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SCANNED ON 12/5/2006

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

FBEM

ALBERT CHENG, M.D., EDGAR BORRERO, M.D., and ROBERT SCHER, M.D., on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

OXFORD HEALTH PLANS, INC. and OXFORD HEALTH PLANS OF NEW YORK, INC.,

Defendants.

INDEX NO. 604083/2001

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

FILED
DEC 05 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: November 28, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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ALBERT CHENG, M.D., EDGAR BORRERO, M.D., and ROBERT SCHER, M.D., on behalf of themselves and all others similarly situated,

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Plaintiffs,

-against-

DECISION and ORDER

OXFORD HEALTH PLANS, INC. and OXFORD HEALTH PLANS OF NEW YORK, INC.,

Defendants.

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Moskowitz, J.:

In this action, plaintiffs claim that defendants improperly deprived participating physicians of millions of dollars of reimbursement payments for healthcare services they provided to members of defendant Oxford Health Plans, Inc. ("Oxford"). The plaintiff doctors Albert Cheng ("Cheng"), Edgar Borrero ("Borrero") and Robert Scher ("Scher") commenced this action in 2001. The complaint asserts claims for breach of contract and for relief based upon violations of section 349 of the General Business law, section 4406-c of the Public Health Law and section 3224-a (a) of the Insurance Law.

Oxford moved to dismiss the action, or, alternatively, to stay the action and compel arbitration pursuant to an arbitration clause contained in defendant Oxford Health Plans (NY), Inc.'s Consultant Physician Agreement ("Physician Agreement").[1] The arbitration clause provides, in pertinent part, that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final

[1] The court notes that, according to defendants, Oxford Health Plans LLC was formerly Oxford Health Plans, Inc., and Oxford Health Plans (NY), Inc. is incorrectly named as Oxford Health Plans of New York, Inc.

and binding arbitration in New York, pursuant to the rules of the American Arbitration Association [AAA] with one arbitrator." (Physician Agreement, Leeuw Aff., Ex. D, ¶ 11).

By decision and order dated January 23, 2003, this court dismissed plaintiffs' claims for violations of the Public Health Law and Insurance Law and compelled the arbitration of plaintiffs' remaining claims. On appeal, the First Department vacated dismissal, resulting in all of plaintiffs' claims proceeding to arbitration. (*See Cheng v Oxford Health Plans, Inc.*, 15 AD3d 207 [1st Dept 2005]). Thereafter, in March 2005, Scher filed a demand for class arbitration "on his own behalf and on behalf of all other physicians who are, or were, participating physicians in [defendants'] network, and whose claims are subject to arbitration ...." (Demand For Class Arbitration, Thielmann Decl., Ex. G, at 1).

The American Arbitration Association ("AAA") has established rules governing class actions in arbitration. These rules "apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class." (AAA Supplementary Rules for Class Arbitrations, ¶ 1[a] <www.adr.org/sp.asp?id=21936> [Oct. 8, 2003]). The Supplementary Rules also provide that: "[w]henever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court." (*Id.* ¶ 1[c]).

Under the Supplemental Rules it is for the arbitrator to determine whether the arbitration clause at issue permits a class action. The Supplemental Rules provide the procedure the arbitrator should follow when making that determination:

3. Construction of the Arbitration Clause

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

The AAA established a three-member arbitration panel ("Panel"). The parties first presented the Panel with the issue of whether the arbitration provision in the Physician Agreement permits the arbitration to proceed on behalf of a class.

According to the Panel majority, the parties agreed that the Panel should determine this issue, that, in construing the arbitration clause, New York law should guide the Panel, and that the arbitration provision is silent concerning the question of class arbitration. (Clause Construction Award, Leeuw Aff., Ex. A, at 7). On March 7, 2006, in a 2-1 decision, the Panel majority issued their 12-page Clause Construction Award (Award) determining that the arbitration clause permits the arbitration to proceed on behalf of a class.

