AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL AND CLASS ACTION ARBITRATION TRIBUNAL

Frank Stokes, individually and on behalf of all others similarly situated,

Claimant,

and

AAA Case No. 11 147 02374 06

AWSM Technology, LLC,

Respondent

CLAUSE CONSTRUCTION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration clause of the September 27, 2005 AWSM Site Map™ Services Agreement ("Services Agreement") entered into between Claimant Frank Stokes ("Claimant") and Respondent AWSM Technology, L.L.C. ("Respondent"), having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

This partial final award regarding the construction of the pertinent arbitration clause is issued pursuant to American Arbitration Association ("AAA") Rule 3 of the Supplementary Rules for Class Arbitration (the "AAA Rules") and pursuant to the requirements of *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003). Based on my review of the arbitration clause, the relevant law, the record before me, and the submissions and argument of counsel, I find that the arbitration clause in question permits the arbitration to proceed on behalf of a class. Nothing in this partial final award implies any view as to whether

this matter will ultimately qualify for class certification under the criteria provided by AAA Rule 4 of the Supplementary Rules for Class Arbitration, or any view of the merits of the underlying dispute.

BACKGROUND AND ALLEGATIONS

Claimant is an individual resident of North Carolina. Respondent is an Arizona-based Internet technology services company that offered its proprietary website technology and services to raise subscribers' website profiles, improve traffic, and integrate multiple graphic web images, associated content and dynamic links into a single web page. Claimant alleges that in September 2005 and thereafter Respondent made representations and promises and did not disclose material information, all to induce Claimant to purchase the services and products of Respondent. Claimant further alleges that as a result he entered the Services Agreement and an AWSM Technology, LLC - Authorized Affiliate Agreement ("Affiliate Agreement;" hereafter, the Services Agreement and the Affiliate Agreement are referred to collectively as the "Agreements"). Under the Services Agreement, Respondent agreed to provide services and a revocable, non-exclusive license to Claimant for its AWSM Site Map™, a proprietary technique for integrating multiple graphic web images, associated content and dynamic links into a single page. Under the Affiliate Agreement, Claimant was to engage in developing leads and soliciting subscriptions for Respondent's Internet services and programs, and Respondent was to pay commissions based on the customer sales achieved by the Respondent through the efforts of Claimant. Claimant alleges that many of the representations on which he relied were false, either intentionally or negligently. Further, he alleges that Respondent breached the Agreements by failing to deliver the promised products and services.

Claimant seeks to maintain a class arbitration on behalf of himself and all others who contracted with Respondent on terms substantially similar to those in its Services Agreement for an "AWSM Ad" or any "AWSM Site Map ™ Licensing and Service Package" and who did not receive the promised commissions from the generation of Internet sales. Claimant seeks relief for violation of Arizona's consumer fraud statutes (Ariz. Rev. Stat. Ann. § 44-1521 to 44-1534 (West 2007)) and unlawful acts statutes (Ariz. Rev. Stat. Ann. § 13-2301 to 13-2314.04 (West 2007)), consumer law fraud, negligent misrepresentation, unjust enrichment, breach of contract, and breach of the covenant of good faith and fair dealing. The relationship between Claimant and Respondent is governed by the Agreements, which contain the following significant provisions.

Section 7 of the Services Agreement provides:

> Any and all disputes arising out of, under, in connection with, or relating to this Agreement, or the breach or any alleged breach thereof, shall be settled by arbitration in the City of Phoenix, Arizona, before the American Arbitration Association in accordance with its then applicable rules, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. This provision for arbitration shall be in addition to, but shall not prevent any party from applying for and obtaining injunctive relief by showing that in the absence thereof, the rights of such party under this Agreement cannot be adequately protected by the arbitration award.

Section 8.6 of the Services Agreement and Section 11 of the Affiliate Agreement provide for the application of Arizona law to questions of contract interpretation and performance.

