UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL A. KATZ, individually and on behalf of all others similarly situated, Plaintiff, vs. CELLCO PARTNERSHIP d/b/a/ VERIZON WIRELESS, Defendant.	:	No 12-cv-9193 (VB) (LMS)

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO PARTIALLY CONFIRM AND PARTIALLY VACATE ARBITRATION AWARD

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Plaintiff Michael A. Katz respectfully submits his reply brief in support of his motion for an Order (i) partially confirming and partially vacating the Arbitrator's October 2016 Decision (Dkt. No. 74-1), and vacating in full the Arbitrator's June 2017 Decision (Dkt. No. 74-2), and (ii) vacating those parts of the October 2016 Decision and the June 2017 Decision that constitute rulings of law, on the ground that Katz's involuntary consent to the standard of review imposed by Congress under FAA § 10(a)(4) violates Katz's constitutional right to judicial review with respect to questions of law required under the Due Process Clause of the Fifth Amendment.[1]

ARGUMENT

I. THE ARBITRATOR'S HOLDING THAT HE LACKED THE AUTHORITY TO GRANT GENERAL INJUNCTIVE RELIEF IN THE ARBITRATION, WHICH SHOULD BE CONFIRMED, PRECLUDES THE ARBITRABILITY OF THE MERITS OF KATZ'S ENTITLEMENT TO SUCH RELIEF UNDER GBL § 349

Katz's motion seeks to confirm the part of the Arbitrator's October 2016 Decision holding, *inter alia*, that : (i) "[t]he arbitrator has no authority to ignore the terms of the Verizon Wireless Customer Agreement with regard to the scope of any award and to grant general injunctive relief for the benefit of others than the individual Claimant party"; and (ii) the "Arbitrator will not award any form of injunctive relief for the benefit anyone [sic] who is not a party to this arbitration." October 2016 Decision, at 3. Verizon does *not* oppose Katz's motion to confirm this part of the Arbitrator's decision, and even asks the Court to confirm it. Verizon Br. 1 n.2.[2]

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[1] Capitalized terms used herein are as defined in Katz's September 27, 2017 opening brief (Dkt. No. 73), which is referred to herein as "Katz Br. __." Verizon's October 31, 2017 amended opposition brief (Dkt. No. 82) is referred to herein as "Verizon Br. __."

[2] Verizon states at Verizon Br. 1 n.2: "Verizon is willing to be bound by the Arbitrator's decision, and has no objection to confirming the decision in all respects. As a result, this Court should either confirm the decision in its entirety, or reject Katz's challenges to the arbitration decision and simply allow the decision to remain in effect." FAA § 6 and § 9, however, require a motion (or cross-motion) by Verizon—which it has declined to file for some reason—to confirm

Verizon does not address, let alone try to distinguish, the four decisions cited by Katz (Katz. Br. 16-17) holding that a comparable limit in an arbitration agreement on the authority of the arbitrator to issue general injunctive relief necessarily means that a claim like Katz's for general injunctive relief is not arbitrable. *See, e.g., AT&T Mobility LLC v. Gonnello,* 11 Civ. 5636, 2011 WL 4716617, at *4 (S.D.N.Y. Oct. 7, 2011) (Castel, J.). *Cf. Emilio v. Sprint Spectrum, L.P.,* 582 F. App'x 63, 63-64 (2d Cir. 2014) (arbitrator "did nothing more than construe the parties' contract [to decide] questions of arbitrability" in connection with her holding that class action preclusion clause prohibited her from presiding over class action arbitration). Instead, Verizon offers only cursory arguments in opposition to Katz's well-supported contention of "non-arbitrability."

First, Verizon argues that Katz did argue the merits of his entitlement to general injunctive relief to the Arbitrator, and that the Arbitration Agreement provides that all "disputes" must be arbitrated. But these "disputes" include a dispute regarding the arbitrability of Katz's claim for general injunctive relief—Katz's first claim asserted at ¶¶ 64-69 of his Amended Demand (Dkt. No. 82-2). As noted in Demand ¶ 68, AAA Consumer Rule R-14(a) (*see* Dkt. No. 74-17, at .pdf 7) expressly authorizes the Arbitrator to make such arbitrability determinations. And arbitrability is a severable "gateway" issue to be decided before merits-related issues. *See Rent-A-Center, Inc. v. Jackson,* 561 U.S. 63, 68-69, 70-71 (2010). Tellingly, neither the word "arbitrable" nor "arbitrability" appears anywhere in Verizon's brief—it simply avoids the issue.

