class proceeding." *Ibid.*[5]

That interpretation makes no sense. Because a class action is nothing more than the sum of each class member's individual claims, Rule 23 cannot transform the claims of *other* employees into *Varela*'s claims, and those other individuals' claims plainly do not relate to *Varela*'s employment with Lamps Plus.

That basic principle has long been established. Nearly four decades ago, this Court recognized that the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). The panel majority itself recognized this

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[5] The Agreement also limited the parties to one deposition per side (subject to the arbitrator's discretion to allow additional depositions). App., *infra*, 32a. That presumptive limit on discovery is impossible to square with the panel majority's conclusion that the parties agreed to authorize class arbitration.

rule in the very next paragraph, acknowledging that "a class action is a procedural device * * * rather than a separate or distinct claim." App., *infra*, 4a (quotation marks omitted).

Moreover, the broad range of substantive disputes subject to arbitration (App., *infra*, 4a) says nothing about the procedures under which the arbitration will be conducted; in particular, it does not address whether class procedures are available for the resolution of any dispute. In other words, this passage of the Agreement simply demonstrates that Varela and Lamps Plus agreed "to submit their disputes to an arbitrator"—nothing more. That agreement is precisely what this Court held *cannot* supply the basis for "[a]n implicit agreement to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 685.[6]

For similar reasons, the Agreement's provision authorizing the arbitrator to "'award any remedy allowed by applicable law'" cannot support the panel majority's interpretation. App., *infra*, 4a. A class action is not itself a remedy, but rather, again, simply a procedural device for aggregating multiple requests for underlying substantive relief.

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[6] Notably, the Agreement says only that the AAA or JAMS employment arbitration rules shall apply (App., *infra*, 25a-26a, 29a), with no reference to the AAA Supplementary Rules for Class Arbitrations (see https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf) or the JAMS Class Action Procedures (see https://www.jamsadr.com/rules-class-action-procedures/). And the procedures addressed in the Agreement repeatedly refer to "*either* party," further reinforcing the Agreement's bilateral nature. App., *infra*, 29a-31a (emphasis added).

In contrast with Judges Reinhardt and Wardlaw's purported application of California law, multiple California state courts have rejected arguments that similarly worded arbitration provisions in the employment context can support an implicit agreement to class arbitration. See *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233 (2016). In *Kinecta*, the Court of Appeal applied *Stolt-Nielsen* to "conclude that the parties did not agree to authorize class arbitration in their arbitration agreement" through language authorizing arbitration of "'any claim, dispute, and/or controversy that either *I* may have against the Credit Union * * * or the Credit Union may have against *me*, arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union.'" 205 Cal.App.4th at 519.

Like the arbitration provision here (App., *infra*, 25a), the arbitration agreement in *Kinecta* covered employment disputes under a variety of enumerated state and federal statutes. *Id.* at 511 n.1. And also like the arbitration provision here (App., *infra*, 24a-25a), the arbitration agreement "ma[de] no reference to employee groups or to other employees," instead "refer[ring] exclusively to 'I,' 'me,' and 'my' (designating [the employee])." 205 Cal.App.4th at 517; see also *Nelsen*, 207 Cal.App.4th at 1130 (following *Kinecta* in a "nearly identical" case).

This directly contrary "California case law" further reveals that the panel majority's opinion is far from a neutral application of ordinary state-law con-

tract principles. *Imburgia*, 136 S. Ct. at 469. Rather, it is a "unique," result-oriented interpretation (*ibid.*), transparently motivated by the panel majority's preference for the class device and desire to "eva[de]" this Court's decisions in *Stolt-Nielsen* and *Concepcion*. App., *infra*, 5a.

3. Finally, the panel majority "cannot salvage its decision" (*Kindred Nursing Ctrs.*, 137 S. Ct. at 1427) by reliance on the state-law canon of contractual interpretation providing that ambiguous terms are construed against the drafter. App., *infra*, 3a-4a. That doctrine cannot be relied on to manufacture consent to class arbitration when, as here, the arbitration clause itself lacks any indication of an agreement to use class procedures.

To begin with, the canon is inapposite because there are no ambiguous terms to interpret for all of the reasons discussed above. As the dissent put it, "the Agreement was not ambiguous." App., *infra*, 5a.

In any event, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture the consent to class arbitration that the "*FAA* requires" as a matter of federal law. *Stolt-Nielsen*, 559 U.S. at 687 (emphasis added). As this Court explained in *Stolt-Nielsen*, "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 681 (emphasis added; quotation marks omitted). And in *Concepcion*, the Court held that "class arbitration, to the extent it is manufactured by [application of a state law doctrine] rather than consensual, is inconsistent with the FAA." 563 U.S. at 348.

Thus, the majority's invocation of this state-law canon cannot save its patently erroneous interpretation of the parties' arbitration agreement. As this Court pointed out in *Imburgia*, "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." 136 S. Ct. at 470.

B. The Decision Below Conflicts With The Decisions Of Several Other Circuits.

By departing from this Court's clear guidance, Judges Reinhardt and Wardlaw created a conflict among the courts of appeals that independently warrants this Court's review. Other circuits applying *Stolt-Nielsen* have consistently rejected similar efforts to transform standard arbitration terms into an "implicit" agreement to class arbitration.

The Sixth Circuit has *three* times rejected arguments indistinguishable from those relied on below. First, in *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, (6th Cir. 2013), the court declined to infer an agreement to class arbitration from language providing for arbitration of "any controversy, claim, or counterclaim * * * arising out of or in connection with this Order." *Id.* at 599. "The principal reason to conclude that this arbitration clause does not authorize classwide arbitration," the court began, "is that the clause nowhere mentions it." *Ibid.* And a "second reason," the court continued, "is that the clause limits its scope to claims 'arising from or in connection with *this Order*,' as opposed to other customers' orders." *Ibid.* The court further rejected as irrelevant the plaintiff's argument "that the agreement does not expressly exclude the possibility of classwide arbitration," explaining that "the agreement does not include it either"— explicitly or

implicitly—"which is what the agreement needs to do in order for us to force that momentous consequence upon the parties here." *Id.* at 600.

A year later, the Sixth Circuit reached the same conclusion in construing an employment agreement that called for arbitration of "[a]ny Claim arising out of or relating to this Agreement." *Huffman* v. *Hilltop Cos., LLC*, 747 F.3d 391, 393 (6th Cir. 2014). The Court explained: "As was * * * the case in *Reed Elsevier*, here the parties' arbitration clause nowhere mentions classwide arbitration. We therefore conclude that the arbitration clause does not authorize classwide arbitration, and hold that the plaintiffs must proceed individually." *Id.* at 398-99 (citation omitted).

