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**AMERICAN ARBITRATION ASSOCIATION  
Class and Employment Arbitration Tribunal**

**HERMAN BENSON, JR.**, individually  
and on behalf of all others similarly  
situated,

Claimant,

vs.

**CSA-CREDIT SOLUTIONS OF  
AMERICA, INC.**,

Respondent.

**Case No.: 11-160-M-02281-08**

**PARTIAL FINAL CLAUSE  
CONSTRUCTION AWARD**

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the parties dated January 9, 2008, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby issue this PARTIAL FINAL CLAUSE CONSTRUCTION AWARD, as follows:

A telephonic hearing was held on June 23, 2010, concerning Claimant's request to obtain a determination that the arbitration agreement executed between

1 the parties authorizes a class arbitration.<sup>1</sup> Claimant was represented by Lee &  
2 Braziel, L.L.P. and The Cochran Firm, PC. Respondent was represented by  
3 Seyfarth Shaw LLP.

#### 4 **Background**

5 Claimant and potential class members are current and former employees of  
6 CSA-Credit Solutions of America, Inc. (“CSA”), a company which provides a  
7 variety of debt solution products and services. Claimant initially brought this case  
8 as a collective action under the Fair Labor Standards Act (the “FLSA”) in the  
9 United States District Court for the Northern District of Texas. CSA moved to  
10 stay the federal court proceeding and to compel arbitration.<sup>2</sup>  
11  
12

13 The arbitration agreement at issue provides as follows:

14 In the event of any dispute or claim relating to or arising out of the  
15 employment relationship or the termination of the employment relationship  
16 including, but not limited to, any claims of wrongful termination or age,  
17 sex, disability, race or other discrimination, you and Credit Solutions agree  
18 that all such disputes shall be fully, finally and exclusively resolved by  
19 binding arbitration conducted by the American Arbitration Association’s  
20 Employment Arbitration Rules and Mediation Procedures in Texas and we  
21 both waive our rights to have such disputes tried by a court or jury.  
22 However, both agree that this arbitration provision shall not apply to any  
23 disputes or claims relating to, or arising out of, the misuse or  
24 misappropriation of your or the Company’s trade secrets or proprietary  
25 information.

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24 <sup>1</sup> Claimant also has sought a determination that his FLSA collective action may proceed  
25 on an opt-out basis rather than on an opt-in basis as provided for under federal law. The  
26 resolution of that issue will be reserved for a later time.

27 <sup>2</sup> In addition to his FLSA collective arbitration, Claimant has also brought a class  
arbitration under applicable provisions of the Texas Labor Code.

1 Because the arbitration agreement does not make explicit mention of class  
2 arbitration it is necessary to interpret the agreement under applicable Texas law,  
3 guided by the recent decision of the United States Supreme Court in *Stolt-Nielsen*  
4 *S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

5  
6 ***Stolt-Nielsen***

7 In *Stolt-Nielsen*, the Court was called upon to consider whether an  
8 arbitration agreement entered into between two parties in an arms-length  
9 negotiation that made no reference to class arbitration nevertheless was properly  
10 found by three arbitrators to permit a class arbitration. In vacating the arbitration  
11 award, the Court placed great weight on the fact that the parties stipulated they had  
12 reached no agreement on whether their arbitration clause authorized a class  
13 arbitration. In light of the significant differences between class arbitration and  
14 bilateral arbitration, the Court held that an “implicit agreement to authorize class  
15 arbitration” may not be inferred solely from the fact that parties have agreed to  
16 arbitrate their disputes. *Id.* at 1774. Finally, the Court took issue with the  
17 approach taken by the arbitrators, who, according to the Court, “did [nothing]  
18 other than impose [their] own policy preference” for class arbitration. *Id.* at 1770.

19 Because parties’ “mere silence on the issue of class-action arbitration”  
20 cannot constitute “consent to resolve . . . disputes in class proceedings,” the Court  
21 held that it is necessary to determine whether the “parties *agreed to authorize* class  
22 arbitration.” *Id.* at 1776 (emphasis in original). According to the Court, this is  
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1 properly done by giving “effect to the contractual rights and expectations of the  
2 parties,” *id.* at 1774 (citation omitted), and by considering the applicable rule of  
3 law which would govern in such situations. It is to this task that I now turn.

