

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NCR CORPORATION,

Plaintiff,

v.

CHRIS GOH,

Defendant.

CASE NO. C16-127 BJR

ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on cross-motions for summary judgment, the second in a series of phased dispositive motions intended to resolve the central issue of this case; namely, does Defendant Goh’s arbitration agreement with Plaintiff NCR (his former employer) permit him to assert the claims of a class of potential parties in an arbitration proceeding with Plaintiff NCR?

The first phase of this litigation saw the parties disputing whether the arbitrator had the authority to decide the arbitrability construction issue. The Court granted Defendant Goh’s motion for summary judgment in that regard, ruling that the arbitrator did have that authority. (Dkt. No.

1 55.) The arbitrator subsequently reviewed the arbitration agreement and construed it as permitting
2 an employee to maintain a class action through arbitration. (*See* Dkt. No. 43-4; “Construction
3 Award.”) Plaintiff NCR seeks to have this Court conduct an independent *de novo* review of the
4 class arbitrability issue; alternatively, the company seeks to have the Court vacate the arbitrator’s
5 ruling. Having reviewed the parties’ arguments, the relevant case law and relevant portions of the
6 court record, the Court will deny Plaintiff NCR’s motion for either *de novo* review or vacatur of
7 the arbitrator’s ruling. Defendant Goh’s motion for summary judgment will be granted and the
8 arbitrator’s decision is confirmed; the Court’s reasoning follows.

9 **II. BACKGROUND**

10 In August of 2013, Plaintiff NCR Corporation (“NCR”) hired Defendant Chris Goh
11 (“Goh”) as a customer engineer in Seattle, Washington. (Dkt. No. 43-1 at 7.) As a condition of
12 his hiring, Plaintiff NCR and Defendant Goh entered into a “Mutual Agreement to Arbitrate All
13 Employment Related Claims.” (“Agreement;” Dkt. No. 11-1.) The Agreement, which was drafted
14 by Plaintiff NCR, contained the following provisions:

15 This agreement to arbitrate includes every possible claim (other than workers
16 compensation claims or claims for benefits covered by the Employee Retirement Income
Security Act) arising out of or relating in any way to my employment...

17 The arbitration hearing will be conducted by the American Arbitration Association (the
18 “AAA”) under the AAA’s rules (except as those rules are modified by this Agreement...)

19 Any issue or dispute concerning the interpretation or enforceability of this Agreement shall
20 be resolved by the arbitrator...

21 We intend for this Agreement to be interpreted broadly to allow arbitration of as many
22 disputes as possible.

23 (*Id.*)

1 In May 2014, Defendant Goh voluntarily terminated his employment with NCR. (Dkt. No.
2 29 at 14.) On June 25, 2015, he filed a demand for arbitration against NCR in Seattle, Washington,
3 alleging that NCR had failed to provide the disclosure required under the Fair Credit Reporting
4 Act prior to running a background check on employees and applicants. (Dkt. No. 43-2.) Besides
5 his individual claims, Defendant Goh also sought to assert claims on behalf of all other persons on
6 whom NCR had obtained background reports. (*Id.*) Although Plaintiff NCR initially indicated its
7 objection to an arbitrator's authority to resolve the class arbitration issue (Dkt. No. 11-2 at 1), NCR
8 eventually agreed to the appointment of a provisional arbitrator to resolve "only the issue of
9 whether the agreement authorizes class arbitration." (Dkt. No. 20 at 55.)

10 The AAA announced the selection of Arbitrator James Paulson on December 8, 2015. (*Id.*
11 at 66.) The parties were given a briefing schedule on the class arbitration issue, with January 29,
12 2016 established as the filing deadline. (Dkt. No. 11 at 2.) Two days before the deadline, NCR
13 advised Defendant Goh and the AAA that it intended to file an action in this District requesting
14 that the federal court determine whether the Agreement permitted class arbitration (Dkt. No. 11 at
15 3); on that same day, NCR filed this suit. (Dkt. No. 1.)