Most recently, in *AlixPartners, LLP* v. *Brewington*, another employment arbitration case, the court discerned no agreement to class arbitration in language providing for the arbitration of "any dispute arising out of or in connection with any aspect of this Agreement" and providing that "all substantive rights and remedies" shall be available in arbitration. 836 F.3d 543, 547 (6th Cir. 2016). The court explained that this language constituted merely "silen[ce] on the availability of classwide arbitration, and we may not presume from 'mere silence' that the parties consented to it." *Id.* at 553 (quoting *Stolt-Nielsen*, 559 U.S. at 687). The court further reasoned that class arbitration could not be inferred because "the clause limits its scope to claims 'arising out of or in connection with any aspect of *this Agreement*,' as opposed to other employees' and/or potential employees' agreements." *Ibid.*

The Third Circuit has also refused to infer consent to class arbitration from the parties' broad

agreement to arbitrate "[a]ny dispute or claim arising out of or relating to Employee's employment * * * or any provision of this Agreement," *Opalinski* v. *Robert Half Int'l Inc.*, 677 F. App'x 738, 742 (3d Cir. 2017) (quotation marks omitted)—language materially identical to that from which the Ninth Circuit inferred a contractual basis for class arbitration here. The arbitration agreement likewise contained similar language requiring arbitration "to the fullest extent permitted by law." *Opalinski* v. *Robert Half Int'l, Inc.*, 2015 WL 7306420, at *1 (D.N.J. Nov. 18, 2015), *aff'd* 677 F. App'x 738.

The Third Circuit rejected the precise approach that the decision below adopted, holding it fundamentally incompatible with *Stolt-Nielsen*: "the Supreme Court was clear * * * that '[a]n implicit agreement to authorize class-action arbitration' cannot be inferred 'solely from the fact of the parties' agreement to arbitrate.'" 677 F. App'x at 742 (quoting *Stolt–Nielsen*, 559 U.S. at 685). The court explained that the "problem" with the plaintiffs' reliance on broad "any dispute or claim" language is twofold: (1) it "misses the critical point" that the agreement refers to claims that "relate to the *particular* employee's employment, not *any* employee's employment"; and (2) it "shows only the parties' general intent to arbitrate their disputes," which cannot support an inference of "an intent to arbitrate class claims." *Ibid.*

The decision below is also irreconcilable with the Fifth Circuit's application of *Stolt-Nielsen*. See *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643-44 (5th Cir. 2012), abrogated on other grounds by *Oxford*

Health, 569 U.S. 564.[7] In *Reed*, the plaintiff agreed to arbitrate "any dispute arising from my enrollment" and the agreement provided that "[a]ny remedy available from a court under the law shall be available in the arbitration." 681 F.3d at 641. The Fifth Circuit explained that neither of these provisions "even remotely relates to or authorizes class arbitration." *Id.* at 642. Specifically, the "'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements." *Ibid.* And the "remedy" provision says nothing about the availability of a class action, which is a "procedural device": "while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy." *Id.* at 643.

Two other circuits had refused even before *Stolt-Nielsen* to order class arbitration when the arbitration clause made "no provision for arbitration as a class." *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); see also *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995). *Stolt-Nielsen* confirmed that these circuits' approach was correct.

C. The Decision Below Is Exceptionally Important.

The decision below warrants this Court's review for several reasons.

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[7] In *Reed*, the Fifth Circuit reviewed an arbitrator's contract interpretation. 681 F.3d at 646. This Court's decision in *Oxford Health* makes clear that the Fifth Circuit was not permitted to override the arbitrator's determination in light of the limited judicial review under Section 10 of the FAA. But *Reed's* analysis would apply fully to the *de novo* review of a district court's contract interpretation.

1. Consistency in the lower courts on the application of the FAA is a matter of considerable practical significance. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority" (*Allied-Bruce Terminix Cos.*, 513 U.S. at 272), which means that departure from the FAA's principles will create confusion about the application of arbitration agreements and lead to the defeat of the contracting parties' expectations.

As demonstrated by the numerous cases cited above (at 19-22), the issue presented arises with considerable frequency. The frequency of the issue presented—and the outlier status of the decision below—are further reinforced by district court decisions from across the country, which have followed this Court's guidance in *Stolt-Nielsen* and refused to infer an agreement to class arbitration from standard arbitration terms.[8]

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[8] See, *e.g.*, *JPay, Inc.* v. *Kobel*, 2017 WL 3218218, at *4-5 (S.D. Fla. July 28, 2017) (broad agreement to arbitrate "Any [] dispute, claim, or controversy among the Parties" does not suffice; holding that "concerns" about small value of individual claims "are not a basis for adding a term to an arbitration agreement on which the parties did not clearly agree") (alteration in original); *Del Webb Communities, Inc.* v. *Carlson*, 2017 WL 1050139, at *2 (D.S.C. Feb. 1, 2017) (following Sixth Circuit's decision in *Reed Elsevier* in construing sales agreement with similar language); *Henderson* v. *U.S. Patent Comm'n, Ltd.*, 188 F. Supp. 3d 798, 809-10 (N.D. Ill. 2016) ("(1) bilateral arbitration language such as that in the [agreements at issue] is silent as to the issue of class arbitration; and (2) silence is not sufficient to permit class arbitration."); *NCR Corp.* v. *Jones*, 157 F. Supp. 3d 460, 467-71 (W.D.N.C. 2016) (agreement to arbitrate "every possible claim * * * arising out of or relating in any way to my employment" and language that parties "intend for this Agreement to

This conflict yields the untenable result that a party within the Ninth Circuit can be subjected to class arbitration while similarly-situated parties elsewhere will not. And if permitted to stand, the decision below could embolden other courts to elevate their preferences for class procedures over the FAA's primary purpose of enforcing arbitration agreements according to their terms. This Court's intervention is needed to ensure that parties' rights under the FAA do not depend on the forum in which they seek to enforce an arbitration agreement.

2. The practical consequences are especially acute when class-action procedures are superimposed upon arbitration absent clear agreement by the parties.