The Panel majority determined that, in 1998, when Scher signed the Physician Agreement, New York law did not prohibit class arbitrations. The Panel stated that "[n]one of the cases brought to [its] attention actually held that a class arbitration could not be maintained." (Award, at 8). The Panel majority found that the parties provided no case or statute that stated

that New York law permitted or prohibited class arbitration in 1998. Based upon its finding that the law was unsettled in 1998, the Panel majority did not agree with Oxford's argument "that because New York prohibited class arbitrations in 1998 the parties necessarily intended that there could be no class arbitrations under their agreement." (*Id.* at 9). The Panel majority stated that, since 1998, no statute has been enacted and no prior case has been overruled that establishes that class actions are *newly* permitted in New York.

The Panel majority cited *Flynn v Labor Ready, Inc.* (6 AD3d 492 [2d Dept 2004]) in support of its conclusion that class arbitrations are permissible in New York. The Panel majority cited the portion of the *Flynn* decision that "compell[ed] the plaintiffs to submit their [class] claims to arbitration and reserv[ed] for the arbitrator the issue of whether class action is permissible." (Award, at 9, citing *Flynn*, 6 AD3d at 492). The Panel majority reasoned that, "[i]f New York law prohibited class arbitration under the pre-*Bazzle* agreement, the Appellate Division would have said so and would not have reserved the issue for the arbitrator to determine." (Award, at 9). The Panel majority concluded that "the law underlying the Appellate Division's *Flynn* ruling in 2004 that recognized the possibility of a class arbitration must also have been the law in 1998 when the Scher-Oxford agreement was signed." (*Id.* at 9-10).

The Panel then analyzed the language of the arbitration clause, determining that the parties agreed to arbitrate "all" disputes, without excluding class claims, thereby implicitly including such claims. (Award, at 10; Physician Agreement, Leeuw Aff., Ex. D, ¶ 11). The Panel reasoned that its interpretation was not unfair to Oxford, because, under the Physician Agreement, Oxford at all times had the right to modify the arbitration clause to prohibit class arbitrations, but never did so. (Award, at 10; *see* Physician Agreement, ¶ 9 ["Oxford may modify

any provision of [the] Agreement upon written notice to Consultant Physician"]).

Arbitrator William H. Baker submitted a 29-page dissent ("Baker Dissent"). A substantial portion of the Baker Dissent grapples with the status of New York law with respect to the permissibility of class arbitrations at the time that the parties entered into the Physician Agreement in 1998. The Baker Dissent analyzes various cases on the subject, including *Howard v Klynveld Peat Marwick Goerdeler* (977 F Supp 654 [SD NY 1997], *affd* 173 F3d 844 [2d Cir 1999]), *Harris v Shearson Hayden Stone, Inc.* (82 AD2d 87 [1st Dept 1981], *affd* 56 NY2d 627 [1982]), *Tsadilas v Providian Natl. Bank* (13 AD3d 190 [1st Dept 2004]), and *Flynn* (193 Misc 2d 721 [Sup Ct, Kings County 2002], *affd as mod*, 6 AD3d 492, *supra*). Based upon an analysis of these cases, the Baker Dissent concludes that "New York courts before Dr. Scher and Oxford entered into their contract in 1998 had expressly held that requests for class treatment ... must be rejected in favor of individual arbitrations." (Baker Dissent, Leeuw Aff., Ex. B, at 10). The Baker Dissent found that the arbitration clause was not ambiguous and did not permit class arbitration. (*Id.* at 16).

Defendants now move to vacate the Award.

Discussion

Standard of Review

Defendants argue that a heightened standard of substantive judicial review applies to their motion to vacate the Award. Defendants argue that the parties fashioned their own standard for vacatur when they agreed to bind themselves to the AAA's Supplementary Rules for Class Arbitrations ("AAA Class Rules"), that require an arbitration panel to issue a "reasoned ... award" and permit the parties to "seek judicial review of the Clause Construction Award ... ."

