18-1436

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL A. KATZ,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

vs.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT MICHAEL A. KATZ

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION[1]

The District Court has diversity subject-matter jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §1332(d), because, when the action was commenced: (i) the proposed plaintiff classes exceeded 100 members as required under §1332(d)(5)(B), (ii) diversity of citizenship exists under §1332(d)(2)(A), because Katz is a resident and citizen of New York, and Verizon, a partnership, is a citizen of Delaware and New Jersey under §1332(d)(10); and (iii) the amount in controversy required under §§1332(d)(2) & (d)(6) exceeded $5,000,000. *See* Katz's Amended Class Action Complaint (Dkt. #6) ("Complaint"), ¶8 (CAFA jurisdictional allegations). *See also Katz v. Cellco P'ship d/b/a Verizon Wireless*, 2013 WL 6621022, at *1 (S.D.N.Y. Dec. 12, 2013) ("The Court has subject matter jurisdiction pursuant to [CAFA]").[2]

This Court's appellate jurisdiction arises under (i) §16(a)(1)(D) of the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* ("FAA"), because the District Court's Opinion and Order entered April 17, 2018 from which Katz appeals (Dkt. #88

[1] Plaintiff-Appellant Michael A. Katz is referred to as "Katz," and Defendant-Appellee Cellco Partnership d/b/a Verizon Wireless is referred to as "Verizon." References to pages of the Joint Appendix are denoted "[A_]." The District Court Docket Entries [A1-A11] are denoted "Dkt. #_."

[2] As further discussed below, this is the second time this case has been appealed to this Court. *See Katz v. Cellco P'ship, id., aff'd in part, vacated and remanded in part*, 794 F.3d 341 (2d Cir. 2015) ("*Katz* I").

[A107-A123]) ("Opinion") is an order "confirming or denying confirmation of an award"; and (ii) FAA §16(a)(3), because the Opinion is "a final decision with respect to an arbitration that is subject to" the FAA.

Katz's Notice of Appeal, filed May 11, 2018 (Dkt. #90 [A125-A126]), is timely under Fed. R. App. P. 4(a)(1)(A), because it was filed within 30 days after the April 17, 2018 entry of the Opinion (Dkt. #88) and within 30 days of the April 18, 2018 entry of the judgment entered thereon (Dkt. #89 [A124]) ("Judgment").

STATEMENT OF ISSUE ON APPEAL

Whether Katz's involuntary consent—i.e., consent without the right to refuse—to the standard of review imposed by Congress under §10(a)(4) of the FAA regarding the arbitrator's rulings of law violates Katz's constitutional right to judicial review of those rulings required under the Due Process Clause of the Fifth Amendment of the United States Constitution?[3]

STATEMENT OF THE CASE

Katz appeals from the portions of the April 17, 2018 Opinion of the Honorable Vincent Briccetti of the United States District Court for the Southern District of New York [A107-A123], and the corresponding portions of the April 18, 2018 Judgment [A124]:

[3] The U.S. Constitution, Amendment V, Cl. 4, requires that "[n]o person shall … be deprived of life, liberty, or property, without due process of law[.]"

(i) denying Katz's September 27, 2017 motion (Dkt. #72 [A44-45]) to vacate those parts of the arbitrator's October 28, 2016 Decision on Motion for Summary Disposition (Dkt. #74-1 [A47-A49]) ("October 2016 Decision") and his June 29, 2017 Decision on Motion for Judgment on the Pleadings (Dkt. #74-2 [A51-A54]) ("June 2017 Decision"), that constitute rulings of law, insofar as Katz's motion was based on the ground that his involuntary consent—i.e., consent without the right to refuse—to the standard of review imposed by Congress under FAA §10(a)(4) violates Katz's constitutional right to judicial review of those rulings required under the Due Process Clause of the Fifth Amendment of the United States Constitution; and

(ii) confirming those parts of the arbitrator's October 2016 and June 2017 Decisions that constitute rulings of law, insofar as the District Court's confirmation was based on its denial of Katz's motion to vacate under the Due Process Clause of the Fifth Amendment.

The District Court's Opinion is currently reported at, *inter alia*, 2018 WL 1891145 (S.D.N.Y. Apr. 17, 2018), although references herein are to the original Opinion filed in the District Court [A107-A123].

A. The Relationship Between Voluntary Consent To Arbitration And Due Process Under The Fifth Amendment

"[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*

S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010), *quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). *See also, e.g., Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 120 (2d Cir. 2011) (quoting *Volt*).

In *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015), the Supreme Court confirmed the fundamental standard for consent to the waiver of the personal constitutional right to adjudication by an Article III court:

> It bears emphasizing, however, that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* [*v. Withrow*, 538 U.S. 580 (2003)] 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. *Ibid.*; 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*"). (emphasis added)

The straightforward combination of these two fundamental precepts from *Stolt/Volt* and *Wellness* leads to the following governing principle on which Katz's appeal is based: "*The right to refuse is a prerequisite to any inference of "voluntary consent" to arbitration under the FAA.*" [4]

The *Roell* decision quoted above in *Wellness* deals with the power of magistrate judges to adjudicate Article III claims on consent. *See Wellness*, 135 S.

[4] In the prior proceedings in this matter, Verizon admitted "that the Customer Agreement contains [the Arbitration Agreement] and that acceptance of the Customer Service Agreement is necessary to obtain equipment and services from [Verizon]" (Dkt. #38, ¶12 [A39])—i.e., that a customer does not have the right to refuse to arbitrate and still receive equipment and services from Verizon.

Ct. at 1948. 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. However, *Wellness* includes *substantial* discussion of arbitration that compellingly supports the conclusion that *Wellness*'s prescribed standard for voluntary consent applies in the arbitration context as well. First, the majority opinion includes the following substantial discussion of the long-standing use of arbitrators by the federal courts to decide parties' claims *on consent*, 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[] (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[] (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 [] (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)[5]

[5] The District Court's order compelling arbitration (Dkt. #39) that was affirmed by this Court in *Katz* I is comparable to the described references to arbitration "under a rule of court."

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[.]

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[] (1813)[.] … [U]nder the Constitution, the "ultimate responsibility for deciding" the case must remain with the Article III court. (citation omitted)

> 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. (emphasis added)

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]).

"[T]he constitutional requirement of due process is a requirement of judicial process." *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). Importantly, in *Crowell,* the Supreme Court held that due process is not violated when rulings on questions of law by non-Article III adjudicators are reviewable by an Article III court. *Id.* at 46. And while "Article III protects liberty …not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges … [including serving] without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries," *Stern v. Marshall,* 131 S. Ct. 2594, 2609 (2011), the Due Process Clause protects liberty and property by ensuring some recourse to the law for the final resolution of legal disputes. *Cf. Crowell,* 285 U.S. at 46. [6]

[6] In addition to Katz's liberty interest at issue in his appeal, his claims for damages are "choses in action" which constitute constitutionally protected "property interests" under the Fifth Amendment. *See, e.g., Richards v. Jefferson Cnty., Ala.,* 517 U.S. 793, 804 (1996). A private right property interest can similarly be subject to involuntary divestiture in the context of arbitration, as Justice Thomas notes in his dissent in *Wellness* quoted above, 135 S. Ct. at 1968.

