AMERICAN ARBITRATION ASSOCIATION
CLASS ACTION AND EMPLOYMENT ARBITRATION TRIBUNAL

Elizabeth M. Laughlin,
Claimant

v. Case No.: #74 160 Y 00068 12

VMware, Inc.,
Respondent

Partial Final Award on Clause Construction

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with an Arbitration Agreement set forth in the Employee Agreement and signed by the parties on April 13, 2004, and having been duly sworn and having heard the proofs and allegations of the Parties, do hereby issue the following PARTIAL FINAL AWARD ON CLAUSE CONSTRUCTION:

I.
Factual Background and Procedural History

Claimant is a former employee of Respondent, based in Texas, but who also performed services for Respondent in California. On February 3, 2011, Claimant filed an action in the United States District Court for the Northern District of California (the "District Court Action"), seeking to represent a class of employees. Respondent first moved to dismiss the District Court Action and to strike the class action allegations, then also moved to compel arbitration. Claimant opposed both motions. The Court granted Respondent's motion to compel arbitration, after severing certain provisions of the Employee Agreement which the Court had found unconscionable, and did not rule on Respondent's motion to dismiss and strike. Respondent now has renewed its motion to strike the class allegations.

The record before the Arbitrator on this motion consists generally of the Demand, Claimant's Complaint in the District Court Action, the Answer, the parties' briefs, declarations and exhibits, and the Court's Order in the District Court Action. The parties have cited numerous authorities as well as the orders and partial final awards of other arbitrators in class arbitrations. A hearing was held on the motion before the Arbitrator, Louise A. LaMothe, Esq., on June 20, 2012, via telephone conference call. Appearing at the hearing were Richard Burch, Esq., Bruckner Burch, P.L.L.C., counsel for Claimant, and Lynne Hermle, Esq., and Michael Aparicio, Esq., Orrick, Herrington & Sutcliff LLP, counsel for Respondent. The hearing was reported.

Pursuant to the parties' stipulation, this ruling is to be the clause construction ruling in the case. Accordingly, I apply Rule 3 of the AAA Supplementary Rules for Class Arbitrations, effective October 8, 2003, which provides in pertinent part:

> "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"). ...
>
> 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 clause construction analysis begins with the language of the parties' 2004 Employment Agreement. Section VII, **Arbitration and Equitable Relief**, of the Employment Agreement provides as follows:

> **"Arbitration.** Except as provided in Section 7(b) below, I agree that any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this agreement, shall be settled by arbitration to be held in Santa Clara County, California, in accordance with the rules then in effect of the American Arbitration Association. The arbitrator may grant injunctions or other relief in such dispute or controversy. The decision of the arbitrator shall be final, conclusive and binding on the parties to the arbitration. Judgment may be entered on the arbitrator's decision in any court having jurisdiction. The Company and I shall each pay one-half of the costs and expenses of such arbitration, and each of us shall separately pay our counsel fees and expenses.
>
> **"Equitable remedies.** I agree that it would be impossible or inadequate to measure and calculate the Company's damages from any breach of the covenants set forth in Sections 2, 3, and 5 herein. Accordingly, I agree that if I breach any such Section, the Company will have available, in addition to any other right or remedy available, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this agreement. I further agree that no bond or other security shall be required in obtaining such equitable relief and I hereby consent to the issuance of such injunction and to the ordering of specific performance."

Claimant's claims are set forth in Claimant's Demand, which states as follows:

> "Laughlin brings this class arbitration on behalf of herself and others similarly situated. For herself and the class, she seeks recovery of unpaid wages, interest,

penalty damages, as well as attorney's fees and costs resulting from VMware's: (1) violation of the overtime provisions of the Fair Labor Standards Act (FLSA); (2) violation of the overtime provisions of the California Labor Code (CA Labor Code); (3) failure to provide accurate wage statements under the CA Labor Code; (4) failure to provide meal periods, as required by the CA Labor Code; (5) violation of the California Business & Profession Code Section 17200."

Respondent seeks to strike the class references in the Demand and to require Claimant to proceed on an individual basis only. Respondent claims that the applicable test is whether the arbitrator can find evidence in the Employee Agreement of an agreement to arbitrate on behalf of a class. Respondent says that the Employee Agreement contains no such evidence, and that therefore the reference to other parties must be stricken.

II.
FAA versus CAA

The class action is a procedural device, rather than a substantive right and the parties' first dispute is over the applicable procedural law. Respondent claims that the Federal Arbitration Act (FAA) controls. Claimant contends to the contrary, that the California Arbitration Act (CAA) applies.