CLAUSE CONSTRUCTION AND THE PARTIES' POSITIONS

Green Tree Fin. Corp. v. Bazzle, 539 U.S. at 452-453, requires that I conduct a meaningful legal analysis of the relevant contract under governing principles of contract law to

determine whether it is consistent with class arbitration. As *Green Tree* teaches, "the relevant question here is *what kind of arbitration proceeding the parties agreed to*." *Id.* at 452 (emphasis in original). Claimant seeks to maintain the action on behalf of himself and a class of all others similarly situated and supports his efforts by reference to Arizona principles of contract construction. Respondent opposes this effort largely on the grounds that, under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16, class arbitration is permitted only if explicitly agreed to in the contract. Indeed, Respondent takes the position that Arizona principles of contract construction are "moot." Respondent AWSM's Supplemental Brief Regarding Clause Construction ("Respondent's Supplemental Brief"), at 2. If Respondent is correct, there is no need to deal with the issues of contract construction. For this reason, I address this argument first.

The FAA and *Green Tree*

The logic of Respondent's argument is as follows. It begins with the premises that the Agreements are silent on the issue of class arbitration and the transactions "fall within the ambit of the FAA." Respondent AWSM's Response to Claimant's Opening Brief Re: Clause Construction ("Respondent's Opening Brief"), at 2-3. Both parties accept these premises.

Next, Respondent notes that under Arizona law "the FAA preempts state law and governs all written arbitration agreements involving interstate commerce." Respondent's Supplemental Brief, at 5, *quoting So. California Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51, 971 P.2d 769, 773 (1999). Thus, Respondent argues that in interpreting the Agreements under Arizona law, I must look to precedent under the FAA. *See, e.g.*, Respondent's Supplemental Brief, at 2, 5-6.

Continuing this line of argument, Respondent asserts that the rule of decision under the FAA has been set forth in a line of cases following *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995); namely, that Section 4 of the FAA bars class-wide arbitration when the arbitration agreement is silent on the subject. *See* Respondent's Opening Brief, at 4-7; Respondent AWSM's Sur-Reply to Claimant's Reply to Response to Opening Brief Re: Clause Construction ("Respondent's Sur Reply Brief"), at 2; Respondent's Supplemental Brief, at 1-2, 5-8. The *Champ* analysis is based on the view that Section 4 of the FAA requires arbitration "in accordance with the terms" of the agreement. If the agreement is silent, then class-wide arbitration is not in "accordance with the terms" of the agreement. *Champ*, 55 F.3d 269. Claimant cites the following cases as having adopted this specific analytical approach: *Dominium Austin Partners, LCC v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D.C. Minn. 1993); *Gray v. Conseco, Inc.*, 2001 WL 1081347 (2001); *McCarthy v. Providential Corp.*, 1994 WL 387852 (1994). Based on the *Gray* and *McCarthy* cases, Respondent extends its argument to state that the Ninth Circuit has adopted the *Champ* approach and that this approach is "controlling." Respondent's Supplemental Brief, at 5-6.[1]

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[1] Respondent attempts to bolster its argument by citing to (1) authority that stands for the proposition that parties cannot be forced to arbitrate claims or issues they have not agreed to arbitrate, *Lifescan, Inc. v. Premier Diabetic Serv., Inc.*, 363 F.3d 1010 (9th Cir. 2004) and *Chiron Corporation v. Ortho Diagnostic Systems, Inc.* 207 F.3d 1126 (9th Cir. 2000), and (2) several federal circuit decisions that have refused to order consolidation when the arbitration agreement is silent, *Johnson v. West Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000); *Gov't of. U.K. v. Boeing Co.*, 998 F.2d 68 (2nd Cir. 1993) and *Weyerhauser Co. v. W. Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984). The first point is undisputed, but begs the question that is the focus of this motion: What did the parties agree to? The second point presents purportedly analogous circumstances without providing sufficient information about Arizona practice in regard to consolidation of arbitrations to complete the analogy and conclude that the result Respondent urges is correct. *See Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 266, 569 S.E.2d 349, 360 (2002) (*rev'd on other grounds in Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)) (noting that applying the

Claimant counters by pointing to an overarching problem with Respondent's argument: It is completely untenable after the Supreme Court's decision in *Green Tree*. There, the United States Supreme Court granted *certiorari* to review the decision of the South Carolina Supreme Court in *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002). The South Carolina Supreme Court had affirmed trial court rulings that class arbitration was available where the arbitration agreement did not clearly preclude class arbitration.