#### 4 **Applicable Texas Law**

5 Although the parties’ agreement contains no choice of law provision, the  
6 parties executed the arbitration agreement in Texas, agreed to conduct this  
7 arbitration in Texas, and both parties are domiciled in Texas. The parties agree  
8 that the substantive law of Texas applies to the interpretation of the arbitration  
9 agreement.  
10

11 Because *Stolt-Nielsen* directs that it is not permissible to assume parties  
12 agreed to class arbitration merely by entering into an arbitration agreement, it is  
13 necessary to consider Texas rules of contract interpretation to answer the question  
14 presented in this proceeding. It is safe to assume that in this adhesion arbitration  
15 contract, the parties did not discuss whether their arbitration agreement would  
16 authorize class arbitration. Indeed, neither party has offered parole evidence on  
17 this point.<sup>3</sup>  
18

19 Under these circumstances, I find that RESTATEMENT (SECOND) OF  
20 CONTRACTS § 204 (1981) offers guidance. This section sets forth the rule to be  
21 applied where parties have not agreed to a term “essential to a determination of  
22 their rights and duties.” Texas courts have adopted this section of the Restatement  
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26 <sup>3</sup> Unlike in *Stolt-Nielsen*, the parties in this case did not stipulate that there was no  
27 agreement to authorize a class arbitration.

1 and “will supply missing terms when necessary to effectuate the purposes of the  
2 parties under the agreement.” *Lidawi v. Progressive Cty. Mut. Ins. Co.*, 112  
3 S.W.3d 725, 731-32 (Tex. App. 2003). “A missing term should be inferred when  
4 it is necessary to effectuate the intent of parties.” *Woodward v. Liberty Mut. Ins.*  
5 *Co.*, 2010 WL 1186323, at \*5 (N.D. Tex. Mar. 26, 2010). In describing Texas law  
6 on this point, the Fifth Circuit Court of Appeals wrote that in “order for a court to  
7 read additional provisions into the contract, the implication must clearly arise from  
8 the language used, or be indispensable to effectuate the intent of the parties.” *R.P.*  
9 *Fuller v. Phillips Petroleum Co.*, 872 F.2d 655, 658 (5<sup>th</sup> Cir. 1989).

11  
12 CSA has suggested that the Texas appellate decision in *Gamma Group, Inc.*  
13 *v. Transatlantic Reinsurance Co.*, 242 S.W.3d 203 (Tex. App. 2007) states a  
14 different principle of law. In that case, the parties’ agreement set forth a specific  
15 methodology for how certain losses would be reimbursed. Although neither party  
16 contended their agreement was ambiguous, the trial court added a “covenant” that  
17 payments must be “reasonable.” The appellate court found that the trial court  
18 erred by inserting the term reasonable where, among other things, it “was not  
19 necessary to effectuate the parties’ intent.” *Id.* at 213. Unlike the situation in  
20 *Gamma Group* where the parties’ agreement actually covered the issue in dispute,  
21 here the arbitration agreement is completely silent on the question of whether class  
22 arbitration is permitted.  
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### Analysis

Applying applicable Texas law to this arbitration agreement, the inquiry which must be made can be stated as follows: Did the parties intend to arbitrate all disputes of every kind, even disputes that might involve a collective or class arbitration? For the following reasons, I conclude the parties in this case agreed to authorize collective and/or class arbitrations.

First, the parties have agreed to arbitrate “any dispute or claim relating to or arising out of the employment relationship.” The Fifth Circuit Court of Appeals has held that an arbitration clause using the “any dispute” language is of the “broad type” and that it is “difficult to imagine broader language.” *Complaint of Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 755 (5<sup>th</sup> Cir. 1993) (citation omitted). Thus, supplying an omitted term regarding collective or class arbitration is consistent with the intent of the parties which demonstrably was to authorize arbitration in the broadest possible category of cases.

Second, the arbitration agreement specifically excludes one category of disputes—disputes pertaining to trade secrets and proprietary information. Like most jurisdictions, Texas courts recognize the doctrine of *expressio unius est exclusio alterius*, a contract interpretation doctrine that provides that the expression in a contract of one or more things of a class, implies the exclusion of all others not expressed. *Oxy USA, Inc. v. Southwestern Energy Prod. Co.*, 161

1 S.W.3d 277, 285 (Tex. App. 2005). Thus, the arbitration agreement may be fairly  
2 interpreted to include all other categories of disputes, including collective and  
3 class arbitrations.