16 The following day, Plaintiff NCR made an email request to the AAA and Defendant Goh's
17 counsel that administration of the arbitration be suspended pending this Court's resolution of the
18 class arbitration issue. (Dkt. No. 11-6.) The AAA declined to do so on the grounds that its
19 Employment Arbitration Rules do not permit a stay when judicial intervention is sought more than
20 thirty days after the arbitration process begins. (Dkt. No. 11-7.) NCR subsequently sought a
21 temporary restraining order to enjoin Defendant Goh from pursuing a ruling from the arbitrator on
22 the class arbitration issue. (Dkt. No. 9.) On February 4, 2016, NCR's motion was denied on the
23 grounds that it had failed to demonstrate entitlement to the requested relief. (Dkt. No. 24.)
24

1 The clause construction process moved forward and, on March 8, 2016, the arbitrator
2 issued a “Partial Final Clause Construction Award” (Dkt. No. 43-4) in which he ruled that the
3 parties’ Agreement authorizes class arbitration. Following the arbitrator’s decision, the parties
4 filed cross-motions for summary judgment on whether the arbitrator was authorized to make that
5 decision. (Dkt. Nos. 42, 44.) The presiding judge at the time, The Honorable Marsha J. Pechman¹,
6 ruled that NCR had waived its objection to the arbitrator’s authority and granted summary
7 judgment in favor of Defendant Goh on the issue. (Dkt. No. 55.) The matter is now before the
8 Court on the second round of cross-motions for summary judgment, intended to resolve the issue
9 of whether to confirm the arbitrator’s ruling that the Agreement permits class arbitration.

10 III. LEGAL STANDARD

11 Summary judgment is proper “if the movant shows that there is no genuine issue as to any
12 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
13 The moving party bears the initial burden of demonstrating the absence of a genuine issue of
14 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding a summary
15 judgment motion, the court must view the evidence in the light most favorable to the non-moving
16 party and draw all justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242,
17 55 (1986).

18 The moving party is only required to assert that the party with the burden of proof cannot
19 carry that burden, and “that there is an absence of evidence to support the nonmoving party’s case.”
20 *Celotex*, 477 U.S. at 325. On those issues where he bears the burden of proof, Defendant Goh
21 must present actual evidence to successfully oppose the motion and may not rest on allegations,
22 speculations or opinion. *Anderson*, 477 U.S. at 248.

23
24 ¹ The matter was transferred to this Court on September 6, 2016; *see* Dkt. No. 57.

1 The parties do not dispute the facts. The remaining issues presented by this controversy
2 are strictly legal, therefore this matter is appropriate for resolution by means of summary judgment.

3 IV. DISCUSSION

4 The cross-motions for summary judgment in this second phase of dispositive briefing
5 present two main arguments: (1) whether, under the standard of review set by the Federal
6 Arbitration Act (“FAA;” *see* 9 U.S.C. § 10(a)) and the cases examining decisions under that
7 statutory scheme, the arbitrator’s ruling that the parties’ Agreement contemplated class arbitration
8 should be confirmed or vacated; and (2) whether Plaintiff NCR is entitled to independent *de novo*
9 review of the class arbitrability issue. The Court will address the issue of *de novo* review first.

10 A. Plaintiff NCR is not entitled to *de novo* review of the class arbitrability issue.

11 NCR contends that it is entitled to *de novo* review of the question of whether its Agreement
12 with Plaintiff NCR permits a class arbitration. NCR’s position is that, despite the fact that it
13 waived its objection to the arbitrator’s authority, its actions following that waiver – filing this
14 lawsuit and then moving for a TRO – “preserved” its right to independent review by the court of
15 the issue. (Dkt. No. 60, Opening Brief at 20.) Plaintiff NCR cites a Supreme Court opinion, *First*
16 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), as supportive of this argument.

17 But the facts in *First Options* are not on all fours with NCR’s circumstances, and thus its
18 rationale and holding are inapplicable here. The Supreme Court in *First Options* concluded that,
19 “because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the
20 Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute
21 was subject to independent review by the courts.” *Id.* at 947.