Ensuring robust consent to class arbitration is critical because "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 563 U.S. at

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be interpreted broadly to allow arbitration of as many disputes as possible" does not suffice; plaintiff's request to read that language to permit class arbitration "flies in the face of binding precedent requiring the court to do exactly the opposite"); *Bird* v. *Turner*, 2015 WL 5168575, at *9 (N.D. W. Va. Sept. 1, 2015) ("[T]he arbitration agreement does not indicate that the parties consented to class arbitration" when the agreement "does not mention class arbitration" and "is put in terms of bilateral disputes"); *Hickey* v. *Brinker Int'l Payroll Co.*, 2014 WL 622883, at *4 (D. Colo. Feb. 18, 2014) (agreement to arbitrate "any legal or equitable claims or disputes arising out of or in connection with employment" amounts to "mere silence" on the issue of class or collective arbitration); *Smith* v. *BT Conferencing, Inc.*, 2013 WL 5937313, at *9 (S.D. Ohio Nov. 5, 2013) (agreement to arbitrate "any dispute * * * arising out of or relating to my employment" is "silent regarding class arbitration" and "plain language" covers only employee's disputes, not "disputes arising out of the employment of others").

347 (quoting *Stolt-Nielsen*, 559 U.S. at 686); see also pages 11-13, *supra*. Indeed, class arbitration is a worst-of-both worlds hybrid of arbitration and litigation.

On the one hand, the expedition, informality, and cost-savings of traditional bilateral arbitration are lost. Class arbitration "*requires* procedural formality" and "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." *Concepcion*, 563 U.S. at 349-50; see also *Stolt-Nielsen*, 559 U.S. at 686. And it raises the "commercial stakes" to defendants to a "comparable" level "to those of class-action litigation." *Stolt-Nielsen*, 559 U.S. at 686.

On the other hand, the extremely limited judicial review of the arbitrator's decisions remains intact. This combination of enormous stakes and minimal review "greatly increases risks to defendants." *Concepcion*, 563 U.S. at 350. Many defendants are willing to forego meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. See *Concepcion*, 563 U.S. at 350; *Stolt-Nielsen*, 559 U.S. at 685. But the calculus changes "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," creating an "unacceptable" risk of error and subjecting defendants to the hydraulic pressure of "settling questionable claims." *Concepcion*, 563 U.S. at 350.

Beyond the lack of effective judicial review, the *res judicata* effect of a class arbitration is unsettled at best. Because arbitration "is a matter of consent, not coercion" (*Volt*, 489 U.S. at 479), when an arbi-

tration agreement does not clearly authorize class arbitration, absent class members would have a powerful due process argument that they did not agree to be bound by an award resulting from an arbitration proceeding in which they did not participate. As Justice Alito put it in his *Oxford Health* concurrence (joined by Justice Thomas), "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring).

At a minimum, these due process concerns increase the procedural complexity required. See *Concepcion*, 563 U.S. at 333 ("If procedures are too informal, absent class members would not be bound by the arbitration."). And even the notice and opt-out procedures employed in class-action litigation in court may not suffice: "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority in any way." *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring). The upshot of a class arbitration's vulnerability to collateral attack is that "absent class members [can] unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* at 575 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-47 (1974)). That result is palpably unfair.

For all of these reasons, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 563 U.S. at 350. And if garden-variety arbi-

tration agreements like the one in this case can be interpreted to permit class arbitration, defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. It is hard to imagine a result more inimical to the strong federal policy favoring arbitration embodied by the FAA.

3. The approach taken by the court below is especially questionable for the reasons discussed above. In fact, given the "obvious" nature of the error below (*Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006)), the Court might wish to consider summary reversal. The Court has taken that step several times in recent years to set aside manifest failures by lower courts to adhere to this Court's arbitration rulings. See *Nitro-Lift Techs.*, 568 U.S. at 20 (lower court "disregard[ed] this Court's precedents on the FAA"); *Marmet*, 565 U.S. at 531 (lower court erred "by misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG LLP* v. *Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (lower court "fail[ed] to give effect to the plain meaning of the [FAA]"); see also *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2002) (per curiam) (lower court refused to apply the FAA by taking an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's holdings). And this Court also, of course, has recently overturned other flawed arbitration rulings after plenary review. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28; *Imburgia*, 136 S. Ct. at 468-71.

4. Finally, this case is an ideal vehicle. It arises out of federal court, so it does not implicate the views expressed by one member of this Court that the FAA

does not apply in state court proceedings. The case also cleanly presents a *judicial* construction of the parties' arbitration agreement rather than an arbitral one—the latter of which is reviewed only under the limited grounds for review of arbitral awards.

In *Oxford Health*, for example, this Court refused to overturn an *arbitrator*'s determination that a similarly "garden-variety arbitration clause" that "lack[ed] any of the terms or features that would indicate an agreement to use class procedures" supported class arbitration "because, *and only because*, it is not properly addressed to a court" given the forgiving standard of review for an arbitrator's decision. 569 U.S. at 572 (emphasis added). As the concurring Justices put it, "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo,* we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate.'" *Id.* at 574 (Alito, J.) (quoting *Stolt-Nielsen*, 559 U.S. at 685). Here, review is indeed "*de novo*," and under that standard, the decision below cries out for reversal.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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JANUARY 2018

APPENDICES

APPENDIX A

FILED AUG 3 2017

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself and all other similarly situated,
Plaintiff-Appellee,
v.
LAMPS PLUS, INC.; et al.,
Defendants-Appellants.

No. 16-56085

D.C. No. 5:16-cv-00577-DMG-KS

MEMORANDUM[1]

Appeal from the United States District Court for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted July 12, 2017
Pasadena, California

Before: REINHARDT, FERNANDEZ, and WARDLAW, Circuit Judges.

Lamps Plus appeals an order permitting class arbitration of claims related to a data breach of personal identifying information of its employees. After Lamps Plus released his personal information in response to a phishing scam, Frank Varela filed a class action complaint alleging negligence, breach of contract, invasion of privacy, and other claims. Lamps

[1] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plus moved to compel bilateral arbitration pursuant to an arbitration agreement ("the Agreement") it drafted and required Varela to sign as a condition of his employment. The district court found that the Agreement is a contract of adhesion and ambiguous as to class arbitration. It construed the ambiguity against the drafter, Lamps Plus, and compelled arbitration of all claims, allowing class-wide arbitration to proceed.

On appeal, Lamps Plus argues that the parties did not agree to class arbitration. We disagree, and affirm the district court.

"[A] party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). The parties agree that the Agreement includes no express mention of class proceedings. However, as the Supreme Court stated, "silence" in its *Stolt-Nielsen* analysis constituted more than the mere absence of language explicitly referring to class arbitration; instead, it meant the absence of *agreement*. 559 U.S. at 687 ("[W]e see the question as being whether the parties *agreed to authorize* class arbitration."); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069-70 (2013). There, the Supreme Court accepted the parties' stipulation that silence meant "there's been no agreement that has been reached …." 559 U.S. at 668-69. That the Agreement does not expressly refer to class arbitration is not the "silence" contemplated in *Stolt-Nielsen*.