Before the South Carolina Supreme Court, Green Tree made the same argument that Respondent makes here. Green Tree argued that the South Carolina Supreme Court was obliged "to follow *Champ* as a matter of federal substantive law, mandated by Section 4 of the FAA." *Bazzle*, 569 S.E.2d at 359. The South Carolina Supreme Court disagreed, noting that the United States Supreme Court had "not addressed the issue and the precedent set by federal circuit courts" was not, in any event, binding on it.[2]

The South Carolina Supreme Court then analyzed the issue on "independent state grounds," which included general principles of contract construction and public policy. *Id.* at 360. After doing so, it concluded that class arbitration could proceed.

The United States Supreme Court "granted *certiorari* to *determine whether this holding is*

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analogy to consolidation would result in permitting class arbitration because South Carolina permits consolidation of arbitration).

[2] In addition, the South Carolina Supreme Court observed that, contrary to Green Tree's assertion, the Fourth Circuit did not conclude that the FAA requires non-class arbitration. This conclusion applies to the present dispute. Contrary to Respondent's assertion, Respondent's Opening Brief, at 5, the Ninth Circuit has not adopted *Champ*. The cases cited by Respondent in support of its assertion are not decisions of the Ninth Circuit. Two of them, *Gray v. Conseco, Inc.*, 2001 WL 1081347 and *McCarthy v. Providential Corp.*, 1994 WL 387852, are unreported district court decisions. One of the cited cases decided that the issue was for the arbitrator to decide. *McCarthy*, 1994 WL 387852, at 9. Further, the other cases are inapposite because they address the authority of federal district courts (not arbitrators) to permit class arbitration. *Gray*, 2001 WL 1081347; *Gammaro v. Thorp Consumer Discount Co.*, 828 F.Supp 673 (D. Minn. 1993).

consistent with the FAA." *Green Tree*, 539 U.S. at 447 (emphasis added). The Supreme Court held that limited "gateway" issues, e.g., whether the parties have an arbitration agreement or whether the agreement even applies, are for the courts. On the other hand, the question of whether a class arbitration is permitted relates to "the kind of arbitration proceeding" the parties agreed to and is a matter of contract interpretation for the arbitrator. *Id.* at 452. Significantly, the Supreme Court ruled this latter question is "a matter of state law." *Id.* at 447.

Most important, for the present dispute, is the fact that the Supreme Court's decision undercuts any notion that class-wide arbitration is inconsistent with and barred by the FAA unless explicitly allowed in the parties' agreement. For if class-wide arbitration were inconsistent and barred, it would not matter who decides the issue of contract construction. One would simply never get to that question. One must first conclude that the class-wide arbitration is permissible under the FAA before one gets to the questions of (a) whether the specific arbitration clause in issue permits it, and (b) who decides that issue as a matter of contract construction.[3]

At oral argument I invited Respondent to deal with the foregoing implications of *Green Tree* in a supplemental brief. Instead, it has reprised the arguments advanced in its opening and reply briefs. This reprise is as deficient as the original argument in that it (a) wholly ignores the full meaning of *Green Tree*,[4] (b) once again advances the unsupported proposition that the Ninth Circuit has adopted the *Champ* reasoning, and (c) is based on the view that Arizona state courts

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[3] Respondent's argument is based on its reading that *Green Tree* "has little, if any, relevance herein, because the *only* issue it addressed was whether the court or an arbitrator decides the issue of clause construction." Respondent's Sur-Reply Brief, at 2 (emphasis added). This reading ignores the very purpose for which the Supreme Court granted *certiorari*.

[4] Tellingly, all cases cited by Respondent to support this line of argument pre-date *Green Tree*.

are bound by precedents of federal circuit courts in matters of contract construction. *See Bazzle*, 351 S.C. at 264, 569 S.E.2d at 359.

In sum, I find Respondent's argument based on the FAA unpersuasive and move to the matter of contract construction.

Contract Construction

A. Introduction

The Agreement specifies, and the parties agree, that Arizona law controls. Claimant's Opening Brief Re: Clause Construction ("Claimant's Opening Brief"), at 2; Respondent's Supplemental Brief, at 2. At oral argument the parties agreed that Arizona appellate courts have not determined whether class arbitration is appropriate when the arbitration agreement is silent. Therefore, I turn to Arizona principles of contract construction. These principles require that I attempt to ascertain and give effect to the intention of the parties at the time the contract was made in light of the language chosen by the parties and in view of prevailing circumstances. *See Taylor v. State Farm Mutual Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1139 (App. 1993); *Smith v. Melson*, 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983).