(Defendants' Mem. of Law, at 8, citing AAA Class Rules 3 and 5 [a]). In opposition, plaintiffs argue that the arbitration agreement must contain any deviation from the general standard of review.

Where the Federal Arbitration Act (FAA) governs the arbitration, "judicial review of this award is governed by the FAA." (*Sawtelle v Waddell & Reed, Inc.*, 304 AD2d 103, 107 [1st Dept 2003]). The arbitration clause provides that all "disputes shall be submitted to final and binding arbitration in New York, pursuant to the rules of the [AAA] with one arbitrator." (Physician Agreement, Leeuw Aff., Ex. D, ¶ 11). Therefore, federal law governs the standard of review.

"As the United States Supreme Court has repeatedly expressed, the FAA embodies a strong 'liberal federal policy favoring arbitration agreements,' providing only for extremely limited judicial review of an arbitration award." (*Sawtelle*, 304 AD2d at 107-08, citing *Green Tree Fin. Corp.-Alabama v Randolph*, 531 US 79, 91 [2000]). However, parties may "contractually agree[] to expand judicial review" of an arbitration award, in which case "their contractual provision supplements the FAA's default standard of review and allows for de novo review ... ." (*See Gateway Tech., Inc. v MCI Telecom, Corp.*, 64 F3d 993, 997 [5th Cir 1995] [expanded review permitted where contract stated that "[t]he arbitration decision shall be final and binding on both parties, except that *errors of law shall be subject to appeal*" [emphasis in original]; *compare Roadway Package Sys., Inc. v Kayser*, 257 F3d 287, 288 [3d Cir 2001] [where parties' agreement contained generic choice-of-law clause stating that it "shall be governed by and construed in accordance with the laws of ... Pennsylvania," the Court held that the clause did not evidence "a clear intent to incorporate Pennsylvania's standards for judicial

review into the [parties' agreement]" or opt out of the FAA's default standards]). The FAA governs review of the arbitration if the contract is silent. (*Gateway Tech., Inc.*, 64 F3d at 997, n 3).

The AAA Class Rules provide that "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')." (AAA Class Rules, Leeuw Aff., Ex. C, ¶¶ 3, 5 [a]). These rules permit the parties to "seek judicial review" by either moving to confirm or vacate the Clause Construction Award. (*Id.* ¶ 3). However, nothing contained in the AAA Class Rules requires heightened or "substantive judicial review," as defendants argue. (Defendants' Mem. of Law, at 8). Indeed, the rules do not mention the word "heightened" or "substantive."

Here, the Panel issued the Clause Construction Award. The AAA Class Rules merely permit defendants to seek vacatur of that Award. Nothing contained in the Physician Agreement evidences an intent to opt out of the FAA's default standard of review on a motion to vacate an award. In short, defendants fail to identify any legal authority or any provision in the arbitration clause or the AAA Class Rules in support of their argument.

Not supporting their argument based upon the law or the applicable provision of the Physician Agreement, defendants attempt to persuade the court of reasons why the AAA calls for substantive judicial review. Defendants argue that decisions on class issues are effectively dispositive, because permitting class arbitration places pressure on defendants to settle lawsuits. Defendants also argue that the arbitration panel's decision will bind many persons. Here, however, the Award does not involve the certification of a class. Rather, the Award merely

interprets the arbitration clause to determine whether the clause permits class arbitration. Plaintiffs have not yet sought class certification that is subject to the requirements of paragraph 4 of the AAA Class Rules. Thus, defendants' arguments are premature.