We apply state law contract principles in order to interpret the Agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In Califor-

nia, a contract is ambiguous "when it is capable of two or more constructions, both of which are reasonable." *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 571 (Cal. 2005). Contracts may be ambiguous as a whole despite terms and phrases that are not themselves inherently ambiguous. *See Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 60 (Cal. 2006). Ambiguity is construed against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion." *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016).

At its outset, the Agreement contains a paragraph outlining Varela's understanding of the terms in three sweeping phrases. First, it states Varela's assent to waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company." Second, it includes an additional waiver by Varela of "any right I may have to resolve employment disputes through trial by judge or jury." Third, "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." A reasonable – and perhaps *the most reasonable* – interpretation of this expansive language is that it authorizes class arbitration. It requires no act of interpretive acrobatics to include class proceedings as part of a "lawsuit or other civil legal proceeding[]." Class actions are certainly one of the means to resolve employment disputes in court. That arbitration will be "in lieu of" a set of actions that includes class actions can be reasonably read to allow for class arbitration.

This construction is supported by the paragraph below these broad statements, captioned "Claims Covered by the Arbitration Provision." The first sentence contemplates "claims or controversies" the par-

ties may have *against* each other, which Lamps Plus argues supports purely binary claims. Yet Varela's claims against the company include those that could be brought as part of a class. The Agreement then specifies that arbitrable claims are those that "would have been available to the parties by law," which obviously include claims as part of a class proceeding. The paragraph lists a non-limiting, vast array of claims covered by the arbitration provisions, including many types of claims for discrimination or harassment ("race, sex, sexual orientation . . .") that are frequently resolved through class proceedings. *See, e.g., E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The paragraph concludes by excluding from the Agreement two types of claims, but not any class or collective proceedings.

Moreover, a class action is "a procedural device for resolving the claims of absent parties on a representative basis" rather than a separate or distinct "claim." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015). The broad language of the Agreement is not limited to claims. Varela surrendered his right to bring all "lawsuit[s] or other civil action[s] or *proceeding*[*s*]." (emphasis added). Additionally, the Agreement authorizes the Arbitrator to "award any remedy allowed by applicable law." Those remedies include class-wide relief.

Because the Agreement is capable of two reasonable constructions, the district court correctly found ambiguity. State contract principles require construction against Lamps Plus, the drafter of the adhesive Agreement. By accepting the construction pos-

ited by Varela – that the ambiguous Agreement permits class arbitration – the district court properly found the necessary "contractual basis" for agreement to class arbitration. *Stolt-Nielsen*, 559 U.S. at 684.

We **AFFIRM** and **VACATE** the stay of arbitration.

Varela v. Lamps Plus, Inc., No. 16-56085

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684–85, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010).

APPENDIX B

FILED SEP 11 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK VARELA, on behalf of himself
and all other similarly situated,
Plaintiff-Appellee,
v.
LAMPS PLUS, INC.; et al.,
Defendants-Appellants.

No. 16-56085

D.C. No. 5:16-cv-00577-DMG-KS
Central District of California, Riverside

ORDER

Before: REINHARDT, FERNANDEZ, and WARDLAW, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Reinhardt and Judge Wardlaw voted to deny the petition for rehearing en banc, and Judge Fernandez so recommended.

The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 16-577-DMG (KSx) Date July 7, 2016

Title ***Frank Varela v. Lamps Plus, Inc., et al.***

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANT'S MOTION TO COMPEL ARBITRATION OR, ALTERNATIVELY, MOTION TO DISMISS [34]

I.
PROCEDURAL BACKGROUND

On March 29, 2016, Plaintiff Frank Varela filed a class action complaint ("Compl.") against Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively "Lamps Plus") for (1) negligence, (2) breach of implied contract, (3) violation of the California Consumer Records Act (Cal. Civ. Code §§ 1798.81.5, 1798.82), (4) violation of the California Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200 *et seq.*), (5) invasion of privacy, and (6) negligent violation of the Credit Reporting Act. [Doc. # 1.]

On May 31, 2016, Lamps Plus filed a Motion to Compel Arbitration on an individual basis ("MTC") or, alternatively, a Motion to Dismiss ("MTD"). [Doc. #34.] On June 10, 2016, Varela filed an Opposition ("Opp.") to Lamps Plus's motions. [Doc. #37.] On June 17, 2016, Lamps Plus filed a Reply. [Doc. #38.]

II.
FACTUAL BACKGROUND

Varela has been an employee of Lamps Plus for approximately nine years and is currently employed there as a Warehouseman at the Lamps Plus warehouse located in Redlands, California. (Compl. ¶ 7). As a condition of employment, Lamps Plus required Varela to provide it with his personal information. (*Id.* ¶ 11.) On Varela's first day of work, he signed multiple documents, including an arbitration agreement, as a condition of his employment with Lamps Plus. (Declaration of Frank Varela in Support of Plaintiff's Opposition to Motion to Compel Arbitration/Motion to Dismiss ("Varela Decl.") ¶ 6 [Doc. # 37-2]; Declaration of Lucenda Jo Beeson in Support of Defendant Lamps Plus, Inc.'s Motion to Compel Arbitration on an Individual Basis ("Beeson Decl.") ¶¶ 4, 7, Ex. 1 (Arb. Agreement) [Doc. # 34-2]). Varela contends that he does not remember signing this document or having its contents explained to him, but does not contest the fact that he signed it. (Varela ¶¶ 6-10.) Varela states that he does not remember being advised by anyone from Lamps Plus to consult an attorney prior to signing the arbitration provision and, even if he had been so advised, he could not have afforded to retain an attorney to review the arbitration provision. (*Id.* ¶ 8.) Lamps Plus Human Resources Director Lucenda Jo Beeson confirms that Lamps Plus employees generally must

sign an Arbitration Agreement as a condition of employment with Lamps Plus. (Beeson Decl. ¶ 3.) The Arbitration Agreement states that part of its "employment practice is agreeing to abide by the terms in the Arbitration Agreement" and an employee should therefore "read this agreement and be willing to sign it if an employment offer is made." (Arb. Agreement at 1.)

> The Arbitration Agreement provides in pertinent part:
>
> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement.