There is no genuine dispute that "the arbitration system is an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law." *Moseley, Hallgarten, Estabrook, & Weeden, Inc. v. Ellis*, 849 F.2d 264, 268 (7th Cir.1988), *quoting Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986). And the leading decisions of three circuit courts addressing the issue whether arbitration violates due process all rely, in whole or in significant part, on the "voluntariness" of the agreement to arbitrate to reject the asserted Due Process Fifth Amendment challenges. *See 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); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995) (same, citing *Todd*); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940 (10th Cir. 2001) (same, citing *Todd*). Furthermore, in the non-arbitration context, in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), the Supreme Court discussed the considerations relevant to determination of a private contractual waiver of due process rights, concluding in that case that the contractual waiver of due process rights was "voluntarily, intelligently and knowingly" made because, among other reasons, and particularly apt here, "[t]here was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit." *Id.* at 186, *see also id.* at 186-87.

The importance of *Wellness*—and its unequivocal requirement of "the right to refuse" as a necessary component of voluntary consent to the waiver of the Article III constitutional right—cannot be overstated. The fact that consent cannot be voluntary unless the consenting party has the right to refuse consent is so obvious that one must ask how it was never made as clear before as it now has been made in *Wellness*. Yet, to the best of Katz's knowledge, other than *Roell*, *Wellness* is the only Supreme Court decision to definitively link "the right to refuse" with "knowing and voluntary" consent to the waiver of a constitutional right in the non-criminal, civil litigation context. No Second Circuit decision of which Katz is aware makes a comparable linkage between "the right to refuse" and "knowing and voluntary" consent in the civil litigation context. But only by reading out every Justice's discussion of arbitration in *Wellness* that expressly recognizes the nation's long history of "arbitration by consent" could this Court divorce the fundamental precept of arbitration—that "arbitration is a matter of consent, not coercion"—from the requirement that such "consent" must include "the right to refuse." And this includes in connection with Congress's mandate imposed under FAA §10(a)(4) for the application by the federal courts of the highly restricted standard for judicial review of arbitration awards that falls woefully short of the "judicial process" necessary to satisfy Due Process.

To the best of Katz's knowledge, the FAA Due Process issue presented by this case based on the *Wellness* standard for voluntary consent is an issue of first impression in the federal courts.

B. Prior Proceedings In *Katz* I

Katz originally commenced his action challenging the constitutionality, under Article III separation of powers principles, of the application of the FAA to his state law claims (Dkt. #6, Complaint). On March 1, 2013, Katz filed a motion for summary judgment on his claim for declaratory judgment on this constitutional issue (Dkt. #17), and Verizon cross-moved to compel arbitration and stay the litigation (Dkt. #21 [A12-A13]).

The District Court denied Katz's motion on his Article III claim and granted Verizon's motion to compel, but dismissed the action—rather than stay it as requested by Verizon. *See Katz* I, 2013 WL 6621022, at *15. *See also* Opinion at 2 [A108].

Cross-appeals to the Second Circuit were filed by the parties, Katz on the denial of his motion, and Verizon on the denial of its request to stay the litigation rather than dismiss it. On July 28, 2015, the Second Circuit issued its opinion affirming the District Court's denial of Katz's motion and its grant of Verizon's motion to compel, but vacated the District Court in part on its determination to dismiss rather than stay the action, and remanded the case for the entry of a stay

pending the arbitration of Katz's individual claims. *Katz* I, 794 F.3d 341. *See also* Opinion at 2-3.

C. The Arbitration And The Arbitrator's October 2016 And June 2017 Decisions

1. Verizon Initially Unsuccessfully Attempts to Derail the Arbitration after Successfully Compelling It

As noted by the District Court (Opinion at 3 [A109]), on May 9, 2016, Katz filed an Amended Demand for Arbitration before the American Arbitration Association ("AAA") (Dkt. #74-3 [A56-A84]) ("Demand").

Katz's Demand sought: (i) a declaration either by the AAA in the first instance, or alternatively by the arbitrator, regarding the enforceability of §3 of the arbitration agreement limiting the injunctive relief the arbitrator could award solely to individual injunctive relief (Demand ¶32 [A66], ¶¶64-69 [A78-A80]);[7] (ii) damages for breach of contract and for consumer fraud under New York General Business Law ("GBL") §349 in connection with Verizon's imposition of a monthly "administrative charge" that Katz alleged was improperly being used to collect non-governmental related costs (Demand, ¶¶70-80 [A80-A81]); and (iii) individual

[7] Section 3 of the arbitration agreement (Dkt. #23-2 [A24-A31 at A30]) provides in relevant part:

> 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).

and general injunctive relief under GBL §349 to enjoin the improper imposition of that administrative charge (Demand, ¶¶81-83 [A82]).

The same day that Katz filed his Demand, Verizon moved in the District Court to preclude Katz from seeking general injunctive relief under GBL §349 and to limit the relief he was entitled to pursue solely to individual injunctive relief (Dkt. #50). The District Court denied Verizon's motion and directed the parties back to arbitration on May 27, 2016. *See* Dkt. #62 (Order denying Verizon's motion), Dkt. #63 (Transcript of May 27, 2016 telephone conference where the District Court ruled and denied Verizon's motion). *See also* Opinion at 3[A109].[8]

[8] In other words, in *Katz* I, Verizon successfully moved in the District Court to compel Katz to individually arbitrate his claims, and successfully obtained an affirmance of that decision from this Court—but when Katz did proceed with the arbitration, Verizon went back to the District Court to try to prevent Katz from arbitrating his individual claim for general injunctive relief under GBL §349. *And Verizon did substantially the same thing several years earlier in another case*—except it went to state court rather than the District Court after Judge Holwell granted its motion to compel arbitration—specifically including arbitration of the same issue regarding the right to seek general injunctive relief under GBL §349. *See Schatz v. Cellco P'Ship d/b/a Verizon Wireless*, 842 F. Supp. 2d 594, 596 (S.D.N.Y. 2013). Judge Holwell resigned from the bench after issuing *Schatz*, and so it was Judge Furman who granted Schatz's motion directing Verizon back to the arbitration and requiring it to dismiss the state court action. *See* S.D.N.Y. No. 10-cv-5414, Dkt. #57 (June 4, 2014 Judgment), Dkt. #58 (Transcript of May 30, 2014 argument and Judge Furman's oral decision). As the District Court in this case noted during argument on Verizon's May 9, 2016 motion, Verizon failed to advise the Court of Judge Holwell's decision in *Schatz* that directly undermined its motion. *See* Dkt. #63, May 27, 2016 Tr. at 8:21-9:22.