Second, Verizon argues that this Court purportedly "concluded that the issue [of the merits of Katz's entitlement to general injunctive relief] 'should be decided by the arbitrator *in the first instance*, not me.'" Verizon Br. 9, *quoting* May 27, 2016 Transcript (Dkt. No. 63), at 18.

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the Arbitrator's decisions in their entirety. In any event, there is no dispute by the parties that the Arbitrator's holding regarding his lack of authority under the Arbitration Agreement to award general injunctive relief under GBL § 349 should be confirmed by the Court.

But *the issue* to be decided *by the Arbitrator* in the first instance—the *gateway issue*—was described by the Court at Transcript p. 12, lines 7-13, consistent with Katz's first claim for relief:

> Katz asks the arbitrator to determine preliminarily whether the injunctive relief language in the contract is enforceable as a limit on the arbitrator's ability to issue the general injunctive relief and if it is he argues that the injunction should be declared not arbitrable in which case he should, he argues, he should be able to bring that claim before the court instead.

Finally, Verizon argues that the Arbitration Agreement "precludes any form of general injunctive relief in any forum," and therefore "such relief is unavailable to Katz"—presumably including in Court even if the claim is not arbitrable. Verizon Br. 9 n.2. Verizon is making it up, because ¶ 3 of the Arbitration Agreement says no such thing, and prohibits *only the Arbitrator* from awarding general injunctive relief (Dkt. No. 82-1, Customer Agreement at p. 7 of 8):

> THE ARBITRATOR MAY AWARD MONEY OR INJUNCTIVE RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL CLAIM. (capitalization in original) (bold omitted).

Under the Arbitrator's own construction of Arbitration Agreement, he lacked the authority to award the general injunctive relief Katz seeks. Thus, the claim is not arbitrable, and the Arbitrator lacked the authority to decide the merits of that claim. *See also* Katz Br. 16-17.

II. THE ARBITRATOR'S RULINGS THAT EXCEEDED HIS POWERS OR MANIFESTLY DISREGARDED THE LAW MUST BE VACATED UNDER FAA § 10(a)(4)

A. The Arbitrator Exceeded His Authority And Manifestly Disregarded The Law In Ruling That Katz Was Not Entitled To Seek General Injunctive Relief Under GBL § 349

Argument I above establishes why the Arbitrator's ruling on the merits of Katz's entitlement to seek general injunctive relief under GBL § 349 exceeded his authority, an express ground for vacatur under FAA § 10(a)(4).

Regarding the merits, the Arbitrator's sole stated reason for his holding that Katz was not entitled as a matter of law to an award of general injunctive relief under GBL § 349 was that "[w]hile Section 349 of the GBL grants authority to the Attorney General of New York State to seek relief on behalf of all Verizon customers, there is no language in the statute granting the same power to individuals." October 2016 Decision at 2. In other words, a cursory semantic analysis without regard to any of the substantial legal authorities Katz directed the Arbitrator to establishing Katz's entitlement to pursue that relief. *See also* Katz Br. 17-19, and Katz Ex. 15 (Dkt. No. 74-15) (excerpts of Katz's Sept. 14, 2016 AAA brief with authorities).

Verizon contends that the Arbitrator's semantic analysis is sufficient to preclude a finding of manifest disregard, even in the absence of any legal authority under GBL § 349 supporting the Arbitrator's holding, and notwithstanding all of Katz's contrary legal authority. Verizon Br. 9-11.[3] Thus, the issue boils down to whether a wholly legally unsupported semantic analysis can override all of the New York authority supporting Katz.

In *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), the Supreme Court vacated the finding of the arbitrators that the arbitration agreement which was silent on the issue of class arbitration allowed class arbitration, when their conclusion was not based on any applicable FAA, federal maritime or state law, *id.* at 673, 677. The Arbitrator's decision here is comparable, "dispens[ing] his own brand of industrial justice." *Id.* at 671 (citation omitted).