22 Plaintiff NCR in this matter *did* “clearly agree to submit the question of arbitrability to
23 arbitration,” and the fact that it later changed its mind about that decision has already been found
24

1 to be of no legal consequence. Plaintiff NCR has not presented a compelling argument as to why
2 the decision of the previous presiding judge in this matter – “NCR repeatedly indicated its
3 agreement to allow the arbitrator to decide the class arbitration issue, thereby withdrawing its
4 objection” (Dkt. No. 55, Order at 7) – is not still the law of this case. It has already been established
5 in this litigation that “NCR waived its right to object to the arbitrator’s authority to decide the class
6 arbitration issue” (*Id.*) and NCR’s argument to the contrary at this point is unavailing.

7 NCR is not entitled to *de novo* review by the court of the class arbitrability issue.

8 **B. The arbitrator’s decision must be confirmed under the FAA and applicable federal**
9 **and state law.**

10 Section 9 of the FAA states that “at any time within one year after the award is made any
11 party to the arbitration may apply to the court so specified for an order confirming the award, and
12 thereupon the court must grant such an order unless the award is vacated, modified, or corrected.”

13 There are several grounds on which an arbitration award can be vacated, but only one is at
14 issue here. “The United States court in and for the district wherein the award was made may make
15 an order vacating the award upon the application of any party to the arbitration... where the
16 arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite
17 award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a)(4).

18 Plaintiff NCR’s position is that the arbitrator’s decision represents an overreaching of his
19 powers to the extent that it must be vacated. NCR raises two rationales for this argument; the
20 Court will examine each in turn.

21 *1. Did the arbitrator recognize but disregard clearly applicable precedent?*

22 The law in the Ninth Circuit is that an arbitrator’s award may be vacated for “manifest
23 disregard” where “the arbitrator recognized the applicable law and then ignored it.” *Comedy*

1 | *Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2003)(*en banc*)(citation omitted).
2 | NCR asserts that the arbitrator in this matter acknowledged but then disregarded two critical
3 | Supreme Court precedents.

4 | *Stolt-Nielsen, N.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) involved an arbitration
5 | agreement which, by stipulation of the parties, was “silent” on the issue of class arbitrability (the
6 | stipulation acknowledged that not only did the agreement make no reference to class arbitration,
7 | but the parties “had not reached any agreement on the issue”). *Id.* at 673. An arbitration panel,
8 | focusing on policy concerns, concluded that class arbitration should be permitted under the
9 | agreement. *Id.* at 673-676. The District Court vacated the award on the grounds that the
10 | arbitrators’ failure to conduct a choice-of-law analysis constituted a “manifest disregard” of the
11 | law. *Stolt-Nielsen, N.A. v. AnimalFeeds Int’l Corp.*, 435 F.Supp. 382, 384-385 (S.D.N.Y. 2006).
12 | The Court of Appeals reversed (548 F.3d 85 (2nd Cir. 2008)), and the Supreme Court granted
13 | certiorari. 557 U.S. 903 (2009).

14 | On review, the Supreme Court overturned the appellate decision, holding that imposition
15 | of class arbitration on a party to an agreement is improper “unless there is a contractual basis for
16 | concluding that the party agreed to” submit to such a form of arbitration. *Id.* at 684. In construing
17 | an arbitration agreement, a court or arbitrator “must give effect to the contractual rights and
18 | expectations of the parties.” *Id.* at 682. “In certain contexts,” the Court held, “it is appropriate to
19 | presume” that the parties “implicitly authorize[d]” class arbitration, but this implicit authorization
20 | may not be inferred just from the “fact of the parties’ agreement to arbitrate.” *Id.* at 685. Nor may
21 | an arbitrator presume “that the parties’ mere silence on the issue of class-action arbitration
22 | constitutes consent to resolve their disputes in class proceedings.” *Id.* at 687.

1 In *Oxford Health Plans, LLC v. Sutter*, 133 S.Ct. 2064 (2013), a doctor entered into a
2 contract with a health plan company. When the doctor sued the health plan company on behalf of
3 himself and a proposed class of physicians, alleging failure to make full and prompt payment to
4 the doctors, Oxford moved to compel arbitration of Sutter’s claims, a motion which was granted.
5 The parties agreed that the arbitrator should decide whether their contract authorized class
6 arbitration. The arbitrator, construing a clause in the agreement which stated that “[n]o civil action
7 concerning any dispute arising under the Agreement shall be instituted before any court, and all
8 such disputes shall be submitted to final and binding arbitration,” concluded that it did. *Id.* at 2067.