Defendants also argue that heightened appellate review is warranted in order to avoid the appearance that the class arbitration process involves incentives that could affect public confidence in arbitration as an even-handed dispute resolution process. In essence, defendants claim that because the parties pay the arbitrators on an hourly basis, these payments provide the arbitrators with a financial incentive to maintain a class and thus generate fees. However, defendants affirmatively argue that they "do[] *not* suggest that the arbitrators in this case were actually biased ... ." (Defendants' Mem. of Law, at 10 [emphasis in original]; *see also* 7/20/06 Tr., at 8 ["we're not contending that these arbitrators are necessarily biased"]). Thus, defendants' statement undermines their own argument.

Defendants argue that "every single one of the more than 20 AAA arbitrators or arbitration panels that have considered the question have ruled in favor of class arbitration," thereby suggesting the existence of an appearance of bias. (*Id.* at 10-11). However, defendants fail to explain how this demonstrates the Panel's bias in this action. Accordingly, defendants' arguments concerning biased arbitrators are unpersuasive.

Defendants claim that the AAA Class Rules "have provisions that speak directly to judicial review of the clause construction award." (Defendants' Reply Mem. of Law, at 4). However, defendants fail to identify any provision that requires heightened or substantive judicial review. Nor do defendants identify any provision of the parties' agreement showing that they contractually agreed to expand judicial review or opt out of the FAA's default standard. For

the foregoing reasons, the court denies defendants' request for a heightened standard of review.

Motion to Vacate

Defendants argue that, even if the court applies the ordinary standard for vacatur, the court should vacate the Award, because the arbitrators exceeded their powers and manifestly disregarded applicable law.

Here, the Physician Agreement states that it "shall be governed in all respects by New York law." (Physician Agreement, ¶ 9). The parties do not dispute that the Physician Agreement selects New York as the substantive law governing the agreement. Nor do the parties dispute that the FAA governs the arbitrability of their dispute.

In a proceeding to vacate an arbitration award, the FAA circumscribes the court's review. A court cannot vacate an award unless: (1) the award was the product of corruption, fraud or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct that prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. (9 USC § 10 [a]).

"In addition to these four grounds, an award may be vacated under federal law if it exhibits a manifest disregard of law." (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006] [internal quotation marks and citations omitted]). Vacatur based upon manifest disregard of the law requires a finding that "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (*Id.* at 481 [internal quotation marks and citations omitted]).

Defendants argue that the Award is contrary to *Green Tree Fin. Corp. v Bazzle* (539 US

444 [2003]). In *Green Tree Fin. Corp.*, two sets of borrowers brought state court class actions against a commercial lender for violations of the South Carolina Consumer Protection Code. The contracts between the borrowers and the lender contained an arbitration clause stating that "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.*" (*Id.* at 448 [emphasis in original]). In one action, the Court certified a class action and compelled arbitration. In the other action, the Court compelled arbitration and the arbitrator certified a class in arbitration. Appeals followed. The South Carolina Supreme Court withdrew the appeals from the appellate court, assumed jurisdiction and consolidated the actions. The Court held that the contracts were silent with respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken the form of class actions.

The case presented to the United States Supreme Court the issue of whether the contracts prohibited class arbitration. On June 23, 2003, the Supreme Court found that the issue concerned "neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." (*Id.* at 452). The Supreme Court determined that, therefore, "the relevant question here is what *kind of arbitration proceeding* the parties agreed to," that "does not concern a state statute or judicial procedures [citation omitted]. It concerns contract interpretation and arbitration procedures." (*Id.* at 452-53 [emphasis in original]). The Supreme Court held that, "[g]iven these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide." (*Id.* at 453). The AAA

Class Rules became effective as of October 8, 2003, after the Supreme Court's decision in *Green Tree Fin. Corp.*

Here, the Panel majority acknowledged that "Rule 3 of the AAA Class Rules directs the panel in this clause construction phase to determine 'whether the applicable arbitration clause permits the arbitration to proceed on behalf of ... a class'." (Award, at 5). The Award goes on to state that, "[i]n *Green Tree Fin. Corp. v Bazzle*, 539 US 444 (2003), the Supreme Court held that construction of an arbitration agreement to determine whether a class arbitration could be maintained was an issue to be decided by the arbitrator not by a court." (*Id.*). Thus, the Panel majority expressly acknowledges the holding of *Green Tree Fin. Corp.*, where the Supreme Court made clear that the arbitration of a particular class action is a question for the arbitrators, not the courts.