Verizon does try to distinguish the legal authorities cited by Katz. But its attempt (Verizon Br. 11) to distinguish *Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248, 274

[3] Verizon relies in part on the decision of the arbitrator in *Schatz v. Cellco P'shp*, AAA Case No. 20-1300-1262 (Jan. 25, 2015), which was confirmed by Judge Furman in *Schatz v. Cellco P'shp*, No. 10-CV-5414, 2016 WL 1717212 (S.D.N.Y. Apr. 28, 2016). *See* Verizon Br. 10. However, Verizon's standard form arbitration agreement precludes using any arbitration award "in any other case," and on November 16, 2017 Katz filed a motion to strike Verizon's *Schatz* citations and evidence and/or preclude their admissibility. *See* Dkt. Nos. 83, 84. The Court should ignore *Schatz*, as its use is contractually prohibited.

(E.D.N.Y. 2012), which is directly on point and clearly supports Katz's entitlement to seek general injunctive relief, actually supports Katz. Verizon notes that *Barkley* has been "called into question" by Judge Rakoff in *Samms v. Abrams*, 198 F. Supp. 3d 311, 316 (S.D.N.Y. 2016). And *Samms*, in turn, references Judge Oetken's decision in *Koch v. Greenberg*, 14 F. Supp. 3d 247, 282-83 (S.D.N.Y. 2014), which also disagrees with *Barkley*'s *award of general injunctive relief.* 198 F. Supp. 3d at 316. But *neither Samms* nor *Koch* questions the entitlement of a private individual to *seek* general injunctive relief—they *confirm it*, but disagree with *Barkley* on whether awarding it requires the application of federal equitable principles and the four-factor standards set out by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). *Samm* and *Koch* directly legally contradict the Arbitrator's semantic analysis.

A finding of no "manifest disregard" under these facts would render its application meaningless. And for the record, the Arbitrator's ruling is *not* the exercise of the judicial power. Not even close. *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (Alito, J., concurring in part and in the judgment) ("No one believes that an arbitrator exercises '[t]he judicial Power of the United States,' Art. III, § 1, in an ordinary, run-of-the mill arbitration.").

B. The Arbitrator's Ruling Binding Katz To Verizon's Wholly Deficient Tender Manifestly Disregarded The Law

It is undisputed that Verizon's Tender (i) was "without prejudice," (ii) did not "admit liability with regard to any of the claims asserted," (iii) did not offer individual or general injunctive relief, (iv) did not offer a specific amount of fees but left open the issue subject to the parties' subsequent negotiation, and (v) was "rejected and refused" by Katz. *See* Dkt. No. 74-4.

Geismann v. ZocDoc, Inc., 850 F.3d 507 (2d Cir. 2017), is a precedential Second Circuit decision Katz cited to the Arbitrator (Dkt. No. 74-5), and which Katz submits is directly on point: it holds that a rejected offer of judgment, even one offering complete relief on a party's

individual claims, "is, regardless of its terms, a legal nullity." *Id.* at 509. And this is particularly true regarding an offer, like Verizon's, that doesn't include all relief sought, including injunctive relief. *Id.* at 514 ("[E]ven if that deposit had satisfied Geismann's demand for monetary relief, it alone does nothing to satisfy the demand for injunctive relief."). Similarly, applicable New York law set out in *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 66 N.Y.2d 321, 331-32 (1985)—a decision Verizon fails to address in its brief—holds that acceptance of a tender under protest "preclude[s] an accord and satisfaction or any other prejudice to the rights thus reserved." *A fortiori*, and assuming arguendo accord and satisfaction applies to a GBL § 349 claim as well as contract claim, there can be no accord and satisfaction from a tender rejected in its entirety.[4]

Verizon's principal authority cited in its brief is *Leyse v. Lifetime Entm't Servs., LLC*, 679 F. App'x 44 (2d Cir. 2017), a non-precedential Summary Order issued three weeks before *Geismann* and described by Verizon as "directly on point" (Verizon Br. 13-15 at 13)—which is utter nonsense. Even assuming arguendo *Leyse* can trump *Geismann*, the offer in *Leyse* was for "complete relief," *id.* at 45, 47-48—which Verizon's Tender indisputably was not. Verizon also cites to *Hepler v. Abercrombie & Fitch Co.*, 607 F. App'x 91, 92 (2d Cir. 2015), another non-precedential Summary Order which actually states (i) that "[i]f the offer tenders *less than complete* relief, the plaintiff is free to accept or not," (emphasis in original), and (ii) that the court should only enter judgment regardless of consent for an offer of complete relief. *Id.* So the relevant law of the Second Circuit is that a rejected incomplete offer cannot be binding. And the relevant New York law is that even acceptance of an offer of relief "under protest" is not an accord and satisfaction—let alone a complete rejection of the offer.