The parties' Employee Agreement provides:

> "**Governing law; Consent to Personal Jurisdiction**. This Agreement will be governed by the laws of the State of California as they apply to contracts entered into and wholly to be performed within such State. I hereby expressly consent to the nonexclusive personal jurisdiction and venue of the state and federal courts located in the federal northern district of California for any lawsuit filed there against me by the company arising from or relating to this agreement." Section VIII (a)

Claimant contends that this is a very broad agreement to use all aspects of the "laws of the State of California"--including the CAA--in construing the parties' Employee Agreement, including its arbitration provision. Respondent argues that despite this "governing law" provision, because the agreement concerns interstate commerce (indeed, Claimant was based in Texas, while Respondent was based in California), the FAA must apply to the arbitration provision.

Here United States Supreme Court precedent as established in *Volt Information Sciences, Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) controls. In *Volt*, the Court was confronted with a contract involving interstate commerce, in which the parties had agreed: "[t]he Contract shall be governed by the law of the place where the Project is located," which was California. The California Court of Appeal had construed the choice of law provision to mean that the CAA, rather than the FAA, applied, and therefore that CCP §1281.2(c)--the CAA provision allowing an

arbitration to be stayed--(which provision did not exist under the FAA) was enforceable.[1] The United States Supreme Court affirmed.

The parties' agreement here is strikingly similar to that which the U.S. Supreme Court construed in *Volt:* "This Agreement will be governed by the laws of the State of California as they apply to contracts entered into and wholly to be performed within such State."

The Court in *Volt* made several important points that guide the determination here: (1) "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." (*Id.* at 476) (2) "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." (*Id.* at 477) (3) [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." (*Id.* at 479)

Following *Volt*, the Arbitrator holds that the parties' Employee Agreement in this case, in choosing California law, also chose application of the CAA, rather than the FAA.

III.
Analysis

Respondent correctly asserts that the ruling in this case is governed by the United States Supreme Court's decision in *Stolt-Nielsen, SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), but while *Stolt-Nielsen* controls, that decision does not mean that classwide arbitration is precluded unless the parties' agreement specifically permits it.

In *Westcott et al. v. ServiceMaster Global Holdings Inc.*, 2011 U.S. Dist. Lexis 69752 (N.D. Cal. June 29, 2011), for example, the District Court ordered an employment case raising wage claims to arbitration for a ruling on the classwide arbitration issue and stated:

> "The Supreme Court has never held that a class arbitration clause must explicitly mention that the parties agree to class arbitration in order for a decisionmaker to conclude that the parties consented to class arbitration."

As Judge Illston pointed out in *Westcott*, the Supreme Court in *Stolt-Nielsen* used the term "silent" in a specific way, to mean that the parties "had not reached any agreement, not in the literal sense that there were no words in the contract discussing class arbitration one way or the other." 2011 U.S. Dist. LEXIS 69752.

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[1] As Chief Justice Rehnquist's opinion for the majority described the procedure unique to the CAA: "Stanford ... moved to stay arbitration pursuant to Cal. Civ. Proc. Code Ann. § 1281.2(c)(West 1982), which permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact.' (fn omitted)" *Id.* at 471.

Generally the question of contract interpretation is a matter of state law. *Arthur Andersen LLP v. Carlisle,* 129 S. Ct. 1896, 1901-02, 173 L. Ed. 2d 832 (2009). In this instance, therefore, the governing state law of California, including the CAA, as discussed above, and the characteristics of the arbitration agreement itself are the deciding factors in this decision. Moreover, as Judge Illston pointed out in *Westcott, supra*, the Supreme Court recognized in *Stolt-Nielsen* that it was also appropriate for the arbitrator to consider the "sophistication" of the parties and the "tradition of class arbitration" in the pertinent field. Each of these points will be considered.

Stolt-Nielsen teaches that since arbitration is bottomed on agreement, the arbitrator must find evidence that the parties agreed to class arbitration. Since in *Stolt-Nielsen* the parties had stipulated that they had not reached an agreement, for the Court's majority the decision was simplified.

The Court in *Stolt-Nielsen* found other characteristics of the parties' agreement important. For example, the shipper had drafted the very contract that it was seeking to construe as permitting class arbitration. The Supreme Court did not have difficulty in finding that the party drafting the agreement had the power to insert any language it chose and that in that case the drafting party had not mentioned class arbitration.

As Respondent points out here, the singular is used 30 times in the Employee Agreement, including in the arbitration provision, there is no mention of other employees and the agreement contains an integration clause. But these drafting points do not compel the conclusion that no agreement to class arbitration can be inferred. As the United States District Court found here in granting the motion to compel arbitration, the employee did not draft the arbitration agreement. Instead, it was part of a plan covering all employees, and the Court found, an unconscionable contract of adhesion. Moreover, it is the weaker party, who did not draft the arbitration agreement, who now seeks to find evidence of agreement to classwide arbitration.