2. The Arbitrator's Decisions

During the arbitration, the arbitrator issued two decisions that include the rulings of law that are the subject of Katz's appeal.

a. The October 2016 Decision

The first decision is the arbitrator's October 28 2016 Decision on Motion for Summary Disposition ("October 2016 Decision") (Dkt. #74-1 [A47-A49]).

In the October 2016 Decision, the arbitrator first upheld the enforceability of §3 of the parties' arbitration agreement that precluded the arbitrator from awarding "any form of injunctive relief for the benefit [of] anyone who is not a party to the arbitration." October 2016 Decision at 3 [A49]; *see also* Note 7, *supra*. This was a ruling construing the language of the arbitration agreement and not a ruling of law. *Cf. Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) ("an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits") (quotations and citations omitted).[9]

[9] Consistent with his Demand (¶¶ 64-69 [A78-A80]), on May 9, 2016, Katz requested an initial ruling from the AAA whether the limitation in §3 of the Arbitration Agreement (*see* Note 7) complied with the due process standards of the AAA Due Process Protocol and Consumer Rules, which require that "[t]he arbitrator should be empowered to grant whatever relief would be available in court under law or in equity." Dkt #74-6 at .pdf 4-6. The AAA delphically rejected Katz's request by advising the parties on May 14, 216 that "[t]he AAA has determined the Consumer Rules apply and will proceed under the before-said rules[.]" Dkt. #74-7 at .pdf 2. Thus, the issue of the enforceability of the §3 limitation fell to the arbitrator for decision.

Second, the arbitrator ruled as a matter of law that Katz was precluded from seeking "general injunctive relief" under GBL §349 on behalf of other Verizon customers because "[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 [A48]; Opinion at 3 [A109].

b. The June 2017 Decision

The second decision is the arbitrator's June 29, 2017 Decision on Motion for Judgment on the Pleadings ("June 2017 Decision") (Dkt. #74-2 [A51-A54]).

First, with respect to Katz's claim for individual injunctive relief under GBL §349 regarding the continued imposition of the administrative charges on the household account which was formerly in his name but now in the name of his non-marital partner, and for which he paid all charges under his agreement with his non-marital partner including for his own wireless phone, the arbitrator ruled as a matter of law that Katz was not entitled to individual injunctive relief under GBL §349 because Katz "no longer is the owner of the account and … is not billed by Verizon," and Katz "is not a customer of Verizon and … has no obligation to pay the Verizon bill of his non-marital partner and therefore lacks standing to seek individual injunctive relief under GBL Sec. 349." June 2017 Decision at 3 [A53];

Opinion at 4 [A110]. *See* also Dkt. #29-1 (Verizon bill in name of non-marital partner Rita Lenda identifying three of Katz's phones).

Second, the arbitrator ruled as a matter of law that Verizon "shall pay [Katz] the sum of $1,500.00, without interest," based on a December 13, 2016 tender by Verizon to Katz of a check for $1500 "without prejudice" and without "admit[ting] liability with regard to any of the claims asserted" by Katz in the arbitration (s*ee* Dkt. #74-4 [A86-A88]) ("Tender")—even though it was undisputed that Katz had "rejected and refused" the Tender, and that the Tender was "incomplete relief since it does not contain individual injunctive relief and an award of attorney fees to [Katz]." June 2017 Decision, at 3 [A53]; Tender [A86-A88]; Opinion at 3, 4 [A109-A110].

Third, having directed Verizon to pay $1500 to Katz, the arbitrator denied Katz's request for an accounting—which was sought by Katz "to determine the split of the administrative charge between government and non-government portion of the charge." June 2017 Decision at 2 [A52]; *see also* Opinion at 4 [A110].

Fourth, the arbitrator awarded Katz attorney's fees in the amount of $500 (June 2017 Decision at 3-4 [A53-54])—even though the Tender stated that the parties would first attempt to negotiate attorney's fees based on documentation

provided by Katz to Verizon, and failing that, the matter would be put to the arbitrator. *See* Tender, at 2 [A87]; Opinion at 4 [A110].

Thus, the arbitrator's Decisions include three rulings of law that are the subject of Katz's appeal under the Due Process Clause: (i) the ruling of law in the October 2016 Decision that GBL §349 does not allow a consumer like Katz to seek general injunctive relief on behalf of other customers subjected to the same allegedly deceptive practices; (ii) the ruling of law in the June 2017 Decision that Katz was not entitled to pursue a claim under GBL §349 for individual injunctive relief because he purportedly now lacked standing to seek such relief as a "non-owner" and "non-customer"; and (iii) the ruling of law in the June 2017 Decision that Katz could be bound by Verizon's Tender, even though he had rejected it, it was made "without prejudice" or any admission of liability, and it provided only incomplete relief.

D. The District Court's Confirmation Of The Arbitrator's Rulings Of Law And Denial Of Katz's Motion To Vacate Those Rulings On Grounds Other Than The Basis For Katz's Appeal

Katz's motion to vacate asserted a number of different grounds, all rejected by the District Court.[10] Before addressing the only ground that is the subject of Katz's appeal (based on involuntary consent under the Due Process Clause of the

[10] Verizon, for some reason, did not file a cross-motion to confirm the Decisions, although the District Court treated Verizon's request on brief to confirm as a motion to confirm. Opinion at 5-6 [A111-A112]. Verizon has not filed a cross-appeal regarding that holding.

Fifth Amendment), the following describes the various grounds rejected by the District Court that are *not* the basis for his appeal.

1. The Grounds under FAA §10(a)(2) and §10(a)(3) Rejected by the District Court That Are Not the Basis for Katz's Appeal

Although not grounds for Katz's appeal, Katz's motion sought in part to vacate the June 2017 Decision in its entirely under FAA §10(a)(a)(2) and §10(a)(3).[11]

Specifically, Katz claimed that the arbitrator violated FAA §10(a)(3), *inter alia*, by refusing to allow Katz to obtain evidence from Verizon necessary to establish damages under his breach of contract and GBL §349 claims—among other reasons because the arbitrator "knew" that Katz wanted the evidence so he could "use it in another case against Verizon." Opinion at 10-11 [A116-A117]. Forcing the Tender on Katz obviated Katz's entitlement to the evidence and his right to establish his damages. *Id.* Based on this conduct and other conduct detailed by Katz in his motion papers (Dkt. #73 at 10-15), Katz asserted that the arbitrator's conduct in its totality supported the complete vacatur of the June 2017 Decision, either for the arbitrator's grossly prejudicial conduct under FAA §10(a)(3), or his

[11] FAA §10(a)(2) allows a district court to vacate an award "where there was evident partiality …in the arbitrators[.]" FAA §10(a)(3) allows a district court to vacate an award, *inter alia*, "where the arbitrators were guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced[.]"