(*Id.* at 1.) The Agreement states that "any and all disputes, claims, or controversies arising out of or relating to this Agreement … shall be resolved by final and binding arbitration as the exclusive remedy." (*Id.*) The then-current American Arbitration Association ("AAA") National Rules for the Resolution of Employment Disputes or the then-current J.A.M.S Arbitration Rules and Procedures for Employment Disputes apply to the arbitration. (*Id.*)

The Agreement further states, in all-capital letters: "I UNDERSTAND THAT I HAVE THREE (3)

DAYS FOLLOWING THE SIGNING OF THIS AGREEMENT TO REVOKE THIS AGREEMENT AND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED." (*Id.* at 2.) Beeson confirms that a Lamps Plus employee may revoke the Arbitration Agreement up to three days after signing it. (Beeson Decl. ¶ 9.) Varela did not revoke the Agreement during the three-day window. (*Id.*)

The Agreement also states that "[t]he Arbitrator is authorized to award any remedy allowed by applicable law" and the Agreement does not "prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction." (Arb. Agreement at 1-2.) The Agreement further states that:

> The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the costs of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorneys' fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law.

(*Id.* at 2.) The Lamps Plus Employment Arbitration Rules and Procedures reiterate that the "fees, costs and expenses of ... the arbitrator shall be allocated between the parties as provided in … the Mutual

Agreement to Arbitrate Claims[.]" (Arb. Agreement, Ex. A ("Lamp Plus Rules") ¶ 5H [Doc. # 37-1].)

The final paragraph of the agreement provides, in all-capital letters: "I ACKNOWLEDGE THAT I HAVE BEEN ADVISED TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO FILE A LAWSUIT IN A COURT OF LAW AND TO HAVE MY CASE HEARD BY A JUDGE AND/OR JURY." (*Id.* at 2.)

The Lamps Plus Employment Arbitration Rules and Procedures provide that "[e]ach party has the right to take the deposition of one individual as well as any expert designated by either party." (Lamps Plus Rules ¶ 5B) The Lamps Plus Rules state that "[n]o other discovery shall be had, except upon order of the arbitrator and upon a showing of substantial need." (*Id.* ¶ 5D.)

On or around March 3, 2016, "a criminal" obtained unauthorized access to copies of current and former employees' W-2 income and tax withholding statements, compromising the security of sensitive personal information of approximately 1,300 employees. (Compl. ¶¶ 1,4.) Varela's information was stolen as a result of the Data Breach. (*Id.* ¶ 7.) As a result of the data breach, Varela's 2015 income taxes were fraudulently filed with the information that was stolen. (*Id.* ¶ 8.) The proposed class includes current and former employees of Lamps Plus, as well as family members and close friends who were affected by the information breach. (*Id.* ¶ 1.)

III.
LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal citation and quotation marks omitted).

Federal substantive law governs questions concerning the interpretation and enforceability of arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). Courts apply ordinary state law contract principles, however, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability)[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995). "[C]lear and unmistakable evidence" is required for courts to conclude that the parties have agreed to arbitrate arbitrability. *Id.* (internal citations and quotations omitted). As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," it must be enforced according to its terms. *Concepcion*, 563 U.S. at 343.

Under California law, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while

a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 842, 181 Cal. Rptr. 3d 781, 786 (2014) (internal citation omitted). "The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence[.]" *Id.* (internal citation omitted).

IV.
DISCUSSION

A. Scope of Arbitration Agreement

When there is a dispute regarding arbitrability, "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate[.]" *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651, 106 S. Ct. 1415, 1420, 89 L. Ed. 2d 648 (1986). Ambiguities in arbitration agreements are "to be resolved in favor of arbitrability[.]" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 288, 130 S. Ct. 2847, 2850, 177 L. Ed. 2d 567 (2010); *see also Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996) ("We interpret the contract by applying general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration.").

Varela contends that the motion to compel arbitration should be denied because the complaint is outside of the scope of his arbitration agreement with Lamps Plus. Varela asserts that the data breach is "an administrative task ancillary to the employment relationship" that falls outside of the scope of an employment claim.

When the scope of the arbitration agreement is broad, the matter should be submitted to arbitration. *See Bhd. of Teamsters & Auto Truck Drivers Local No. 70 v. Interstate Distrib. Co.*, 832 F.2d 507, 511-12 (9th Cir. 1987); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("factual allegations need only "touch matters" covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability."); *Bui v. Northrop Grumman Sys. Corp.*, Case No. 15-CV-1397-WQH-WVG, 2015 WL 8492502, at *7 (S.D. Cal. Dec. 10, 2015) ("based on the broad language of the Agreement, the court concludes that Plaintiff's…claim falls within the scope of the Arbitration Agreement.").

The Arbitration Agreement states that the parties agree to arbitrate "all claims or controversies" Varela may have against the Company or against its officers, directors, employees or agents. The Agreement goes on to specify that it applies to all claims that arise "in connection with [Varela's] employment." The language of the Arbitration Agreement is broad, encompassing *all* claims Varela may have against Lamps Plus or its officers. The claim at issue here also arises "in connection" with Varela's employment, in that Lamps Plus collected and stored his personal information in connection with his employment there. Based on the plain language of the Arbitration Agreement, the Court concludes that Varela's claims fall within the broad scope of the arbitration clause.

B. Unconscionability

Varela asserts that the Arbitration Agreement is invalid because it is unconscionable. Under California law, "the doctrine of unconscionability has both a

procedural and substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133, 163 Cal. Rptr. 3d 269 (2013). Both procedural and substantive unconscionability are required to render a contract unenforceable, but they need not be present in the same degree. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745 (2000). "California law utilizes a sliding scale to determine unconscionability—greater substantive unconscionability may compensate for lesser procedural unconscionability." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) (internal citation omitted). Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 851, 113 Cal. Rptr. 2d 376 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal. 4th 223, 247, 145 Cal. Rptr. 3d 514 (2012).

1. Procedural Unconscionability

Varela contends that, because the contract that was drafted solely by Lamps Plus on a "take-it-or-leave-it" basis and he was never granted the opportunity to negotiate the terms, the agreement is procedurally unconscionable.

"[T]he critical factor in procedural unconscionability analysis is the manner in which the contract or the disputed clause was presented and negotiated[.]" *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1282 (9th Cir. 2006). In assessing procedural unconscionability, courts have considered whether a contract is one of adhesion, "i.e., a standardized con-

tract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003). A court assessing procedural unconscionability also considers the factors of oppression and surprise due to unequal bargaining power. *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002). "Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in 'no real negotiation.'" *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013). "Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party." *Id.*

In this case, while signing the Agreement did appear to be a type of "take-it-or-leave-it" condition of employment, there was minimal oppression or surprise. The Agreement's terms were clearly disclosed, and it was a stand-alone Agreement, labeled as such, rather than being folded into a general employment contract in which its terms were more likely to be overlooked. *See Fouts v. Milgard Mfg., Inc.*, Case No. C11-06269 HRL, 2012 WL 1438817, at *6 (N.D. Cal. Apr. 25, 2012) ("although the Agreement was a contract of adhesion that Fouts had no opportunity to modify, the arbitration clauses are not hidden in the text but are written in the same typeface as the rest of the agreement, with clear headings to explain each section."). Varela has not suggested that he was in any way coerced or duped into signing the arbitration agreement, or urged not to read or ask questions about any of the forms he signed. *See Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932 (N.D. Cal. 2012); *see also Employee Painters' Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir.