Claimant's argument on contract construction includes a review of the Clause Construction Awards available on the AAA Class Arbitration Docket. Claimant's Opening Brief, at 5-6. Claimant notes that in the majority of cases arbitrators have issued a clause construction award in favor of the claimant after finding the provision was silent on whether class arbitration was permitted. Claimant does not directly argue that these awards constitute precedent or make any effort to analyze the reasoning of the decisions. By presenting these results, however, he implicitly suggests that these awards should bear on my analysis. Yet, the

information about holdings by other arbitral panels does not focus on the key issues of the parties' intent and prevailing circumstances. Rather, it focuses on numerical results. As such, this approach is unpersuasive and I accord it no weight.

Similarly, I accord no weight to Claimant's argument that because AAA Rules contemplate class arbitration and the Arbitration clause incorporates AAA Rules, I should conclude that the parties reasonably expected and intended for class arbitration to be available. Claimant's Supplemental Brief Re Clause Construction ("Claimant's Supplemental Brief"), at 3-4. I accord this argument no weight because Rule 3 of the AAA Rules provides:

> 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.

As will be seen, I decide the question presented as a matter of contract interpretation in light of the factors identified in *Taylor* and Arizona public policy. Thus, it is unnecessary for me to address at this stage Claimant's arguments based on unconscionability.[5] *See* Claimant's Opening Brief, at 6; Claimant's Supplemental Brief, at 7-8.

B. Guiding Principles

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[5] "Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed." *Maxwell v. Fid. Fin. Sevs. Inc.*, 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995). Factors showing substantive unconscionability include "contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Id.* "The determination of unconscionability is to be made by the court as a matter of law." *Id.* at 87, 907 P.2d at 56. However, a court "cannot make its determination *without first making factual findings*." *Id.* (emphasis added).

In any event, the factual record is insufficiently developed to permit the required unconscionability analysis. *See, e.g., Kristian v.Comcast Corporation*, 446 F.3d 25, 58 (1st Cir. 2006) (plaintiffs introduced evidence from an attorney experienced in prosecuting the type of case at issue, a former judge, and an economist who outlined the nature and scope of the plaintiffs' required proof and estimated expert fees and other costs that plaintiffs would incur in prosecuting their claims as well as estimates of the range of individual recoveries). There is no such evidence before me.

My task is to discover the intention of the parties as revealed in the language they used. *Taylor*, 175 Ariz. at 154. In doing so, I must give effect, if possible, to all parts of the instrument and must construe the contract to give a reasonable meaning to all of its provisions rather than leave any of its provisions useless or inexplicable. If, after applying the foregoing standards, the meaning of the terms remains uncertain, then I must look to secondary rules of construction. *Polk v. Koerner*, 111 Ariz. 493, 495, 553 P.2d 660, 662 (1975).

An important secondary rule of construction is that, where an ambiguity appears in a written agreement, the writing is to be "strictly construed" against the party preparing it. *See Cummings v. Aviation Specialties Trade Corp.*, 120 Ariz. 536, 539, 587 P.2d 255, 258 (App. 1978). An ambiguity in a contract exists if its terms are susceptible to at least two reasonable alternative interpretations and its construction cannot be determined within the four corners of the instrument. *Associated Students of Univ. of Ariz. v. Ariz. Bd. of Regents*, 120 Ariz. 100, 104, 584 P.2d 564, 568, (App. 1978). Such close construction is also required where the contract is one of adhesion. *See Broemmer v. Abortion Services of Phoenix*, 173 Ariz. 148, 151, 840 P.2d 1013, 1016 (1992). Typically, a contract is one of adhesion where a party is offered a standardized contract for goods and services on a take-it-or-leave-it basis without affording the party a realistic opportunity to bargain and under circumstances where the goods or services cannot be obtained except by acquiescence. *Broemmer*, 173 Ariz. at 150, 840 P.2d at 1016. In performing this task of contract construction, I am not to "alter, revise, modify, extend, rewrite, or remake an agreement." *Goodman v. Newzona Investment Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1967).