The Panel majority did not, as defendants argue, interpret *Green Tree Fin. Corp.* to require a finding that an arbitration clause that is silent on the issue of class arbitration permits class arbitration. Rather, the Panel majority merely acknowledged its responsibility to make the initial determination of whether the parties' arbitration clause permits the arbitration to proceed on behalf of a class. The Panel then proceeded to make its determination.

Defendants argue that the Award disregards the parties' specification of AAA arbitration and New York law and that New York Law did not permit class arbitration at the time of the Physician Agreement's execution.

Under New York law, unless the contract provides otherwise, the law at the time of a contract's execution becomes part of the contract, because it is presumed that the parties contemplated the law when they entered into the contract. (*Mayo v Royal Ins. Co. of America*,

242 AD2d 944 [4th Dept 1997]). "It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract." (*Evans v Famous Music Corp.*, 1 NY3d 452, 458, 807 NE2d 869, 872 [2004]).

The law at the time that the Physician Agreement was executed, under a pre-*Green Tree Fin. Corp.* standard, is clearly set forth in the cases cited in the Baker Dissent. In *Howard* (977 F Supp 654, *supra*), the plaintiff entered into an employment agreement with KPMG Peat Marwick's New York City office. The agreement contained an arbitration clause that provided:

> [a]ny claim or controversy between the parties arising out of or relating to this Agreement or the breach thereof, or in any way related to the terms and conditions of the employment of Senior Manager by Peat Marwick, shall be settled by arbitration under the rules of the American Arbitration Association and the laws of the State of New York.

(*Id.* at 657). Subsequently, KPMG Peat Marwick terminated Howard's employment, and she brought an action against her employer, asserting claims sounding in negligence, employment discrimination and fraud. Howard's employer moved to stay the action pending arbitration. The court granted the motion, but, while the motion was still pending, the plaintiff commenced another action against various defendants, asserting essentially the same claims as she asserted in the original action and treating the defendants in the new action as a class. In the context of finding Howard's claims in the new action duplicated the claims asserted in the original action, the court noted that "a plaintiff such as Howard, who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration." (*Id.* at 665, n 7, citing *Champ v Siegel Trading Co.*, 55 F3d 269, 276-77 [7th Cir 1995]).

Harris (82 AD2d 87, *supra*) also involved a broad arbitration clause. The First

Department analyzed whether a class action could proceed in light of an arbitration clause the plaintiff had signed. The Court compelled arbitration of the purported class action. The Court held that "the interests favoring arbitration should prevail over those favoring the class action, both in general and in the present instance." (*Id.* at 94). The Court stated that maintaining a class action in court was impermissible where the parties agreed to arbitrate their dispute.

The dissent in *Harris* stated that, "if the matter is to proceed in arbitration it must proceed as an individual claim." (*Id.* at 101). The majority opinion responded to, and acknowledged, the conflict identified by the dissenters, that is, the conflict between "two countervailing public policies, arbitration and class action." (*Id.* at 93). The majority stated:

> Concededly, if no arbitration agreement existed plaintiffs might have a strong case for class action certification, since the institution of an individual lawsuit for the paltry sum at issue would be self-defeating. But, maintenance of a class action here by assertion of a claim for which a forum is provided elsewhere, would defeat the aim of arbitration, and undercut an avowed purpose of the class action itself -- the "conservation of judicial effort."

(*Id.* at 95 [citations omitted]). Thus, the majority acknowledged the dissenters' argument, but concluded that the interests favoring arbitration outweighed those favoring class actions and sent the individual plaintiff to arbitration.