9 Plaintiff twice tried to vacate the arbitrator’s decision on appeal (pre- and post-*Stolt-*
10 *Nielsen*); both times the District Court and the Court of Appeals affirmed the arbitrator. On the
11 second appeal, the Third Circuit noted the constraints placed on judicial review by §10(a)(4): So
12 long as an arbitrator “makes a good faith attempt” to interpret a contract, “even serious errors of
13 law or fact will not subject his award to vacatur.” 675 F.3d 215, 220 (3rd Cir. 2012). The Supreme
14 Court granted certiorari. 113 S.Ct. 786 (2012).

15 On review, the Supreme Court also refused to vacate the arbitrator’s decision. The Court
16 quoted *Stolt-Nielsen* that “[i]t is not enough... to show that the [arbitrator] committed an error –
17 or even a serious error” (559 U.S. at 671) and upheld the Court of Appeals’ finding that, “[s]o long
18 as an arbitrator ‘makes a good faith attempt’ to interpret a contract, ‘even serious errors of law or
19 fact will not subject his award to vacatur.’” 113 S.Ct. at 2068; citation omitted. While clearly not
20 agreeing with the arbitrator’s legal conclusion, the Supreme Court in *Oxford Health* stated:

21 All we say is that convincing a court of an arbitrator’s error – even his grave error – is not
22 enough. So long as the arbitrator was “arguably construing” the contract – which this one
was – a court may not correct his mistakes under §10(a)(4).

23 *Id.* at 2070.

1 It is unquestioned that the arbitrator in this matter cited to both these cases, summarizing
2 their principles as “the relevant restrictions and guidance” of the Supreme Court “concerning the
3 arbitrability of class actions.” (Construction Award at 4.) It is NCR’s contention that the arbitrator
4 in his ruling “recognized the applicable law and then ignored it;” in fact, Plaintiff NCR claims that
5 “the arbitrator announced his intent to disregard all of the authorities cited by both parties, other
6 than the four decisions involving NCR’s own arbitration clause.” (Dkt. No. 60, Pltf Brief at 21.)

7 The Court does not agree. In the first place, the portion of the arbitrator’s decision cited
8 by Plaintiff NCR to support this contention of “intent to disregard” appears to be taken
9 considerably out of context. The Construction Award contains a section entitled “Court Imposed
10 Restrictions/Guidance on the Arbitrator Interpreting The Arbitration Clause Language” which
11 references the relevant Supreme Court decisions and summarizes the holdings which apply to
12 arbitrator’s analysis. (See Construction Award at 4.) Following that section is a section entitled
13 “Prior Cases Involving NCR’s Arbitration Clause Language;” in a footnote to the *title* of that
14 section, the arbitrator observes that

15 [w]hile both parties have cited several arbitration decisions interpreting similar language
16 to that in the instant agreement, the Arbitrator finds it most helpful to examine situations
involving the actual language of the arbitration agreement.

17 (Construction Award at 5, n.7.) Given the location of the footnote, the Court finds that it is not a
18 reference to the Supreme Court cases cited in the previous section and does not constitute an
19 announcement of the arbitrator’s intent to ignore *Stolt-Nielsen* and *Oxford Health*.

20 The Court further finds that the arbitrator’s analysis satisfies both the requirements of *Stolt-*
21 *Nielsen* and *Oxford Health*. In a lengthy section of the Construction Award entitled “Analysis of
22 Relevant Arbitration Clause Language,” the arbitrator lays out every paragraph in the Agreement
23
24

1 | which he finds supportive of an interpretation permitting class arbitrability. (Construction Award
2 | at 8-9.)