1996) ("A party who signs a written agreement is bound by its terms, even though the party neither reads the agreement nor considers the legal consequences of signing it.").

Under the terms of the Agreement, Varela had three days in which to revoke the Agreement after signing it. The Ninth Circuit has observed that providing an employee with three days to *consider* the terms of an arbitration agreement is "irrelevant" where the employee has no other options available. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) ("when a party who enjoys greater bargaining power than another party presents the weaker party with a contract without a meaningful opportunity to negotiate, oppression and, therefore, procedural unconscionability, are present.") (internal citations and quotation marks omitted). In this case, it is not clear what options Varela would have had if he had chosen to invoke the revocation clause during the three-day window, given that Lamps Plus does not contest that signing an arbitration agreement was a condition of employment. Under the circumstances, it does not appear that the three-day revocation window provided Varela with any additional ability to negotiate.

Because the Arbitration Agreement was written by Lamps Plus, Varela was required to sign it as a condition of employment, and Varela had no meaningful opportunity to negotiate, it is a contract of adhesion and some measure of procedural unconscionability is therefore present. Nonetheless, the terms of the stand-alone agreement were very clear and there was no evident pressure not to read the forms or ask questions about them. Thus, the

level of procedural unconscionability is "minimal." *See Nagrampa*, 469 F.3d at 1284.

2. Substantive Unconscionability

Varela contends that the Agreement is substantively unconscionable in part because the "fee-splitting" arrangement is "riddled with inconsistencies" in that it provides that Lamps Plus will pay for the cost of the arbitration, but also states that the Agreement does not include the costs for the filing fee if the employee initiates the arbitration, and that each party is responsible for paying for their own attorney's fees. (Opp. at 12.)

Varela's arguments are not well taken. Regardless of whether Varela resolves his dispute in court or in arbitration, he will be required to pay for his own attorney's fees. *See, e.g., Coleman v. Jenny Craig, Inc.*, No. 11CV1301-MMA DHB, 2012 WL 3140299, at *4 (S.D. Cal. May 15, 2012) (arbitration agreement including provision that each party be responsible for paying its own costs, including attorneys' fees, valid where it "preserves the same allocation of costs that a litigant would face if he filed in court."); *Fouts,* 2012 WL 1438817, at *4 (arbitration agreement requiring employee to pay own attorney's fees was valid). Similarly, the Arbitration Agreement requires the grievant to pay the cost of a filing fee regardless of whether his claims are brought in court or before an arbitrator. The Agreement imposes no greater cost on Varela than he would face in the absence of such an Agreement. Attorneys' fees and filing fees are generally distinguishable from the "costs of arbitration" which include forum fees and arbitrators' expenses. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 102, 99 Cal. Rptr.2d 745 (2000). The Agreement states that such

additional costs of arbitration will be paid by Lamps Plus, while Varela will bear responsibility for the types of costs and fees that he would pay regardless of the forum. This is entirely permissible.

Varela also asserts that the arbitration agreement is substantively unconscionable because it contains a provision permitting the parties to seek injunctive relief and "Lamps Plus is the more likely party to seek injunctive relief." (Opp. at 11). "An agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party." *Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 843 (N.D. Cal. 2012) (citing *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 13 Cal. Rptr. 3d 88 (2004)). California courts have found that when an arbitration agreement permits *only* injunctive relief, this may unconscionably favor the employer, because an employer is more likely to seek injunctive relief. *See Lara*, 896 F. Supp. at 843 (collecting cases). That is not the case here. The Agreement states that the Arbitrator may award any remedy allowed by applicable law, including injunctive relief, and merely specifies that this does not prohibit the parties from going to court to seek injunctive relief as well. Both parties are entitled to any and all appropriate relief, and the availability of injunctive relief does not render the Agreement substantively unconscionable.

Finally, Varela contends that the arbitration agreement provides for "extremely limited" discovery. (Opp. at 12, n.7). Limitations on discovery do not necessarily render an Agreement substantively unconscionable. *See Morgan v. Xerox Corp.*, No. 2:13-

CV-00409-TLN-AC, 2013 WL 2151656, at *5 (E.D. Cal. May 16, 2013) ("even if Plaintiff's contention that discovery may be *potentially* limited is correct, that does not render the agreement substantively unconscionable."); *see also Armendariz*, 24 Cal. 4th at 106 ("lack of discovery is not grounds for holding a …. claim inarbitrable.").

Under the Lamps Plus Rules, each party has the right to depose one witness as well as any expert designated by the parties. The claims at issue are complex, and it is possible that this amount of discovery will prove inadequate. The Rules provide, however, that the arbitrator may order additional discovery upon a showing of substantial need. This safeguard is adequate to remedy any undue curtailment of neessary discovery. *See Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 984, 104 Cal. Rptr. 3d 341, 349 (2010) (giving arbitrator broad discretion over discovery does not render an arbitration agreement unconscionable) (collecting cases); *see also Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-CV-1938-BAM, 2016 WL 2756848, at *8 (E.D. Cal. May 12, 2016) (limitations on discovery do not render an arbitration provision unconscionable, particularly where arbitrator is authorized to increase discovery limits upon a showing of necessity).

The Arbitration Agreement is not substantively unconscionable, and raises only the most minimal concerns about procedural unconscionability. It will therefore not be invalidated on this basis.

3. Class Action Arbitration

Lamps Plus contends that arbitration should be compelled on an individual basis, asserting that there is no contractual basis for finding that the par-

ties intended to arbitrate on a class-wide basis. Varela responds that the Arbitration Agreement does not waive class-wide arbitration, and that the language stating that "all claims" arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter. Varela therefore contends that, if his individual claims are subject to arbitration, so are the class claims.

The Supreme Court has held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (emphasis in original). Where an arbitration clause is "silent" as to class arbitration, "the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 687. In *Stolt-Nielsen*, however, the parties expressly stipulated that there was "no agreement" as to the issue of class arbitration. *Id.* at 668-69, 687. Courts have therefore limited *Stolt-Nielsen* to cases where an arbitration agreement is "silent in the sense that [the parties] had not reached any agreement on the issue of class arbitration, not simply ... that the clause made no express reference to class arbitration." *Yahoo! Inc. v. Iversen*, 836 F. Supp. 2d 1007, 1011 (N.D. Cal. 2011) (internal citations and quotations omitted). The "failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in *Stolt-Nielsen*." *Vazquez v. ServiceMaster Global Holding, Inc.*, 2011 WL 2565574 at *3 n.1 (N.D. Cal. June 29, 2011).