In *Tsadilas* (13 AD3d 190, *supra*), the First Department determined that "[t]he arbitration provision [was] enforceable even though it waive[d] plaintiff's right to bring a class action." (*Id.* at 191). Similarly, in *Flynn* (193 Misc 2d 721, *supra*), the trial court granted the defendants' motion to stay the proceedings and compel individual arbitrations. The court determined that "maintenance of a class action here by assertion of a claim for which a forum is provided elsewhere would defeat the aim of arbitration and undercut the avowed purpose of the class

action itself - the conservation of judicial effort." (*Id.* at 724 [citation and internal quotation marks omitted]). The court acknowledged that, "[b]ecause plaintiffs would be precluded from acting as a class in arbitration, the costs they would each incur in arbitration would far outweigh any potential recovery." (*Id.* at 722).

These cases demonstrate that, in 1998, at the time that the parties entered into the Physician Agreement, under a pre-*Green Tree Fin. Corp.* standard, New York law did not permit class arbitration. At that time, claims of class members that were arbitrable class actions resulted in individual arbitrations. This principle is "well defined, explicit, and clearly applicable to the case." (*Wien & Malkin LLP*, 6 NY3d at 481).

Moreover, the Panel majority acknowledged and purportedly applied New York law in the Award (Award, at 7-10), and the Baker Dissent extensively analyzed each of these cases interpreting New York law. Thus, the Panel majority must have been aware of the law set forth in these cases, but either refused to apply it or ignored it altogether. (*Id*). Therefore, defendants have shown that the Panel majority acted in manifest disregard of the law.

On appeal of the *Flynn* decision, the Second Department, in light of the intervening decision in *Green Tree Fin. Corp.* (539 US 444, *supra*), modified the lower court's order to the limited extent of referring to the arbitrator the decision regarding whether there could be class arbitration. (6 AD3d 492, *supra)*. The Court otherwise affirmed the trial court's order. The Second Department held that "[t]he agreements were silent as to whether class action arbitration was permissible. Accordingly, the question of whether these claims may be submitted to arbitration as a class action is for the arbitrator to decide." (*Id.* at 494).

With respect to this decision, the Panel majority reasoned that, "[i]f New York law

prohibited class arbitration under the pre-*Bazzle* agreement, the Appellate Division would have said so and would not have reserved the issue for the arbitrator to determine." (Award, at 9). However, *Flynn* merely stands for the principle that, since the Supreme Court's decision in *Green Tree Fin. Corp.*, the question of whether an arbitration agreement permits class arbitration is for the arbitrator to decide. Therefore, the Panel majority's interpretation of the Second Department's decision in *Flynn* is overly broad.

Stolt-Nielsen SA v Animalfeeds Intl. Corp. (435 F Supp 2d 382 [SD NY 2006]) also supports this court's conclusion. The Southern District of New York decided *Stolt-Nielsen SA* on June 26, 2006, after the parties had fully briefed this motion. However, the parties addressed *Stolt-Nielsen SA* on July 20, 2006, when the court heard arguments on this motion.

Stolt-Nielsen SA involved claims of antitrust violations, that allegedly caused respondents to overpay for shipments of items in parcel tankers that *Stolt-Nielsen SA* owned. *Stolt-Nielsen SA* moved to compel arbitration pursuant to arbitration clauses contained in the respective shipping agreements, and the court referred the matter to arbitration.

The respondents then filed a demand for the class arbitration of claims that arose prior to the Supreme Court's decision in *Green Tree Fin. Corp. Stolt-Nielsen SA* objected, arguing that it never consented to class arbitration. The contracts at issue contained standard maritime arbitration clauses, none of which expressly permitted class arbitration. The three-member arbitration panel held that the clauses, although silent on the issue, permitted class arbitration, beginning "its discussion in the Award by asserting that 'resolution of the foregoing issue [of whether the clauses permit class arbitration] is controlled by the Supreme Court's decision in [*Green Tree Fin. Corp.*].'" (*Id.* at 384). *Stolt-Nielsen SA* moved to vacate the award, arguing that

the panel issued its decision in manifest disregard of the law.