3 | In the second paragraph of the Agreement, the arbitrator notes that the document “includes
4 | every possible claim... arising out of or relating in any way to my employment,” a phrase which
5 | he construes as “expansive enough to cover concerns of other employees where those
6 | concerns/claims are the same as with the employee executing the document.” (*Id.* at 8.) The
7 | opinion finds the language of Paragraph Eight (that the Agreement is “to be interpreted broadly to
8 | allow arbitration of as many disputes as possible”) “particularly significant as it is the only
9 | language referencing how the agreement is to be interpreted,” and further finds “that this language
10 | allows for class disputes as class disputes are clearly a type of dispute of which an individual
11 | employee may be a part.” (*Id.* at 9.) The arbitrator concludes that, “[w]hile this Arbitrator finds
12 | that the language is clearly susceptible of an interpretation that its intent was to permit class
13 | actions, at the very least the language must be viewed as ambiguous.” (*Id.*)

14 | The decision then goes on to an analysis of Washington contract law which “recognize[s]
15 | the well-established rule of contract interpretation that ambiguities should be interpreted against
16 | the drafter particularly where the parties had unequal bargaining power.” (*Id.* at 9-10.) Finding
17 | that NCR’s Agreement is “a contract of adhesion” created by Plaintiff NCR, the arbitrator then
18 | proceeds to construe the document in Defendant Goh’s favor. (*Id.* at 10.)

19 | Plaintiff NCR’s extensive argument that this contractual analysis is incorrect is ultimately
20 | for naught because this Court is bound (as was the arbitrator) by the constraints of *Oxford Health*
21 | and the cases which followed it. The Supreme Court could not have been clearer: so long as the
22 | arbitrator is “arguably construing” the contract, § 10(a)(4) of the FAA does not permit the
23 |
24 |

1 correction of any errors through vacatur. The Court finds it beyond question that the arbitrator in
2 this matter was construing the Agreement before him.

3 And that finding leads the Court to conclude that the tenets of *Stolt-Nielsen* have been
4 observed. While *Stolt-Nielsen* does stand for the twin principles that merely agreeing to bilateral
5 arbitration does not constitute an agreement to class arbitrability and an arbitrator cannot presume
6 from “mere silence” that the parties have consented to class arbitration, the Supreme Court also
7 stated that an arbitration award must stand unless “there is no contractual basis for determining
8 that the parties agreed to class arbitration.” 559 U.S. at 682. The arbitrator here clearly found “a
9 contractual basis for determining that the parties agreed to class arbitration,” a finding which (even
10 if it were erroneous) is not subject to being vacated.

11 The Supreme Court in *Stolt-Nielsen* identified the error of the arbitration panel as follows:
12 “[I]nstead of identifying and applying a rule of decision derived from the FAA or... [state] law,
13 the arbitration panel imposed its own policy choice and thus exceeded its powers.” 559 U.S. at
14 676-77. The arbitrator here identified and applied Washington contract law. (*See* “Relevant Rules
15 of Interpretation of Contract Language;” Construction Award at 9-10.) Furthermore, the Court
16 could not find – and Plaintiff NCR has not identified – any instance where it could fairly be said
17 that the arbitrator was “imposing [his] own policy choice.” NCR has not established to the Court’s
18 satisfaction that the arbitrator here exceeded his powers.

19 The Court is cognizant that, at one point in the Construction Award, the arbitrator cites
20 with approval language from an earlier matter (*Haro v. NCR Corp.*, AAA 11-160-1962-05 (Mar.
21 6, 2006)) wherein the arbitrator observed that an agreement identical to the one construed here was
22 “silent about class actions.” (Construction Award at 6.) The Court understands that language to
23 mean that the phrase “class action,” “class arbitration,” or “class arbitrability” appears nowhere in
24

1 the Agreement. But *Stolt-Nielsen* does not stand for the principle that only an arbitration
2 agreement that explicitly states that class arbitrations are permitted will be found to support class
3 arbitrability. The First, Second and Third Circuits agree: “*Stolt-Nielsen* did not establish a bright
4 line rule that class arbitration is allowed only under an arbitration agreement that incants ‘class
5 arbitration’ or otherwise expressly provides for aggregate procedures.” *Sutter v. Oxford Health*
6 *Plans LLC*, 675 F.3d 215, 222 (3rd Cir. 2012); *see also Fantastic Sams Franchise Corp. v. FSRO*
7 *Assoc’n*, 683, F.3d 18, 22 (1st Cir. 2012) and *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 123
8 (2nd Cir. 2011).²

9 This analysis disposes of Plaintiff NCR’s final argument on federal precedent: that the
10 arbitrator wrongfully invoked Washington contract law because any applicable state law was
11 supplanted by the Supreme Court’s opinion in *Stolt-Nielsen*. That would be the case only where
12 there was “no contractual basis” for a finding that the parties had agreed to class arbitrability. The
13 arbitrator’s analysis, using Washington contract law, determined that there was a contractual basis
14 for such a finding; not even a “grave error” in that contractual analysis would entitle NCR to
15 vacatur of that decision.