The lack of an explicit mention of class arbitration here does not constitute the "silence" contemplated in *Stolt-Nielsen*, as the parties did not affirmatively agree to a waiver of class claims in arbitration. Indeed, such a waiver in the employment context would likely not be enforceable. *See Lewis v. Epic Sys. Corp.*, __ F.3d __, 2016 WL 3029464 (7th Cir. May 26, 2016) (class action waiver violates Section 7 of the National Labor Relations Act ("NLRA")); *Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019 (C.D. Cal. Jan. 22, 2016) (same); *but see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (class action waiver does not violate NLRA).

In addition to the dubious enforceability of a class arbitration waiver in the employment context, the Court agrees with Varela that the language of the Arbitration Agreement is at least ambiguous as to class claims. The Court therefore construes the ambiguity against the drafter and finds that the parties may proceed to arbitrate class claims. *See Jacobs v. Fire Ins. Exch.*, 36 Cal. App. 4th 1258, 1281, 42 Cal. Rptr. 2d 906, 921 (1995) (the drafter of an adhesion contract must be held responsible for any ambiguity in the agreement).

C. Request for leave to conduct discovery on arbitration issues

Varela has requested leave to conduct limited discovery on arbitration-related issues. (Opp. at 15). The Court denies Varela's request, because Varela has not identified what type of facts he would seek, and the Court has sufficient facts to make its determination on the motion to compel arbitration.

D. Motion to Dismiss

Lamps Plus's motion to dismiss is premised in the alternative, as its primary contention is that Varela's claims are subject to arbitration. (MTC at 11). Given that the Court is granting the motion to compel arbitration, all of Varela's claims against Lamps Plus are dismissed without prejudice. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (dismissal of claims subject to arbitration clause is appropriate).

V.
CONCLUSION

In light of the foregoing, Lamps Plus motion to compel arbitration is **GRANTED**, and its motion to dismiss is **GRANTED** without prejudice.

IT IS SO ORDERED.

APPENDIX D

Lamps Plus is considering you as a prospective employee. Part of our employment practice is agreeing to abide by the terms in the Arbitration Agreement. Please read this agreement and be willing to sign it if an employment offer is made. Thank you for your cooperation.

LAMPS PLUS, INC.

ARBITRATION PROVISION

Except as provided below, the parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, that are not resolved by their mutual agreement shall be resolved by final and binding arbitration as the exclusive remedy.

I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Claims Covered by the Arbitration Provision

The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. Specifically, the Company and I mutually con-

sent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement. The only claims that are arbitrable are those that, in the absence of this Agreement, would have been available to the parties by law. The claims covered by this Agreement include, but are not limited to, claims for discrimination or harassment based on race, sex, sexual orientation, religion, national origin, age, marital status, or medical condition or disability (including claims under the California Fair Employment and Housing Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and any other local, state or federal law concerning employment or employment discrimination). This agreement does not affect the Employee's right to seek relief through the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing.

The Arbitration Process

Either party may commence the arbitration process by filing a written demand for arbitration with J.A.M.S/ENDISPUTE ("J.A.M.S.") or the American Arbitration Association ("AAA") and sending a copy by personal delivery or certified mail to the other party. In the event I initiate the arbitration process, I will send the notice to the Human Resources Department. If the Company initiates arbitration, it will send the notice to my last known residence address as reflected in my personnel file. The Company and I agree that, except as provided in this Agreement, the arbitration shall be in accordance with the AAA's then-current National Rules for the Resolu-

tion of Employment Disputes (if AAA is designated) or the then-current J.A.M.S. Arbitration Rules and Procedures for Employment Disputes (if J.A.M.S. is designated). The arbitration shall be conducted by one arbitrator ("the Arbitrator") selected pursuance to the selection procedures provided by J.A.M.S. or AAA or by an arbitrator mutually selected by the parties.

The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the State of California, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law, or law of remedies. The Arbitrator is authorized to award any remedy allowed by applicable law. The Arbitrator shall not have the power to modify any of the provisions of this Agreement. The Arbitrator shall issue a written and signed statement of the basis of his or her decision, including findings of fact and conclusions of law. The statement and award, if any, shall be based on the terms of this Agreement, the findings of fact and the statutory and decisional case law applicable to this dispute. Proceedings to enforce, confirm, modify, set aside or vacate an award or decision rendered by the Arbitrator will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq, or applicable state law. Nothing in this paragraph shall prohibit or limit the parties from seeking injunctive relief in lieu of or in addition to arbitration at any time directly from a Court of competent jurisdiction. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

Arbitration Fees and Costs

The Company agrees to pay all fees associated with the arbitration that are unique to arbitration including the cost of the arbitrator. These costs do not include the initial filing fee if I initiate the arbitration costs or the cost of discovery, expert witnesses, or other costs which I would have been required to bear had the matter been filed in a court. The costs of arbitration are borne by the Company. The parties will be responsible for paying their own attorney's fees, except as otherwise required by law and determined by the arbitrator in accord with applicable law.

Voluntary Agreement

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS TERMS, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THE AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF. I UNDERSTAND THAT I HAVE THREE (3) DAYS FOLLOWING THE SIGNING OF THIS AGREEMENT TO REVOKE THIS AGREEMENT AND THAT THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

I ACKNOWLEDGE THAT I HAVE BEEN ADVISED TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS AGREEMENT. I UN-

DERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO FILE A LAWSUIT IN A COURT OF LAW AND TO HAVE MY CASE HEARD BY A JUDGE AND/OR JURY.

THE EMPLOYEE	LAMPS PLUS
Frank R. Varela III	*/s/ Kathy Tomlinson*
Employee's Name	
/s/ Frank R. Varela III	4.09.07
Employee's Signature	Date

ATTACHMENT A
LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES

1. **Federal Arbitration Act**: Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, California law pertaining to agreements to arbitrate shall apply.

2. **Arbitration Procedures**: A. The arbitration will be conducted by Judicial Arbitration & Mediation Services, Inc. ("J.A.M.S."). The Company and I agree that, except as provided in this agreement, the arbitration shall be in accordance with the then-current J.A.M.S. Employment Arbitration Rules. The arbitrator shall be either a retired judge, or an attorney licensed to practice law in the state in which the arbitration is convened. The arbitration shall take place in or near the city in which the Employee is or was last employed by the Company.