4 CSA contends that such an interpretation is not proper because the  
5 exclusion for trade secret disputes refers to substantive claims, whereas collective  
6 or class arbitrations are procedural devices, not substantive ones. Although CSA is  
7 correct that there is a difference between a substantive claim and a procedural  
8 right, the significance of the exclusion is simply that the drafter of the arbitration  
9 agreement, CSA, knew how to exclude certain disputes from the scope of the  
10 arbitration agreement, but apparently chose not to exclude collective and class  
11 arbitrations.  
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14 CSA's decision not to expressly exclude collective or class arbitrations is  
15 significant because as of 2008 it was not uncommon for certain employers and  
16 others to expressly restrict arbitration to individual claims.<sup>4</sup> See, e.g., *Pleasants v.*  
17 *American Express Co.*, 541 F.3d 853, 855 (8<sup>th</sup> Cir. 2008) ("Further you and we  
18 will not have the right to participate in a representative capacity or as a member of  
19 any class of claimants pertaining to any claim subject to arbitration . . . .");  
20 *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 634 (4<sup>th</sup> Cir. 2002) ("There  
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24 <sup>4</sup> It is the position of CSA that the arbitration agreement not only limits employees' claims  
25 to bilateral arbitration, but also prohibits completely collective or class claims whether in  
26 arbitration or in court. In light of my interpretation of the arbitration agreement it is  
27 unnecessary to consider whether the arbitration agreement interpreted as proffered by  
CSA is unconscionable. See *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294  
(5<sup>th</sup> Cir. 2004).

1 shall be no authority for any claims to be arbitrated on a class action basis . . . . An  
2 arbitrator can only decide . . . your claim and may not consolidate or join the  
3 claims of other persons who may have similar claims . . . .“).

4 Third, CSA filed a motion in federal court to compel arbitration. Claimant  
5 brought his complaint in federal court as a FLSA collective action. Although there  
6 is nothing in CSA’s motion wherein it agreed that a collective action may be  
7 brought in arbitration, CSA knew that Claimant had brought a collective action.  
8 Nevertheless, CSA sought to compel arbitration of that collective action without  
9 making any distinction between Claimant’s individual claim and his request to  
10 proceed in a collective action under the FLSA. That position strongly suggests it  
11 was CSA’s view that all of the claims raised in the federal court complaint could  
12 be brought in arbitration.  
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15 For the foregoing reasons and giving consideration to Texas rules of  
16 contract interpretation, I conclude that with the limited exclusion of disputes over  
17 trade secrets, it was the intent of the parties to arbitrate all disputes regarding  
18 employment, of every kind whatsoever, and therefore I find that the arbitration  
19 agreement in this case authorizes a collective and/or class arbitration.  
20

21 The proceedings shall be stayed for 30 days from the date of this award to  
22 permit any party to move a court of competent jurisdiction to confirm or vacate the  
23 Clause Construction Award. Once all parties inform the undersigned in writing  
24 during the period of the stay that they do not intend to seek judicial review of the  
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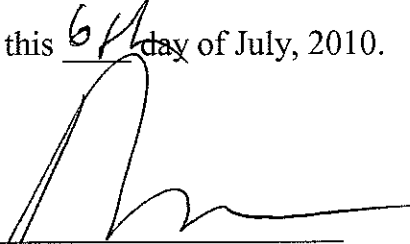
1 Clause Construction Award, or once the requisite time period expires without any  
2 party having informed the arbitrator that it has done so, this matter shall proceed to  
3 a determination of class certification. If any party informs the arbitrator within the  
4 period provided that it has sought judicial review, a further stay of the proceedings  
5 will be considered.  
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7 DATED this 6th day of July, 2010.

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12 Bruce E. Meyerson, Arbitrator

13 I, Bruce E. Meyerson, do hereby affirm upon my oath as Arbitrator that I  
14 am the individual described in and who executed this instrument, which is my  
15 Partial Final Clause Construction Award.

16 DATED this 6th day of July, 2010.

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20 Bruce E. Meyerson, Arbitrator  
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