[4] The Customer Agreement also provides that New York law applies because Katz's area code is a New York area code, "914." *See* Dkt. No. 82-1 (Customer Agreement at p. 8 of 8); Dkt. No. 23-1 (Katz's "914" area code).

Thus, this issue boils down to the following: Are *Geismann* and *Horn* "well defined, explicit, and clearly applicable" law ignored by the arbitrator that is sufficient to find "manifest disregard," *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n.1 (2d Cir. 2011), and if not, is the "ambiguity" created by *Leyse* sufficient to preclude vacatur under § 10(a)(4)? Verizon says the ambiguity is enough (Verizon Br. 15). If it is, and Katz can be bound by an incomplete, rejected tender, then, with all due respect, arbitration under the FAA is "a travesty of a mockery of a sham." Allen, Woody, *Bananas* (1971).[5]

C. The Arbitrator's Fee Award Exceeded His Powers

Verizon's cursory defense of the Arbitrator's $500 attorney's fee award to Katz is that it is reasonable, and didn't require the submission of documentation (Verizon Br. 15). Katz's challenge, however, is that Verizon's Tender specifically provided for negotiation by the parties, and then submission to the Arbitrator if agreement could not be reached; thus the matter of the amount of fees was not submitted to the Arbitrator for decision (Katz Br. 20). Verizon doesn't dispute that this is what the Tender says regarding fees, indeed, it simply ignores the terms of the Tender.

The Arbitrator's fee award exceeded his powers and requires vacatur under § 10(a)(4). *See Jock*, 646 F.3d at 122 (arbitrator exceeds authority by considering issues beyond those submitted for his consideration).

[5] Because there is no "well defined, explicit, and clearly applicable" law to the contrary, Katz does not challenge on manifest disregard grounds the Arbitrator's legal ruling in his June 2017 Decision, at 3, that, because the Verizon account is in Katz's non-marital partner's name and not Katz's, Katz is not entitled to individual injunctive relief under GBL § 349 regarding Verizon's continuing wrongful imposition of the Administrative Charges—even though he is paying all of the charges and they are being imposed in part on his own phone. *See* Katz Br. 22-23. Verizon cited in the Arbitration, and also cites in its brief (Verizon Br. 10-11), to New York cases holding that "indirect or derivative injuries [sustained by another party] will not suffice." That Katz does not challenge the ruling does not mean he doesn't think it is completely wrong, and that most if not all judges would have ruled to the contrary. But right or wrong, Katz's "involuntary waiver" of his right to judicial review regarding this legal ruling violates his right to Due Process.

III. THE JUNE 2017 DECISION MUST BE VACATED IN ITS ENTIRETY UNDER FAA §§ 10(a)(3) AND 10(a)(2)

Katz refers the Court to his opening brief (Katz Br. 10-15, 20-22) for a complete discussion of the Arbitrator's refusal to allow even limited discovery or the submission of evidence regarding Verizon's Administrative Charge, and the totality of the Arbitrator's "evidently partial" conduct, supporting vacatur of the June 2017 Decision in its entirety under §§ 10(a)(3) and 10(a)(2).

In response to Katz's challenge under § 10(a)(3) based on the Arbitrator's refusal to hear pertinent evidence, Verizon argues, in essence, that the Arbitrator was entitled to preclude the discovery because Verizon's Tender "for the full amount of all potential damages made discovery on those damages unnecessary" (Verizon Br. 16). The problem with the argument is that the Arbitrator precluded the discovery *before* briefing and decision on whether the Tender was binding—and it is not, *see* Argument II(B) above. Verizon's purported rationale and the Arbitrator's other reason to preclude discovery—because Katz wanted it so he could use it in another arbitration (*where he could get it anyway*)—not only establish a violation of § 10(a)(3), but also provide support for a finding of evident partiality under § 10(a)(2).

As for § 10(a)(2) partiality, Verizon suggests (Verizon Br. 17-18) that Katz's challenge is based only on the exponential (9 times) increase in the amount of fees the Arbitrator had originally agreed to accept under the AAA rules (*see* Katz Br. 10-12, 15, 22). To the contrary, Katz's partiality challenge is based on all of the Arbitrator's words and conduct, including his prejudicial and unjustified refusal to allow discovery, his reflexive rejection of Katz's request to amend the pleadings, his prejudging of issues, as well as his exploitation of Verizon's deep pocket to collect fees totaling $13,962.50, notwithstanding his unqualified acceptance of $1500 total compensation in the Notice of Compensation Arrangements (Dkt. No. 74-8 at .pdf 6) and

the Notice of Appointment and General Arbitrator Oath (Dkt. No. 74-8 at .pdf 9). Katz respectfully submits that the Court should know partiality supporting vacatur when it sees it.