B. The arbitrator shall be selected as follows. J.A.M.S. shall give each party a list of 10 arbitrators drawn from its panel of employment dispute arbitrators. Each party may strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the arbitrator. If more than one common name remains on the lists of all parties, the parties shall strike names alternately from the list of common names until only one remains. The party who did not initiate the claim shall strike first. If no common name exists on the lists of all parties, the sponsoring organization shall furnish an addi-

tional list and the process shall be repeated. If no arbitrator has been selected after two lists have been distributed, then the parties shall strike alternately from a third list, with the party initiating the claim striking first, until only one name remains. That person shall be designated as the arbitrator.

C. The arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. The arbitrator is without jurisdiction to apply any different substantive law, or law of remedies. The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable. The arbitration shall be final and binding upon the parties, except as provided in this Agreement.

D. The arbitrator shall have jurisdiction to hear and rule on pre-hearing disputes and is authorized to hold the prehearing conferences by telephone or in person, as the arbitrator deems necessary. The arbitrator shall have the authority to entertain a notice to dismiss and/or a motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedures.

E. Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of proceedings.

F. Either party, upon request at the close of hearing, shall be given leave to file a post-hearing

brief. The time for filing such a brief shall be set by the arbitrator.

H. Either party shall have the right, within 20 days of issuance of the arbitrator's proposed opinion, to file with the arbitrator a motion to reconsider (accompanied by a supporting brief) where the party believes that the arbitrator's award violates public policy and/or the applicable arbitration procedures set forth herein and by J.A.M.S. The other party shall have 20 days from the date of the motion to respond. The arbitrator thereupon shall reconsider the issues raised by the motion and, promptly, either confirm or change the decision, which (except as provided by this Agreement) shall then be final and conclusive upon the parties. The costs of such a motion for reconsideration and written opinion of the arbitrator shall be borne by the party prevailing on the motion, unless the arbitrator orders otherwise.

3. **Hearing Date**: The arbitrator will promptly set a hearing date and time, and will mail written notice to each of the parties at least sixty (60) days in advance of the hearing unless the parties otherwise agree or mutually waive notice.

4. **Pleadings**: Formal pleadings are not required. However, the party initiating the claim shall put J.A.M.S. and the responding party on notice of the claims asserted and include a short and plain statement of (1) the factual and legal bases for the claims, and (2) the amount of damages being sought and a description of any other relief being sought.

5. **Discovery**: A. Witnesses/Documents: At least thirty (30) days before the arbitration, the parties shall exchange lists of witnesses, including any experts, as well as copies of all exhibits intended to be

used at the hearing. The arbitrator shall have discretion to order earlier and additional pre-hearing exchange of information.

B. Deposition: Each party shall have the right to take the deposition of one individual as well as any expert designated by either party.

C. Document Production: Each party shall have the right to require production of relevant documents from the other party.

D. Other Discovery: No other discovery shall be had, except upon order of the arbitrator and upon a showing of substantial need.

E. Discovery Motions: The arbitrator will establish an informal procedure to resolve discovery disputes. The procedure may include presentation of motions by letter as opposed to formal pleadings. Service of motions by facsimile transmission and rulings by telephonic conference calls also may be permitted at the arbitrator's discretion.

F. Subpoenas: The subpoena rights under Rule 7(D) shall apply to discovery.

G. Dispositive Motions: The Arbitrator shall have the jurisdiction and power to entertain a motion to dismiss and/or motion for summary judgement by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedures.

H. Fees: The fees, costs and expenses of J.A.M.S. and the arbitrator shall be allocated between the parties as provided in Section 6 of the Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement").

6. **Briefs**: Concise pre-arbitration briefs are encouraged. Any such brief shall be filed and served ten (10) days before the arbitration date. Either party, upon request at the close of the hearing, may be given leave to file a post-hearing brief. The time for filing such a brief shall be set by the arbitrator. Reply briefs may not be filed unless the arbitrator specifies to the contrary at the close of the hearing. Briefs are limited to thirty (30) pages.

7. **The Arbitration Hearing**: A. Conduct of Hearing. The arbitrator shall preside at the hearing and rule on the admission and exclusion of evidence as well as questions of procedure, and may exercise all other powers conferred upon the arbitrator by the parties herein in the Arbitration Agreement. The hearing will be conducted as if it were an informal court trial. Proceedings may be adjourned from time to time.

B. Representation: Any party may be represented by an attorney or other representative selected by the party.

C. Attendance of Witnesses and Production of Evidence: The arbitrator may issue subpoenas for the attendance of witnesses and the production of documents for the hearing.

D. Order of Proof: The order of proof should generally follow that of a typical court trial, including an opportunity to make opening statements and closing arguments.

E. Presentation of Evidence: Judicial rules relating to the order of proof, the conduct of the hearing and the presentation and admissibility of evidence will not be applicable. Any relevant evidence, including hearsay, shall be admitted by the arbitra-

tor if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law.

F. Law: The arbitrator shall apply the substantive law and the law of remedies, if applicable, of the state in which the claim arose, or federal law or both, as may be applicable to the claim(s) being asserted.

G. Ancillary Services: Any party desiring a stenographic record may hire a court reporter to attend the proceedings. The same applies to any party desiring an interpreter. The requesting party must notify the other parties of the arrangements in advance of the hearing and must pay the costs incurred. If the other party desires a copy of the transcript, it shall be made available, but in that event the reporter's total charges shall be shared equally by all parties.

H. Payment of Attorney and Witness Expenses: Each party shall pay its own attorney's fees, witness fees and other expenses incurred for its own benefit, unless otherwise provided by contract or statute.

I. Arbitration in the Absence of a Party or Representative: The arbitration may proceed in the absence of any party or representative who, after due notice, fails to appear or fails to obtain a continuance. In such case, the arbitrator shall rule against the absent party.

J. Serving Notice: Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith or for the entry

of judgement on any award made under these rules, may be personally served or mailed to the party or its representative at the last known address, provided that a reasonable opportunity to be heard with regard to the processing has been granted to the party. The arbitrator may allow, and/or the parties may consent to, the use of facsimile transmission (FAX, telex, telegram, or other written forms of electronic communication to give notices required by these rules).

K. Waiver of Rules: Any party who proceeds with arbitration with knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

L. Jurisdiction: The arbitrator has the authority to resolve any dispute relating to the formation, interpretation, applicability or enforceability of the Arbitration Agreement.

8. **Award**: The arbitrator shall make the award and issue an opinion in the written form typically rendered in labor arbitration as soon as possible, and in no case more than thirty (30) days, after the close of evidence or the submission of posthearing briefs, whichever is later. The arbitrator may grant any remedy or relief, legal or equitable, that would have been available had the claim been asserted in court. The award shall include a brief statement of the factual and legal bases for the ruling.