16 The Court finds that the precepts of *Stolt-Nielsen* and *Oxford Health* have not been
17 disregarded in the Construction Award.

18 2. *Did the arbitrator err in relying on the Haro stipulation to find that NCR had agreed*
19 *to class arbitrability?*

21 ² This Court is aware that there is a circuit split on this issue, with the Sixth and Tenth Circuits requiring an express
22 agreement to authorize class arbitration prior to resorting to contract interpretation. *See AlixPartners, LLP v.*
23 *Brewington*, 836 F.3d 543, 553 (6th Cir. 2016) and *Pollard v. ETS PC, Inc.*, 186 F.Supp.3d 1166, 1179 (D.Colo.
24 2016). No Ninth Circuit precedent on the issue has been cited, and the Court finds the contrary authority cited *supra*
to be the better-reasoned and more persuasive. *Stolt-Nielsen* permits a party to be compelled under the FAA to
submit to class arbitration if there is “a contractual basis for concluding that the party *agreed* to do so” (559 U.S. at
684; emphasis in original). An arbitrator must be permitted to employ rules of contract interpretation in order to
determine if there is “a contractual basis for concluding that the party agreed to do so.”

1 On January 8, 2016, the parties were notified by the arbitrator that he had discovered a
2 stipulation entered into by NCR in an earlier matter (*Haro v. NCR Corp.*, AAA 11-160-1962-05
3 (Mar. 6, 2006)) wherein NCR had stipulated “the arbitration agreement (apparently the same one
4 as in this case) allowed for class actions.” The arbitrator requested counsel to discuss the
5 stipulation in their briefing (Dkt. No. 43-5 at 2) and they did so. (Dkt. No. 58, Def Opening Brief
6 at 13.)

7 In the Construction Award, the arbitrator ruled that the *Haro* stipulation constituted a
8 “judicial admission of NCR’s intent that the language [of the arbitration agreement] permits class
9 action arbitration.” (Construction Award at 10.) The arbitrator assigned further significance to
10 the facts that the language of the *Haro* agreement was identical to the Agreement presently before
11 the arbitrator, that the stipulation was “public and was never limited as to applying to only the
12 *Haro* case,” and that “NCR never disavowed that Stipulation.” (*Id.*)

13 Plaintiff NCR attacks this finding, both for its characterization of the *Haro* stipulation as a
14 “judicial admission” and for the use of an extra-contractual document to interpret the Agreement
15 executed by the parties. While the Court agrees with Plaintiff NCR that the *Haro* stipulation does
16 not constitute a “judicial admission” (admissions must concern facts and the stipulation clearly
17 concerns the legal impact of the document; *see Lam Res. Corp. v. Schunk Semiconductor*, 65
18 F.Supp.3d 863, 871 (N.D.Cal. 2014)), the Court disagrees that the arbitrator erred in considering
19 the stipulation as evidence of Plaintiff NCR’s intent.

20 The arbitrator cited to the Supreme Court of Washington in support of his methodology in
21 interpreting the contract language:

22 “To interpret the meaning of a contract’s terms, Washington Courts employ the context
23 rule. * * * The context rule requires that we determine the intent of the parties by viewing
24 the contract as a whole, which includes the subject matter and intent of the contract,
examination of the circumstances surrounding its formation, subsequent acts and conduct

1 *of the parties*, the reasonableness of the respective interpretations advanced by the parties,
2 and statements made by the parties during preliminary negotiations, trade usage, and/or
3 course of dealing.”

4 Construction Award at 9, citing *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351 (2004)(citation
5 omitted)(emphasis supplied by arbitrator). The arbitrator then went on to remark that he found
6 “great significance in NCR’s *conduct* in entering into the Stipulation in the *Haro* case.” (*Id.* at 10;
7 emphasis in original.)