"evident partiality" under §10(a)(2), or both. The District Court rejected both grounds.

Regarding Katz's claim under FAA §10(a)(3) regarding the prejudicial refusal by the arbitrator to allow Katz to take the requested discovery, the District Court held that because the discovery Katz sought "was collateral to the [legal] issues on which the arbitrator resolved the case—namely, Verizon's tender offer and Katz's lack of standing … the arbitrator's decision not to allow discovery 'fits comfortably within his broad discretion to admit or exclude evidence and raises no questions of fundamental fairness.'" Opinion at 10-11 [A116-A117] (citation omitted).

Regarding Katz's claim of evident partiality under FAA §10(a)(2), the Court rejected Katz's arguments based, *inter alia,* on the arbitrator's comments during a telephonic conference described above in which the arbitrator pejoratively misstated Katz's reason for wanting the discovery requested, and the fact that the arbitrator ultimately requested and was paid almost $14,000 in fees after initially committing to arbitrate the case for $1500. Katz initially objected to the $1500 as being wholly insufficient to properly arbitrate the case, but Verizon argued it was adequate (Dkt. #74-9 at .pdf. pp. 2-4), and the AAA determined the $1500 was

appropriate (Dkt. #74-10).[12] The District Court held that such conduct was insufficient under Second Circuit precedent to support the existence of evident partiality or fundamental unfairness. Opinion at 11, 12-13 [A117, A118-A119].

2. The "Exceeded His Authority" Grounds under FAA §10(a)(4) Rejected by the District Court that Are Not the Basis for Katz's Appeal

Although not grounds for Katz's appeal, Katz also based his motion to vacate in part on his assertion that the arbitrator exceeded his authority in certain respects under FAA §10(a)(4).

First, regarding the October 2016 Decision, Katz actually sought to confirm the part of the arbitrator's decision upholding the enforceability of §3 of the arbitration agreement precluding the arbitrator from awarding "injunctive relief on behalf of anyone not a party to the arbitration" *See* Katz Notice of Motion (Dkt. #72 [A44]; October 2016 Decision at 3 [A49]. *See also* Note 7, *supra*. However, as Katz argued to the District Court, a ruling that §3 was enforceable and that the arbitrator could not issue such relief under §349 rendered "not arbitrable," and

[12] When the arbitrator was appointed, he three times confirmed his agreement to arbitrate the case for a flat $1500 fee (Dkt. #74-8, at pp. 4, 6 & 9 of 11), but ended up requesting and being paid almost $14,000 of compensation by Verizon. *See* June 2017 Decision at 4 [A54]. By comparison, the Arbitrator in *Schatz* abided by his commitment to the $1500 limit despite issuing far more extensive and reasoned decisions. *See* S.D.N.Y. No. 10-cv-5414, Dkt. #62-3 (Jan. 25, 2015 Decision on Motion for Partial Summary Disposition); Dkt. #62-4 (July 8, 2015 Award of Arbitrator); Dkt. #62-5 (July 24, 2015 Award Modification confirming Verizon's liability for arbitrator's $1500 total compensation).

precluded the arbitrator from ruling on, the issue whether Katz was entitled to seek "general injunctive relief" under GBL §349 as a matter of law—an "arbitrability" ruling Katz sought from the outset in his Demand (Dkt. #74-3 at ¶69 [A79-A80]; *see also* Dkt. #73 at 16-17).

The District Court rejected Katz's §10(a)(4) "exceeded authority" argument. Opinion at 6-7 [A112-A113]. Specifically, the District Court held that because Katz had briefed that issue regarding the availability of "general injunctive relief" (only in the alternative, a fact overlooked by the District Court), Katz therefore "conceded" that the arbitrator had the authority to rule on the issue and had not exceeded that authority. *Id.*

Additionally, Katz sought to vacate that portion of the June 2017 Decision awarding him $500 of attorney's fees on the ground that the arbitrator exceeded his authority under FAA §10(a)(4) because: (i) the terms of the Tender relegated the amount of those fees to preliminary negotiations between the parties with arbitrator involvement only if the parties failed to reach an agreement (Dkt. #74-4 at 2 [A87]); and (ii) Verizon had not asked the arbitrator to award those fees, only declare the Tender enforceable under its terms (Dkt. #74-16). The District Court rejected Katz's arguments on this issue as well, holding that because Katz had rejected the offer (even though the arbitrator bound Katz to it), "the issue of attorney's fees was properly before the arbitrator." Opinion at 9 [A115].

3. The Application of the "Manifest Disregard" Standard under FAA §10(4) to the Arbitrator's Three Rulings of Law That Is Not the Basis for Katz's Appeal

As noted in Section C(2)(a) & C(2)(b) above, the arbitrator's decisions included three rulings of law that are the subject of Katz's appeal under the Due Process Clause of the Fifth Amendment: (i) the ruling in the October 2016 Decision that GBL §349 does not allow a consumer like Katz to seek general injunctive relief on behalf of other customers being subjected to the same allegedly deceptive practices [A48]; (ii) the ruling in the June 2017 Decision that Katz was not entitled to pursue a claim under GBL §349 for individual injunctive relief because he purportedly lacked standing to seek such relief [A52-A53]; and (iii) the ruling in the June 2017 Decision that Katz could be bound by Verizon's Tender, even though he had rejected it, the Tender was made "without prejudice" or any admission of liability, and it provided only incomplete relief [A53].

To decide Katz's motion to vacate, the District Court articulated several different components of the standards necessary to establish "manifest disregard" under applicable Second Circuit law (Opinion at 8 [A114]):

> "To vacate an award on the basis of a manifest disregard of the law, the court must find 'something beyond and different from mere error in the law or failure on the part of the arbitrators to understand or apply the law.'" *Jock v. Sterling Jewelers Inc.*, 646 F.3d at 121 n.1 (quoting *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002)). "The two part showing requires the court to consider, first, 'whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable,' and, second, whether the arbitrator knew about 'the

> existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.'" *Id.* (quoting *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d at 209). A party must "clearly demonstrate[] 'that the panel intentionally defied the law.'" *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) (citation omitted). The Court will uphold an award when the arbitrator does not explain the reason for his decision if the Court can discern any valid ground for it. *See id.*

The District Court further elaborated on the standards (Opinion at 10 [A116]):

> An arbitrator does not intentionally defy the law, and thereby manifestly disregard the law, when a party fails to identify 'authority clearly on point that expressly rejects' the possible rationales for the arbitrator's decision." *See GMAC Real Estate, LLC v. Fialkiewicz*, 506 F. App'x 91, 93 (2d Cir. 2012) (summary order).