Lastly, I must be mindful of the purpose of the clause in question and public policy

considerations. *State Farm Mut. Auto Ins. v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (1989). At least two such public policies are operative in these facts. First, Arizona recognizes the class mechanism as so valuable to the public interest generally to accord it liberal treatment, resolving doubts in favor of a class proceeding. *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98, 50 P.3d 844, 848 (App. 2003). This liberal treatment is based on the view that class actions serve to vindicate rights that would otherwise go unprosecuted and to educate individuals about their rights. *Id.* Some courts have found such a liberal construction appropriate based on the view that such actions promote the interests of litigant and judicial economy. *See Keating v. Southland Corp.*, 645 P.2d 1192, 1207 (Cal. 1982).

Second, Arizona has a strong policy favoring arbitration such that any doubts about the scope of arbitrable issues are to be resolved in favor of arbitration. Ariz. Rev. Stat. Ann. § 12-1501 (West 2007), *et seq.*; *City of Cottonwood v. James L. Fann Contracting, Inc.*, 179 Ariz. 185, 877 P.2d 284 (App. 1994); *Rocz v. Drexel Burnham Lambert, Inc.*, 154 Ariz. 462, 743 P.2d 971 (App. 1987).

C. Application

Applying the foregoing principles of construction, I begin with the words of the Arbitration clause at issue. The language "[a]ny and all disputes arising out of, under, in connection with, or relation to this Agreement, or the breach or any alleged breach thereof, shall be settled by arbitration..." is so broadly worded as to bring within its ambit all disputes about performance of the Agreements. This language encompasses not merely the disputes "arising out of" or "under" the Agreement, but also all that might arise "in connection with, or relation to" the Agreement. The clause at issue is certainly broad enough to include a claim brought in a

representative capacity and would, without more, permit a class arbitration. Indeed, the clause at issue matches the clause at issue in *Green Tree*, which the Supreme Court described as "sweeping," 539 U.S. at 453, and is broader than the clause at issue in *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 246, 119 P.2d 1044, 1049 (App. 2005).

My conclusion is reinforced by the precept of construction that, in construing contract language I should not "alter, revise, modify, extend, rewrite, or remake" the Agreement. *Goodman*, 101 Ariz. at 472, 421 P.2d at 320. The construction sought by Respondent would require that I violate this canon in that it would require me to insert an exception for class actions.

Although it is not necessary to strictly construe the Arbitration clause to reach the above conclusion, doing so would further buttress my reasoning and conclusion. Strict construction would be justified because Respondent drafted the clause and any ambiguity should be resolved against it. *See Cummings*, 120 Ariz. at 538, 587 P.2d at 258. It would also be justified because the Arbitration clause is part of a contract of adhesion in that it was part of a standardized contract offered with no meaningful opportunity to bargain for different terms or to otherwise obtain the services. *See Broemer*, 173 Ariz. at 151, 840 P.2d at 1016.

Finally, the Arizona public policies relating to the class mechanism and to arbitration weigh in favor of permitting class arbitration. *ESI Ergonomics*, 203 Ariz. at 98, 50 P.3d at 848; *City of Cottonwood*, 179 Ariz. at 189, 877 P.2d at 288.

CONCLUSION AND AWARD

Having considered the arguments and submissions of the Parties, and based on the foregoing, I find and conclude as follows:

1. The Arbitration clause is construed to permit this arbitration to proceed as a class.
2. Respondent's objections to processing this arbitration as a class are overruled and dismissed.
3. Pursuant to the Supplementary Rules for Class Arbitration, I retain jurisdiction, but these proceedings shall be stayed for 30 days to permit any Party the opportunity to move a court of competent jurisdiction to confirm or vacate this Clause Construction Award.
4. If each Party informs the AAA in writing during the period of this stay that they do not intend to seek judicial review of this Clause Construction Award, or once the requisite time period expires without any Party having informed the AAA that they have done so, the AAA shall promptly arrange a case management conference.

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.

Date: 6/22/07 Brendan M. Hare

Brendan M. Hare

I, Brendan M. Hare, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Clause Construction Award.

Date: 6/22/07 Brendan M. Hare

Brendan M. Hare