8 The Court is struck (as was the arbitrator) by the fact that the document which Plaintiff
9 NCR agreed 10 years ago “permits the arbitration to proceed on behalf of a class” (*Id.* at 6) is the
10 same document which was executed by Defendant Goh in this action. As the arbitrator pointed out
11 in his summary of the *Stolt-Nielsen* holding: “Arbitration is a matter of consent and the consent by
12 a party to arbitration class actions must be gleaned *from the language of the agreement to*
13 *arbitrate.*” (*Id.* at 5; emphasis supplied.) Plaintiff NCR has already agreed that the language of
14 the document which it drafted allows for class arbitrability.

15 Furthermore, the state law rules of contract interpretation favor the use of *Haro* stipulation.
16 In support of the arbitrator’s decision, Defendant Goh cites a Washington appellate decision which
17 allows the decision maker, ““while viewing the contract as a whole, to consider extrinsic evidence
18 such as the circumstances leading to the execution of the contract, the subsequent conduct of the
19 parties and the reasonableness of the parties’ respective interpretations.”” *Roats v. Blakely Island*
20 *Maint. Comm’n, Inc.*, 169 Wn.App. 263, 274 (Div. 1, 2012)(citation omitted). In light of the fact
21 that the document used in *Haro* is identical to the Agreement executed between Plaintiff NCR and
22 Defendant Goh, the Court finds that the stipulation in *Haro* is evidence of “the circumstances
23 leading to the execution of the contract, the subsequent conduct of the parties and the
24 reasonableness of the parties’ respective interpretations.”

1 Plaintiff NCR complains that intervening changes in the law (changes exemplified by *Stolt-*
2 *Nielsen* and *Oxford Health*) have rendered its earlier stipulation ineffective. But that argument is
3 a two-edged sword: In light of the intervening court decisions, Plaintiff NCR could have amended
4 the document at any time to reflect that its position regarding class arbitrability had changed. It
5 did not do so. The arbitrator did not err in assigning the weight to that stipulation which he did,
6 and in citing it as evidence of Plaintiff NCR's intent in entering into the Agreement with Defendant
7 Goh.³

8 CONCLUSION

9 The facts are not in dispute and the Court finds as a matter of law that Defendant Goh is
10 entitled to summary judgment confirming the decision of the arbitrator. The decision was issued
11 in conformity with the requirements which the Supreme Court announced in *Stolt-Nielsen* and
12 *Oxford Health*. The arbitrator unquestionably construed the Agreement and the result is thus
13 entitled to be upheld. Plaintiff NCR's motion for summary judgment will be DENIED;
14 Defendant Goh's motion for summary judgment will be GRANTED. The arbitrator's ruling is
15 hereby CONFIRMED.

18 ³ The Court further finds that, even if the arbitrator's use of the *Haro* stipulation was erroneous, it was not an error
19 which affects the ultimate result.

20 First, the error could simply be viewed as an error in the construction of the contract, in which case the Court
21 is bound by the Supreme Court precedent discussed *supra* to find that "an arbitrator's error – even his grave error – is
22 not enough. So long as the arbitrator was 'arguably construing' the contract... a court may not correct his mistakes
23 under §10(a)(4)." *Oxford Health*, 133 S.Ct. at 2070 (citation omitted).

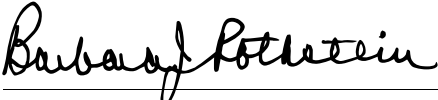
24 Alternatively, the Court looks to the other portions of the arbitrator's analysis – i.e., his analysis of the
language of the contract itself (*see* "Analysis of Relevant Arbitration Clause Language," Construction Award at 8-9)
– and finds that any possible error in utilizing the *Haro* stipulation does not impact his separate analysis of the contract
language. The vast majority of that analysis is conducted independently of the *Haro* stipulation, is strictly concerned
with the arbitrator's interpretation of the language of the contract, and is entitled to the deference (dictated by *Oxford*
Health) due to any arbitrator who has "arguably constru[ed] the contract."

Either way, even if the arbitrator erred in utilizing the *Haro* stipulation as evidence of NCR's intent, it does
not change the final outcome of this Court's examination of the facts and the law.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

The clerk is ordered to provide copies of this order to all counsel.

Dated May 30, 2017.



Barbara Jacobs Rothstein
U.S. District Court Judge