a. No "Manifest Disregard" Regarding Katz's Right to Seek "General Injunctive Relief" under GBL §349

In the arbitration, Katz directed the arbitrator to two legal decisions strongly supporting Katz's right to pursue general injunctive relief under GBL §349 (Dkt. #74-15 [A102-A103]): (i) *Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248 (E.D.N.Y. 2012), which is directly on point and includes a detailed discussion of the language of the statute and its legislative history as support for its holding; and (ii) *McDonald v. North Shore Yacht Sales, Inc.*, 513 N.Y.S.2d 590 (Sup. Ct. Nassau Cnty. 1987), in which the court issued general injunctive relief under GBL §350, the deceptive advertising analog to the deceptive practices included in GBL §349. Katz directed the arbitrator to *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20 (1995), which also emphasized the

legislative history of §349 and the importance of the available injunctive relief to protect consumers, and Katz directed the arbitrator to the law review article cited in *Oswego* that was written shortly after GBL §349 was amended to allow a private right of action and which emphasized the importance of the private right to enjoin public deceptive consumer practices (Dkt. #74-15 [A97-A98, A101]). Katz directed the arbitrator to *Sulner v. General Acc. Fire & Life Assur. Corp.*, 471 N.Y.S.2d 794, 797 (Sup. Ct. N.Y. Cnty. 1984), where then Justice Harold Baer, Jr., confirmed that §349 is a remedial statute to be liberally construed under applicable New York statutes, and relying on the legislative history, expressly stated that "[t]he amendment provided *for the first time that the individual consumer might now stand in the shoes of the Attorney General and bring similar lawsuits*" (emphasis added) [A97]. And Katz directed the arbitrator to *N.Y. Pub. Interest Research Group, Inc. v. Ins. Info. Inst.*, 531 N.Y.S.2d 1002, 1006 (Sup. Ct. N.Y. Cnty. 1988), which also emphasized the remedial nature of §349 and the statutory requirement that it be broadly and liberally construed [A96-A97].

Notwithstanding this substantial body of authority regarding the proper statutory construction supporting the right of a consumer to seek "general injunctive relief" under GBL §349, the arbitrator held that §349 does not authorize Katz to seek "general injunctive relief," because "[w]hile [GBL §349] 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" [A48].

And the District Court confirmed this act of statutory construction by the arbitrator—an exercise of judicial power[13]—and denied Katz's motion to vacate the arbitrator's legal ruling, finding that the arbitrator had not manifestly disregarded the law because he "had valid grounds for his decision, as GBL Section 349 is *silent* as to whether private individuals may bring claims for general injunctive relief." Opinion at 8 [A114] (emphasis in original). For the record, Katz is not aware of any decision expressly rejecting the arbitrator's minimalistic, superficial rationale. *Cf. GMAC Real Estate, LLC*, 506 F. App'x at 93. But on the other hand, there undisputedly is no legal authority rejecting Katz's right to seek the general injunctive relief either. Just the wealth of authority described above supporting it.

b. No "Manifest Disregard" Regarding the Arbitrator's Ruling that Katz was Bound by Verizon's Incomplete, "Rejected and Refused" Tender Offer

It was undisputed that Verizon's Tender was "incomplete relief since it does not contain individual injunctive relief and an award of attorney fees to [Katz]," and that Katz had "rejected and refused" the Tender. June 2017 Decision, at 3

[13] "[I]nterpreting and applying substantive law is the essence of the 'judicial Power' under Article III of the Constitution." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting).

[A53]; Tender [A86-A88]; Opinion at 3, 4 [A109-A110]. In his June 2017 decision, however, the arbitrator ruled that Katz was bound by the Tender [A53]:

> Respondent [Verizon] argues that there is no remaining issue to arbitrate since Respondent has tendered full payment of compensation to Claimant [Katz] in the sum of $1,500.00 which is an amount that may be greater than Claimant may obtain as an award in successful arbitration. Claimant rejected and refused the tendered payment.
>
> Claimant has not disputed the amount in dispute being greater than $1,500.00. Claimant argues the tender is incomplete relief since it does not contain individual injunctive relief and an award of attorney fees to Claimant.
>
> ***
>
> Respondent shall pay Claimant the sum of $1,500.00, without interest.

The legal issue whether a party can be bound by a rejected tender offer under federal law is important enough to have recently made its way up to the Supreme Court, which held that a party cannot be bound by the rejected offer. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). As luck would have it, while the Tender issue was being briefed in the arbitration, this Court issued its decision in *Geismann v. ZocDoc, Inc.*, 850 F.3d 507, 514 (2d Cir. 2017), which held that a plaintiff cannot be bound by offer of judgment that had been rejected and did "nothing to satisfy the demand for injunctive relief." And under New York law, and assuming that accord and satisfaction applies to GBL §349 claims as well as contract claims, even the acceptance of a tender under protest "preclude[s] an accord and satisfaction or any other prejudice to the rights thus reserved." *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 66 N.Y.2d 321, 331-32 (1985).

In a series of emails, Katz brought these cases to the attention of the arbitrator, and Verizon argued that they were distinguishable (Dkt. #74-5 [A90-A92]). Katz also argued that *Geismann* controlled over the decision Verizon had previously directed the arbitrator to in *Leyse v. Lifetime Entm't Servs., LLC*, 679 F. App'x 44, 46, 48 (2d Cir. 2017), a non-precedential Summary Order issued three weeks before *Geismann* which distinguished *Campbell-Ewald* and held that a plaintiff could be bound by an offer for "complete relief" deposited into an account payable to the plaintiff. *See* Dkt. #74-5 [A90-A92].

The District Court denied Katz's motion to vacate the arbitrator's legal ruling that Katz could be bound by the rejected, incomplete Tender, holding that even though there were precedential decisions both by the Second Circuit and New York Court of Appeals directly addressing the rejection of tender offers, those decisions did not "expressly reject the possible rationales for the arbitrator's decision" and thereby establish that the arbitrator "intentionally defied the law." Opinion at 10 [A116]. The District Court also stated that *Leyse* "provided support for the arbitrator's decision to enter judgment in the amount of Verizon's tender." *Id.*

c. No "Manifest Disregard" Regarding the Arbitrator's Ruling that Katz Lacked Standing to Obtain "Individual Injunctive Relief" under GBL §349

Finally, because there is no "well defined, explicit, and clearly applicable" law to the contrary, Katz did not challenge on manifest disregard grounds the arbitrator's legal ruling in his June 2017 Decision that, because the Verizon account is in Katz's non-marital partner's name and not Katz's, and because Katz is not the "owner" of the account and has "no obligation to pay the Verizon bill of his non-marital partner," Katz is not entitled to individual injunctive relief under GBL §349 regarding Verizon's continuing wrongful imposition of the administrative charges—even though Katz pays all of the charges (and substantially all other household expenses) and they are being imposed in part on his own cellphone. June 2017 Decision at 3 [A53]; Opinion at 4 [A110]. *See* also Dkt. #29-1 (Verizon bill in name of non-marital partner identifying three of Katz's phones). Furthermore, Verizon did cite in the arbitration, and also cited in its brief in the District Court (Dkt. #82, at 10-11), to New York cases holding that "indirect or derivative injuries [sustained by another party] will not suffice."