IV. THE INVOLUNTARY APPLICATION OF THE EXTREMELY RESTRICTED STANDARD OF JUDICIAL REVIEW IMPOSED BY CONGRESS UNDER FAA § 10(a)(4) REGARDING THE ARBITRATOR'S RULINGS OF LAW VIOLATES KATZ'S FIFTH AMENDMENT DUE PROCESS RIGHTS

A. The *Wellness* Standard Of Voluntary Consent, Including The Right To Refuse, Applies To Arbitration And This Case

Wellness sets out the following standard of consent for the waiver of the individual right to the Article III judicial power, 135 S. Ct. at 1949 (emphasis added):

> It bears emphasizing, however, that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* makes clear *that the key inquiry is whether "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before the non-Article III adjudicator*. [538 U.S. at 590]; see also *id.*, at 588, n.5, 123 S. Ct. 1696 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent").

Although *Roell* deals with the power of magistrate judges to adjudicate Article III claims on consent, and the holding of *Wellness* relates specifically to the issue whether the parties can consent to the bankruptcy court deciding certain claims otherwise subject to adjudication by an Article III court, *id.* at 1939, *Wellness* also includes *substantial* discussion of the long-standing use of arbitrators by the federal courts to decide parties' claims *on consent*. For example, the majority opinion includes the following extensive discussion of arbitration, 135 S. Ct. at 1942:

> Adjudication by consent is nothing new. Indeed, "[d]uring the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." Brubaker, The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications, 32 Bkrtcy. L. Letter No. 12, p. 6 (Dec. 2012); see, *e.g.*, *Thornton* v. *Carson*, 11 U.S. 596, 7 Cranch 596, 597, 3 L. Ed. 451 (1813) (affirming damages awards in two actions that "were referred, *by consent under a rule of Court to arbitrators*"); *Heckers* v. *Fowler*, 69 U.S. 123, 2 Wall. 123, 131, 17 L. Ed. 759 (1865) (observing that the " [p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law," and "is now universally regarded … as the proper foundation of judgment"); *Newcomb* v. *Wood*, 97

> U.S. 581, 583, 24 L. Ed. 1085 (1878) (*recognizing "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators* and refer a case pending before it"). (emphasis added)[6]

Justice Alito, in his concurrence in *Wellness*, also equated the entry of judgment by a bankruptcy judge and the issuance of a decision by an arbitrator, 135 S. Ct. at 1949:

> No one believes that an arbitrator exercises "[t]he judicial Power of the United States," Art. III, § 1, in an ordinary, run-of-the mill arbitration. And whatever differences there may be between an arbitrator's "decision" and a bankruptcy court's "judgment," those differences would seem to fall within the Court's previous rejection of "formalistic and unbending rules." *Schor, supra,* at 851, 106 S. Ct. 3245.

Indeed, Chief Justice Roberts, in his dissent, takes both the majority and Justice Alito to task for equating bankruptcy court "judgments" and an arbitrator's decision, 135 S. Ct. at 1958-59:

> The majority also points to 19th-century cases in which courts referred disputes to non-Article III referees, masters, or arbitrators. *Ante*, at 8. In those cases, however, it was the Article III court that ultimately entered final judgment. *E.g., Thornton* v. *Carson*, 11 U.S. 596, 7 Cranch 596, 600, 3 L. Ed. 451 (1813)[.] … [U]nder the Constitution, the "ultimate responsibility for deciding" the case must remain with the Article III court.
>
> The concurrence's comparison of bankruptcy judges to arbitrators is similarly inapt. *Ante*, at 1 (opinion of ALITO, J.). … As the concurrence acknowledges, only Article III judges—not arbitrators—may enter final judgments enforcing arbitration awards. *Ante*, at 1.