The Southern District vacated the award because the panel based its award on the panel's "mis-assumption that *Bazzle* 'controlled' the issue of whether the clauses here permitted class actions," and, in doing so, "failed to make any meaningful choice-of-law analysis but simply made vague and passing reference to its belief that its analysis of *Bazzle* is 'consistent with New York law as articulated by the Court of Appeals ... and with federal maritime law.'" (*Id.* at 384-85). The court found that the choice of law rules in this situation were "well established and clear cut," and that the maritime contracts "are controlled in the first instance by federal maritime law," that provided "that a court sitting in admiralty applies state law unless there is an established federal maritime rule governing the issue in dispute or the court wishes to fashion such a rule." (*Id.* at 385).

Stolt-Nielsen SA "forcefully brought to the attention of the Panel that there was such a rule," and, thereafter, the arbitration panel expressly acknowledged the existence of the established maritime rule in its award, stating that the arbitration clauses at issue "are part of a long tradition of maritime arbitration peculiar to the international shipping industry. Among other things, the clauses are part of standard contract forms developed by charterers and widely used by them and their brokers for 30 years." (*Id).* The award stated that the respondents asserted, "again without dispute from Claimants, that these arbitration clauses have never been the basis of a class action," and cited evidence taken from maritime experts "that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." (*Id).*

Nevertheless, the panel in *Stolt-Nielsen SA* found these facts "unpersuasive when

weighed against the contract interpretation the Panel believed was mandated by *Bazzle*." (*Id*). In analyzing the panel's award, the court reasoned that:

> if, instead, the Panel had made the choice-of-law analysis that it was mandated to make but chose to ignore, it would have had to recognize that what Stolt presented was tantamount to an established rule of maritime law. For in the maritime area, more than perhaps any other, the interpretation of contracts - and especially charter party agreements - is very much dictated by custom and usage. Indeed, it could hardly be otherwise, for the international and transient nature of maritime commerce renders the development of binding rules of custom absolutely necessary if the business is not to devolve into chaos.

(*Id.* at 385-86). The court held that, therefore, "the arbitrators manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration under the clauses here in issue and that their decision to the contrary must therefore be reversed." (*Id.* at 386).

Significantly, the court determined "that the result would be the same even if there was no established maritime rule and [New York] law then governed," because, "as the Panel itself noted, Stolt presented uncontested evidence that the clauses here in question *had never been the subject of class action arbitration*." (*Id.* [emphasis added]). The court stated "New York's historically narrow view of what can be read into a contract by implication." (*Id.* at 386).

The court analogized the case to a situation where the trial court authorized the parties to proceed to expedited arbitration absent any contractual provision explicitly authorizing expedited arbitration in the parties' agreement, as occurred in *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (85 NY2d 173 [1995]). The court stated that "[t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms." (*Id.* at 387-88). The court reasoned that reading into an arbitration contract "a provision authorizing compulsory expedited

arbitration would be to fundamentally modify the terms of the parties' contract and force respondent to arbitrate in a manner contrary to the agreement to which it has assented." (*Id.* at 387).

The court also likened the case to *In re Cullman Ventures, Inc., Conk* (252 AD2d 222 [1st Dept 1998]), where the First Department held that "'courts may not consolidate arbitrations in contravention of the parties' agreement even if consolidation would ensure a more economical proceeding. ... A court's failure to give effect to provisions in separate agreements contemplating separate arbitrations is an unauthorized reformation of these contacts." (*Id.* at 387).