That Katz did 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. Under the arbitrator's rationale, an account in the name of one spouse with lesser income that is paid by the other higher earning spouse, or an account in the name

of the child but paid for by the parent, would not allow the paying party suffering the injury to seek injunctive relief under §349—a statute intended to protect all consumers which is remedial and to be liberally construed. But right or wrong, Katz's "involuntary consent" to the application of FAA §10(a)(4)'s extreme limit on judicial review regarding this legal ruling violates his right to Due Process.

E. The Basis For Katz's Appeal Rejected By The District Court: That Katz's Involuntary Consent—i.e., Consent Without The Right To Refuse—To The Standard Of Review Imposed By Congress Under FAA §10(A)(4) Regarding The Arbitrator's Rulings Of Law Violates Katz's Constitutional Right To Judicial Review Of Those Rulings Required Under The Due Process Clause Of The Fifth Amendment

At the outset, Katz emphasizes that the basis for his appeal under the Due Process Clause is the narrow issue regarding the involuntary application of the vacatur standard imposed by Congress under FAA §10(4)—including the "manifest disregard" "judicial gloss" on that standard applied in the Second Circuit, *see, e.g., Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451-52 (2d Cir. 2011). Katz is *not* challenging the constitutionality of the FAA generally or FAA §10(a)(4) specifically, and is not asserting a claim under the Due Process Clause where the standard is applied *on voluntary consent.* Nor, as noted in Section D(3) above, is Katz basing his appeal on whether the District Court correctly applied §10(a)(4) and the "manifest disregard" standard under Second Circuit law. Rather, Katz's appeal is based solely the ground that the involuntary application of the standard under §10(4)—based on consent without the right to refuse required for

consent to be voluntary under *Wellness*—violates Katz's constitutional right to judicial review of the arbitrator's legal rulings required under the Due Process Clause of the Fifth Amendment. A ruling by this Court that the FAA requires "consent" consistent with *Wellness* eliminates the Due Process implications altogether.

As also discussed above, the issue of voluntariness of consent to arbitration is strongly supported by three Circuit Court cases all basing their holdings that the arbitration at issue did not violate due process in whole or significant part on the "voluntariness" of the agreement to arbitrate. *See Todd Shipyards Corp.*, 943 F.2d at 1063-64; *Davis*, 59 F.3d at 1193 (citing *Todd*); *Bowen*, 254 F.3d at 940 (citing *Todd*).

The District Court, in essence, relied on two grounds to fail to fully analyze and thereby reject the "involuntary consent" issue raised by Katz. First, the District Court determined that Katz's motion and Due Process claim was governed by the "law of the case" doctrine based on *Katz* I, which said that for the purposes of waiving the individual right to an Article III adjudication under separation of powers principles, the voluntariness of the waiver was not governed by "a heightened 'knowing and voluntary' standard" but by general contract principles, and that *Wellness* was insufficient to depart from the law of the case. *See Katz* I, 2013 WL 6621022, at *13; *see also* Opinion at 13-15, 15 [A119-A121].

Second, the District Court held that, under the law of the case, "the 'requisite state action is absent' from [Katz's] agreement to arbitrate. *See Katz* I, 2013 WL 6621022, at *6-8; *see also* Opinion at 13-15, 14[A119-A121]. Neither of the Court's bases for rejecting the applicability of the "voluntariness" requirement can withstand scrutiny, and require reversal of the District Court's denial of Katz's motion to vacate on Due Process grounds.

SUMMARY OF ARGUMENT

The *Wellness* standard for voluntary consent—including the right to refuse—applies to Katz's right to judicial review of rulings of law under the Due Process Clause, and the District Court's failure based on "the law of the case" doctrine to consider its applicability in the context of judicial review of the arbitrator's award under FAA §10(a)(4) was erroneous.

First, the law of the case doctrine cannot apply to an issue of first impression nationwide in the federal courts, which Katz's sole issue on appeal is. And *Wellness* wasn't even issued until May 2015, almost 18 months after the District Court December 2013 decision, and was not addressed in any fashion in this Court's opinion in *Katz* I.

Second, the Due Process constitutional right asserted by Katz is separate and distinct from the separation of powers Article III right addressed exclusively in *Katz* I. The separate and distinct nature of these rights is confirmed, *inter alia*, by

applicable Supreme Court decisions, by the fact that the circuit court decisions specifically addressing the due process issue were never considered by the District Court in *Katz* I, and by the fact that none of the cases relied on by the District Court in its decision to support its rejection of the "knowing and voluntary" standard mention "due process." Indeed, under *Spokeo*, Katz did not have standing to raise the Due Process claim until *after* the arbitrator issued his adverse rulings of law that are the basis for Katz's Due Process injury because of his involuntary consent to the FAA §10(a)(4) standard of review.

Third, the District Court's reliance on the "state action" holding in *Katz* I as law of the case for Katz's Due Process claim also was erroneous. State action is not relevant to the issue of the involuntariness of consent to arbitration—the sole Due Process issue presented in this appeal. And again, none of the cases relied on by the District Court in *Katz* I mention "state action" in connection with their holdings rejecting the applicability of the "knowing and voluntary" standard, or anywhere else. Indeed, the District Court's opinion in *Katz* I considered the applicability of that standard in a completely different section of its opinion than the "state action" section, and this different section addressing the constitutionality of the FAA under Article III never mentions "state action." *Compare Katz* I, 2013 WL 6621022, at *8-13 *with* *5-8. Furthermore, the Congressional and federal court "actions" relevant to the "state action" determination in connection with Katz's

Due Process "involuntary consent" claim are independent and distinct from the "state action" elements evaluated by the District Court in *Katz* I. And even if state action were relevant, it is fully established here.

Finally, it is clear as a matter of federal law that *Wellness* applies to arbitration and governs the standard for voluntary consent regarding the Due Process right implicated by FAA §10(a)(4). And a holding by this Court that the *Wellness* requirement of "the right to refuse" to establish "voluntary consent" in connection with the applicability of the highly restricted judicial review standard imposed by Congress under FAA §10(a)(4) eliminates the claimed Due Process violation, a result supported by the doctrine of constitutional avoidance.

ARGUMENT

The Court of Appeals "review[s] a district court's decision to confirm an arbitration award *de novo* to the extent it turns on legal questions, and [reviews] any findings of fact for clear error." *Duferco Intern. Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003). Katz's appeal is based solely on legal questions requiring *de novo* review, and undisputed facts.