Finally, Justice Thomas, in his dissent, also discusses the linkage between voluntariness and consent in connection with the use of an arbitrator and its similarity to the waiver of the right to trial by jury, 135 S. Ct. at 1968:

> Party consent, in turn, may have the effect of lifting that "private rights" bar, much in the way that waiver lifts the bar imposed by the right to a jury trial. … [I]t is on this logic that the law has long encouraged and permitted private settlement of disputes, including through the action of an arbitrator not vested with the judicial power. See *ante*, at 1 (ALITO, J., concurring in part and concurring in judgment); T. Cooley, Constitutional Limitations 399 (1868). Perhaps for this reason, decisions discussing the relationship between private rights and the judicial power have emphasized the "*involuntary* divestiture" [191 L. Ed. 2d 950] of a private right. *Newland* v. *Marsh*, 19 Ill. 376, 382-383 (1857) (emphasis added [by Justice Thomas]).

[6] This Court's prior order compelling arbitration is comparable to the described references to arbitration "under a rule of court."

As the Supreme Court frequently has stated, "arbitration is a matter of consent, not coercion." *E.g., Stolt-Nielsen*, 559 U.S. at 681. It would defy logic to conclude that the standard for voluntary consent and waiver set out in *Wellness* does not apply to the arbitrations that *Wellness* repeatedly equates to bankruptcy court and magistrate judge proceedings. This standard of voluntary consent under the Constitution necessarily includes the right to refuse to waive the constitutional "requirement of judicial process" regarding questions of law required to satisfy Katz's Due Process rights under the Fifth Amendment. *See Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). And Verizon has already conceded in the prior proceedings in this matter "that the Customer Agreement contains an arbitration clause and that acceptance of the Customer Service Agreement is necessary to obtain equipment and services from Verizon Wireless" (Dkt. No. 31, ¶ 12)—i.e., that a customer does not have the right to refuse to waive the Fifth Amendment Due Process protections and still receive services and equipment from Verizon.[7]

B. Verizon's Arguments In Opposition To Katz's Due Process Claim Are Meritless

1. Verizon's Merits-Related Arguments in Opposition to Katz's "Involuntary Consent" Due Process Claim Should Be Rejected

Katz discusses at length in Argument IV(A) above why *Wellness* and its standard for "voluntariness" of consent should be read to apply to arbitration—because seven of the nine Justices make clear that voluntariness of consent applies to non-Article III arbitration as well as bankruptcy and magistrate judge adjudications. To conclude otherwise would require this Court

[7] To be clear, Katz's challenge based on his "involuntary consent" and waiver of his Due Process rights under the Arbitration Agreement in no way limits his right and ability to accept the Customer Agreement and its terms regarding the wireless services provided to Katz by Verizon. It is well established that as "a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract," including the terms of the services provided. *Rent-A-Center, Inc.*, 561 U.S. at 70-71 (citation omitted).

to impute total cognitive dissonance to these Justices. Verizon's attempt to limit the *Wellness* holding only to bankruptcy judges (Verizon Br. 23) should be rejected.

Furthermore, Verizon consistently misstates or mischaracterizes Katz's Fifth Amendment Due Process claim. Katz's challenge to the severe limitations on the extent of judicial review by the courts mandated by Congress under FAA § 10(a)(4) with respect to the questions of law decided by the Arbitrator is based only on Katz's "involuntary consent"—he otherwise concedes that "judicial process" can be "voluntarily waived." Katz Br. at 23-24. As opposed to the "private agreement" to arbitrate, it cannot be disputed that that this congressionally imposed limitation under § 10(a)(4) is exclusive and is *not* the result of or subject to modification by private agreement, *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583 (2008). Further, § 10(a)(4) has itself been extensively judicially analyzed by the federal courts in terms of the proper scope of its application (including whether and how "manifest disregard" applies after *Hall Street*)—and in the Second Circuit the result of this judicial analysis is the application of the "judicial gloss" of "manifest disregard." *See Schwartz v. Merrill Lynch & Co., Inc.*, 655 F.3d 444, 451 (2d Cir. 2011). *Cf. Stolt-Nielsen*, 559 U.S. at 672 n.3 ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street*[.]"). Contrary to Verizon's arguments (e.g. Verizon Br. 22), these acts of Congress and the federal courts are not the result a private agreement, and clearly satisfy any requirement for "state action" that might apply.