In *Stolt-Nielsen SA*, Stolt brought these issues of contract interpretation to the attention of the arbitrators, who then failed to "make any choice-of-law analysis [and] failed to recognize how strongly Stolt's position accorded with New York law." (*Id*). Similarly, in this action, as discussed above, the Baker Dissent establishes that the Panel majority was aware of the law in New York concerning class arbitration, but either disregarded or ignored it. Thus, for the same reasons as set forth in *Stolt-Nielsen SA* (435 F Supp 2d 382, *supra*), the Panel majority manifestly disregarded a well-defined rule of New York law that precluded class arbitration under the arbitration clauses here.[2]

The court notes defendants' argument that the Award improperly disregards the parties' intent that the contractual arbitration process would involve only individual arbitrations, not class arbitration. Defendants claim that certain statements of Scher, that constitute judicial admissions, show this intent. Defendants' argument relies upon statements that Scher made in

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[2] The court notes that plaintiffs' counsel's only response to *Stolt-Nielsen SA* (435 F Supp 2d 382, *supra*) is her belief that it was wrongly decided and that the plaintiffs in that action are appealing the decision. 7/20/06 Tr., at 13.

opposition to defendants' motion to compel arbitration. While not the basis of the court's decision, the court addresses this argument below.

"Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary. Informal judicial admissions are facts incidentally admitted during the trial. These are not conclusive, being merely evidence of the fact or facts admitted." (*Wheeler v Citizens Telecommunications Co. of New York, Inc.*, 18 AD3d 1002, 1005 [3d Dept 2005] [internal citations omitted]; *see also Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 NY2d 94, 103 [1996] [same, including among informal judicial admissions: statements made during trial or a judicial proceeding, or statements contained in a deposition, a bill of particulars, or an affidavit]).

At the time of defendants' motion to compel arbitration, Scher argued that defendants had not satisfied their burden of showing that Scher entered into an arbitration agreement with defendants. In that context, Scher stated that "[a]rbitration is strictly a contractual right that must be expressly provided for between the specific parties to a dispute for that dispute to be submitted to arbitration." (Scher Opp. Mem. of Law, Leeuw Aff., Ex. E, at 4, citing *Riverdale Fabrics Corp. v Tillinghast-Stiles Co.*, 306 NY 288, 289 [1954]). Scher also stated that, "[b]y moving to compel arbitration, the Defendants seek to force the Plaintiffs and the members of the Class into a multitude of individual arbitration proceedings" and that "[o]nly a court with the power to address such systemic conduct can appropriately adjudicate Oxford's liability under GBL § 349 for its pervasive wrongful practices." (*Id.* at 6, 7). Scher's counsel also made the following statement before the Panel during the clause construction proceeding: "Dr. Scher's 2001-2002 conduct and statements reflect the belief that, at that time, class arbitration was not available in New York." (Leeuw Aff., Ex. P, at 14).

Here, none of Scher's counsel's statements are formal statements of fact. Rather, the statements express opinions about the likelihood of success in bringing a class arbitration prior to the Supreme Court's decision in *Green Tree Fin. Corp.* (539 US 444, *supra*). These statements are not factual in nature. Nor are they concessions or stipulations as to any facts of the case. Therefore, they do not constitute binding, formal judicial admissions or informal judicial admissions.

Scher argues that his statements merely reflect his belief that, at that time, neither the United States Supreme Court nor the New York Court of Appeals had addressed the issue or provided a structure for bringing and maintaining a class arbitration. However, the only inference that one can draw from Scher's statements is that arbitration forces plaintiffs to engage in individual arbitrations, and that is precisely what is implied in Scher's statements.

The court also notes that the AAA Class Rules did not become effective until October 2003 and that this decision might be different if this case arose subsequent to *Green Tree Fin. Corp.* and the AAA's promulgation of the AAA Class Rules.

Accordingly, it is hereby

ORDERED that defendants' motion to vacate the Clause Construction Award, dated March 7, 2006, is granted and the case is remanded to the Panel for proceedings consistent with this Decision and Order.

Dated: November 28, 2006

ENTER:

J.S.C.