I. The Law Of The Case Doctrine Does Not Apply To The *Wellness* Due Process "Voluntariness" Issue Raised By Katz's Appeal

As the District Court properly noted, the law of the case "doctrine is properly applied only when the parties had a full and fair opportunity to litigate the initial determination" and that "a court may depart from the law of the case for

'cogent' or 'compelling' reasons including an intervening change of law, availability of new evidence, or 'the need to correct a clear error or prevent manifest injustice.'" Opinion at 13-14 [A119-A120] (citations omitted).

A. The Law of the Case Doctrine Cannot Apply to an Issue of First Impression in the Federal Courts Nationwide that Was Not Litigated or Addressed in *Katz* I

As an initial matter, the law of the case doctrine, by definition, cannot apply to an issue of first impression in the federal courts nationwide—which the issue raised by Katz's appeal is. Nor could there have been a "full and fair opportunity to litigate" the applicability of *Wellness* in *Katz* I in the District Court several years before *Wellness* was decided. Katz did direct this Court to *Wellness* in a 346 word Rule 28(j) letter in June 2015 (Appeal No. 14-138-cv, Dkt. #112), but that was eight months after Katz filed his November 21, 2014 Reply-Response brief (Dkt. #74). And this Court affirmed the District Court's order compelling arbitration "[f]or substantially the reasons identified in the District Court's thorough memorandum decision," 791 F.3d at 344—which again did not and could not have addressed *Wellness.* And *Wellness* was not addressed in this Court's decision in *Katz* I either.

Thus, the law of the case doctrine cannot apply in the first instance because there was no "full and fair opportunity to litigate the issue."

B. The Fifth Amendment Due Process Right is Separate and Distinct from the Individual Article III Separation of Powers Right That Was Addressed in *Katz* I

In order to apply the law of the case doctrine, the District Court rejected the difference between the prior Article III separation of powers adjudication in *Katz* I and Katz's Due Process voluntariness claim at issue in the instant appeal—relying on the Second Circuit decision in *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999), for the District Court's conclusion that "state action as to plaintiff's Fifth Amendment due process claim can be analyzed under the same framework as his Article III claim." Opinion at 14-15 [A120-A121]. Although *Desiderio* does, in part, involve claims based both on Article III and Due Process, it nowhere addresses the applicable standard for "voluntary consent," and it preceded the Supreme Court's decision in *Wellness* by 16 years. It does address whether the existence of an inherent conflict between Title VII and arbitration evidences Congress's intent to preclude a waiver of the right to a judicial forum, but found no such conflict to exist, and that is not the issue on appeal here. 191 F.3d at 205-06. The "state action" issue addressed in *Desiderio* is discussed in Argument II, below.

The District Court's rejection of the distinction between Katz's Article III separation of powers claim and the Due Process "voluntariness" claim in order to apply the law of the case is legally erroneous, and is directly contradicted by

Supreme Court precedent. In *Crowell v. Benson*, the Supreme Court expressly distinguished between the Due Process implications from any limitations on judicial review, 285 U.S. at 41, 47, and the Article III separation of powers issue, *e.g.*, *id.* at 49-54, 57. Justice Brandeis, in dissent, viewed the case as one solely involving Due Process, and stated that the Article III separation of powers issue did not "ha[ve] properly any bearing upon the question presented in this case." *Id.* at 88; *see also id.* at 87 ("the constitutional requirement of due process is a requirement of judicial process") (Brandeis, J., dissenting). Furthermore, one of the leading cases addressing the Article III separation of powers issue relied on by Katz *and* addressed by the District Court in *Katz* I, 2013 WL 6621022, at *11 n.4, was *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 592-93 (1985)—which *did* address arbitration under a federal statute, and which separately addressed but did not decide the "due process considerations" that it stated were "independently required" in the context of the Article III separation of powers issue.[14] Simply put, there *is* a difference of constitutional dimensions between

[14] *Thomas* did state that "FIFRA does provide for limited Article III review, including whatever review is independently required by due process considerations," 473 U.S. at 593, but that review included the right to pursue "Tucker Act claims in the District Courts or in the United States Claims Court with review in the Court of Appeals for the Federal Circuit for any shortfall between the arbitration award and the value of trade secrets submitted between 1972 and 1978." *Id.* at 593, n.4.

Article III separation of powers protections and the right under the Due Process Clause to judicial process, i.e., meaningful judicial review of rulings of law.[15]

Additionally, none of the three leading circuit court decisions addressing the relationship between "voluntariness" and whether arbitration violates Due Process (decisions never addressed in *Katz* I) mentions Article III, in the separation of powers context or otherwise. *See Todd Shipyards*, 943 F.2d 1056; *Davis*, 59 F.3d 1186; *Bowen*, 254 F.3d 925.

Furthermore, Due Process was never analyzed or addressed substantively by either the District Court or this Court in *Katz* I. And not one of the decisions relied on by the District Court to support its rejection of the "knowing and voluntary" standard, 2013 WL 6621022, at *13, mentions "due process.[16]

The constitutional rights to Article III separation of powers and Due Process under the Fifth Amendment are entirely separate and distinct in the protections they provide, and preclude application of the law of the case doctrine.

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[15] It is also telling that there is a discussion of the importance of Article III separation of powers, including life tenure, in the Federalist Papers, *see The Federalist*, No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed. 1961), but to the best of Katz's knowledge there is no express discussion of due process anywhere in the Federalist Papers.

[16] *Cf. Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 224 (3d Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1372 & 1371 n.12 (11th Cir. 2005); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002); *Williams v. Imhoff*, 203 F.3d 758, 763 (10th Cir. 2000); *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001); *Awuah v. Coverall N. Am., Inc.*, 703 F.3d 36, 44 (1st Cir. 2012).

C. The Law of the Case Doctrine is Inapplicable Because, under *Spokeo,* Katz Lacked Standing to Assert His Due Process Claim Until After the Arbitrator Issued his Adverse Rulings of Law Subject to the FAA §10(a)(4) Limited Standard of Judicial Review

In *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016), the Supreme Court set out the elements necessary to establish the "irreducible constitutional minimum" of standing. The first element, and the one that was the Court's focus, is that the plaintiff must suffer "an injury in fact." *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks and citation omitted). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Id.* And for an injury to be "concrete," it must be "*de facto*"—i.e. "it must actually exist." *Id.*

Katz's claimed Article III injury was concrete and imminent at the commencement of his action in the face of the enforcement of the arbitration agreement under the FAA. By comparison, the Due Process injury Katz claims in this appeal based on involuntary consent did not exist until after the arbitrator issued his three adverse rulings of law that Katz then unsuccessfully sought to vacate in the District Court. And these now-confirmed legal rulings are "concrete" deprivations of his legal right to Due Process because of the highly restricted standard of review imposed by Congress under FAA §10(a)(4), as interpreted and

applied by the District Court. Until the arbitrator issued those adverse rulings of law, Katz's injury was conjectural and hypothetical, because it was possible Katz might have received favorable legal rulings notwithstanding his involuntary consent. But now the arbitrator's rulings of law are enforceable and supported by the entry of the District Court's Article III Judgment [A124], regardless of whether they are contradicted by substantial legal authority. *Cf. 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.").