The Supreme Court directed arbitrators to look to governing law—mentioning state contract law—for evidence of agreement. In *Stolt-Nielsen*, the Court pointed out that the arbitrators had failed to review either New York state contract law or maritime law to determine whether an agreement to classwide arbitration existed. The Court also rested its ruling on the fact that class claims were unknown in the maritime law tradition, and that the case before it involved sophisticated multinational commercial parties.

We have very different facts here. As discussed above, the employer chose California law to govern the Employee Agreement of which the arbitration agreement is a part. The drafter is charged with understanding and having in mind this California background law when the contract was entered into. *Edwards v. Arthur Andersen LLP* (2008) 34 Cal. 4th 937. The employer cemented the California locus when it also chose to insert in the parties' contract the employee's consent to venue in state or federal court in California, rather than in Texas, where this employee was based.

As Claimant points out, California state contract law favors the procedural devices of class actions and class arbitration in cases such as this one. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 106. Indeed, it is uncontroverted that the employee in this case raises claims under the California wage and hour laws that are typically raised in class actions or class arbitrations. California Business & Professions Code §17203 permits pursuit of claims on behalf of others and under the FLSA, actions may be maintained on behalf of others similarly situated. 29 U.S.C.A. § 216(b).

Respondent argues that the FAA preempts *Armendariz* and that there is no room here for application of the default rule of California contract law. The preemption argument is already dealt with in Section II, above. There is no FAA preemption, based on the contract Respondent itself drafted.

Nor is there a basis to disregard California background law of employment contracts and employee rights.[2] Respondent points out that when the parties entered into this Employee Agreement in 2004, VMware could not have inserted a class arbitration waiver, since class arbitration waivers were unenforceable under California law at the time. (*Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), overruled by *ATT Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).) Therefore, Respondent argues, the fact that it did not insert a provision waiving class arbitration should not be construed to mean that Respondent agreed to class arbitration. But the failure to include a class waiver provision is beside the point. The background law of California in the area of employment agreements and the vindication of employee rights was well established when this agreement was entered into in 2004. The strong public policy of the state, expressed in numerous decisions, including *Armendariz*, supported class arbitration.

Moreover, whether a class arbitration waiver was enforceable in 2004 or not would not be a convincing argument for declining to use here the tool the U.S. Supreme Court explicitly gave to arbitrators for making the determination. Had the Court intended arbitrators to look only at the text of the contract itself, the absence of the words "class arbitration" would have been enough to decide the matter. Obviously, that is not the case. There must be more, and that "more" is the background law of the relevant jurisdiction and the other matters the Court mentioned in *Stolt-Nielsen* for guidance of arbitrators.

The reasonable expectations of parties entering into contracts with language such as this one with California governing law in 2004 was that there would be class arbitration of claims such as those raised in this Arbitration. For that reason, the motion to strike class allegations is denied.

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[2] **"Law and usage of the place.** A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." C.C.P. § 1646.

This is not a decision on the merits of Laughlin's claim or the class she seeks to represent; the claims might fail entirely. Likewise, this is not a decision on whether the case should proceed as a class arbitration. This decision establishes only that under the adhesion contract the employer admittedly drafted, California law provides that classwide arbitration was consented to because it was within the reasonable expectations of the employee based on the language the employer chose.[3]

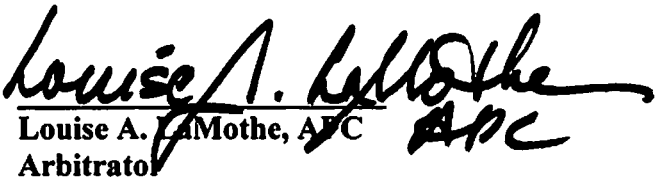
IV.
Conclusion

For all of the reasons set forth above, the Arbitrator hereby issues her Partial Final Award on Clause Construction under Rule 3, finding that the parties' arbitration agreement permits class arbitration.

All issues and/or arguments raised by the parties have been considered, but not all have been expressly addressed in this Clause Construction Award. Any such arguments not so addressed in this Clause Construction Award are hereby rejected and denied.

All proceedings herein are hereby stayed for a period of 30 days after the date of this Partial Final Award "to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award." AAA Rule 3.

Dated: August 27, 2012



Louise A. LaMothe, APC
Arbitrator

[3] As the court in *Hoover v. American Income Life Ins. Co.*, 206 Cal. App. 4th 1193 (4th Dist. 2012) mentioned, we are in a "fluid and volatile area of the law." Indeed it is. Already the *Hoover* decision, reported on June 13 and mentioned for the first time at oral argument on the motion in this case, has been distinguished by *Nelsen v. Legacy Partners Residential*, 207 Cal. App. 4th 1115 (1st Dist. 2012) reported on July 18, and modified on denial of rehearing on August 12, 2012. *Nelsen* has in turn been cited in *Truly Nolen of America v. Superior Court*, 2012 WL 3222211 (4th Dist. 2012) decided August 9.