Further, these statutorily imposed limitations on judicial review by Congress clearly implicate deprivations of Due Process protections. *See, e.g., Crowell*, 285 U.S. at 46. *See also Honda Motor Co. v. Oberg*, 512 U.S. 415, 417 (1994) (statutory prohibition of judicial review of punitive damage jury award). Particularly when that imposition is *involuntary*, as Katz contends it is here, under *Wellness*. *Cf. Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-

64 (9th Cir. 1991) (focusing on voluntary agreement to arbitrate to reject due process challenge); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001) (voluntary agreement to limited judicial review does not violate Due Process, citing *Todd*).[8] Verizon's contention that Due Process requires "nothing more" than "reasonable notice and an opportunity to be heard" (Verizon Br. 22) ignores the fact that Due Process requires "voluntariness" to be satisfied, and Verizon's contention cannot be reconciled with the extensive authority regarding the scope of judicial review in connection with Due Process. The cases cited by Verizon either don't address the limited scope of judicial review under § 10(a)(4) or voluntariness, or involve an arbitration agreement that *was voluntary. Cf. InterChem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 359 n.16 (S.D.N.Y. 2005) ("The arbitration in this case was arranged by a voluntary contractual agreement between Oceana and InterChem[.]").

2. Katz's Due Process Claim Is Not Precluded by Collateral Estoppel or Law of the Case, and Has Not Been Waived by Katz Not Raising It in the Prior Proceedings

Verizon's arguments that Katz's Fifth Amendment Due Process claim is precluded by collateral estoppel or the law of the case doctrine (Verizon Br. 19-21) are completely meritless. Given that the terms "due process" and "Fifth Amendment" appear nowhere in Katz's complaint (Dkt. No. 6), and that the issue was neither raised nor addressed by the Court's prior decision and its affirmance by the Second Circuit, *see Katz v. Cellco P'shp*, 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013) (VB), *aff'd in part and vacated and remanded in part*, 794 F.3d 341 (2d Cir. 2015), it is impossible for the claim to satisfy the criteria for the application of collateral estoppel

[8] That *Todd, Bowen* and *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995), "do not condition voluntariness on the right to refuse" (Verizon Br. 23) is of little moment. *Wellness*, a Supreme Court decision issued decades or more after those decisions, obviously is higher authority governing the applicable standard. And, contrary to Verizon's contention (*id.*), the *Wellness* standard is constitutional and not governed by the FAA, and precludes the need for Katz to establish that the Arbitration Agreement "was unfair, oppressive or unconscionable."

(Verizon Br. 19)—including, *inter alia*, that it be "identical" to the Article III separation of powers claims that were the subject of the prior proceedings, and that it was "litigated and actually decided." For the same reason, the law of the case doctrine is inapplicable.

Nor could the applicable standard for consent and waiver under the Fifth Amendment Due Process clause based on the Supreme Court's decision in *Wellness* have been litigated and decided—*Wellness* wasn't issued until May 2015, eighteen months after the Court's December 2013 decision, and neither *Wellness* nor this Court's holding regarding voluntariness was addressed in the Second Circuit's decision. As previously noted by Katz (Katz Br. 24), *none* of the "knowing and voluntary" cases cited in the Court's 2013 decision, 2013 WL 6621022, at *13, mentions "due process," let alone discusses the requirement for "voluntariness" in connection with the waiver of Due Process under the Fifth Amendment. And to the best of Katz's knowledge, the applicability of the standard of consent and waiver under *Wellness* has never been addressed by any court, either in connection with FAA arbitration or Due Process under the Fifth Amendment—the issue appears to be one of first impression nationwide.

Finally, Katz has not waived the claim for multiple reasons. As compared to Katz's Article III claim, which attached *ex ante* as soon as the arbitration was commenced, the issue of whether his involuntary consent to the limited standard of judicial review imposed by Congress under § 10(a)(4) violates Due Process was neither ripe nor concrete *until after the arbitration was completed and decided by the Arbitrator*, because § 10(a)(4) was not applicable until after Katz received the unfavorable legal rulings requiring a motion to vacate. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984) ("Only after … an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme [including under Due Process] become ripe."); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("concrete"

injury for Article III standing "must be '*de facto*'; that is, it must actually exist"). Indeed, if Verizon rather than Katz had lost and sought to vacate the legal rulings in the award, then it would have been *Verizon's* Due Process rights that could be claimed by Verizon to have been violated.

CONCLUSION

For all of the reasons stated herein and in Katz's opening brief, Katz's motion under FAA §§ 9 & 10, including under the Due Process Clause of the Fifth Amendment, should be granted in its entirety by the Court.

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