The law of the case doctrine cannot apply to a claim which is not sufficiently concrete to establish standing, because such a claim, by definition, cannot be subject to a "full and fair opportunity to litigate the initial determination."

II. The District Court's Application Of The Law Of The Case Doctrine To Its "State Action" Holding In *Katz* I Was Erroneous

As set out in Argument I above, the District Court's reliance on the law of the case doctrine was misplaced and erroneous in connection with Katz's *Wellness* "involuntary consent" Due Process claim. In its Opinion, the District Court's principal application of the doctrine was to deny Katz's Due Process claim based on its holding in *Katz* I of no "state action." Opinion at 13-15 [A119-A121]. State action, however, is irrelevant to the *Wellness* voluntariness issue that was and is the sole basis from Katz's Due Process claim. And even if "state action" was relevant,

the nature, scope and legal consequences of the actions of Congress and the District Court in connection with the application to the arbitrator's rulings of law of the extremely restricted standard of judicial review by the District Court imposed by Congress under FAA §10(a)(4) are materially different and substantially greater than the limited judicial involvement on which the District Court's "no state action" holding in *Katz* I was based. To the extent it applies, there is state action here.

A. State Action Is Not Relevant to the *Wellness* Involuntary Consent Due Process Claim on which Katz's Appeal is Based

Although the District Court also relied on the law of the case regarding the lack of state action to deny Katz's "involuntary consent" Due Process claim, it did not apply a similar requirement in *Katz* I when it separately rejected a "heightened standard" of "knowing and voluntary" consent *independent* of the state action issue: "[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." 2013 WL 6621022, at *13 (citation omitted). Indeed, the District Court's opinion in *Katz* I considered the applicability of the proper waiver standard in a completely different section of its opinion than the "state action" section, and this different section addressing the constitutionality of the FAA under Article III never mentions "state action." *Compare Katz* I, 2013 WL 6621022, at *8-13 *with* *5-8.

Simply stated, because there is no issue that Katz has a right to Due Process under the Fifth Amendment (*see* Statement of the Case Section A, above), the voluntariness of his consent to the waiver of that right should be analyzed independent of the existence of state action, just as it was in *Katz* I. And this conclusion is fully supported by the fact that not only do none of the decisions relied on by the District Court to support its rejection of the "knowing and voluntary" standard (*see* 2013 WL 6621022, at *13) mention "due process," but none of them mention "state action" either. *See* Note 16 above.

Nevertheless, candor requires Katz to advise the Court that the leading circuit court cases relying on "voluntariness" in rejecting Fifth Amendment Due Process claims in the context of arbitration go different ways regarding the issue of state action.

In *Todd Shipyards*, 943 F.2d at 1063-64, the 9th Circuit decided that the issue of voluntariness was dispositive, and never discussed "state action." In *Davis*, although rejecting the Due Process claim based in meaningful part on the voluntariness of the agreement to arbitrate, 59 F.3d at 1193 (citing *Todd*), the Eleventh Circuit also held that "the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause," 59 F.3d at 1192. *Davis* cited, e.g., to *United States v. American Soc'y of Composers, Authors & Publishers*, 708 F. Supp. 95, 96-97

(S.D.N.Y.1989), but that court's rejection of the Due Process claim was based in substantial part of the voluntariness of consent. And in *Bowen*, 254 F.3d at 940, citing to *Todd*, the Tenth Circuit decided the case on voluntariness grounds without finding it had to address the *Davis* "state action" holding. *See also Interchem Asia 2000 PTE Ltd v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 359 n.16 (S.D.N.Y. 2005) (finding no state action where arbitration was result of a "voluntary" private agreement) (citing *Davis* and *ASCAP*).

These other cases raise an issue regarding the relevance of "state action" in connection with a due process claim where consent to arbitration was "voluntary"—a disputed issue in this case based on the applicability of *Wellness.* Nevertheless, Katz respectfully submits that if state action is a requirement even in connection with involuntary consent to arbitration, there is state action here.

B. To the Extent It is Required, The Combination of Congress's Immutable Mandate for Restricted Judicial Review of the Arbitrator's Rulings of Law under FAA §10(a)(4), Combined With the Actions of the Federal Courts in Interpreting and Applying That Mandate and Entering Judgment Depriving Katz of His Substantive Legal Rights without Meaningful Judicial Review, Constitutes State Action

In *Commonwealth Assocs. v. Letsos*, 40 F. Supp. 2d 170, 177 (S.D.N.Y. 1999), Judge Kaplan also rejected a due process challenge to the award of punitive damages by arbitrators, concluding that "[a]t least one clear response to the argument, however, is that Commonwealth's insistence that customer disputes be

resolved by arbitration inherently accepted any limitations on judicial review of awards rendered in the arbitral forum." In other words, voluntariness.

However, in a footnote to the same passage, in addition to citing to *Todd*, Judge Kaplan further explained, *id.* at 177 n.37 (citations omitted):

> [The Court] respectfully doubts that the rationale for this result set forth in [*Davis*]—viz. that an arbitration award involves no state action—is well founded. While the procedures utilized in arbitration do not constitute state action, … the application of the coercive power of a court to confirm and enforce an arbitration award arguably is another matter.

Here, there are multiple actions of the government that fully support the existence of state action. First is Congress's mandate of the standard of extremely restricted judicial review under §10(a)(4). The District Court stated that Katz's argument that "Congress's enactment of FAA Section 10(a)(4) creates state action … lacks any support," Opinion at 15 [A121], but that is incorrect. In support of his argument, Katz cited to the decision of the Supreme Court in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583 (2008), which held that the extremely limited standard of judicial review of arbitration awards Congress has imposed under FAA §10(a)(4) cannot be varied by agreement of the parties—in other words, the standard must be applied regardless of the agreement of the parties for the application of a different standard. *See* Dkt. #73, at 6, 23. The District Court's Opinion did not address *Hall Street*. But the District Court's application of its prior conclusion in *Katz* I as law of the case that there is no "state action in the signing

of an arbitration agreement" (Opinion at 13 [A119]) cannot be squared with the fact that the §10(a)(4) standard of review *is imposed by Congress* and *not* the result of the arbitration agreement—voluntary or otherwise. The fact that *Hall Street* was not addressed by the District Court in *Katz* I precludes its relevance from being the law of the case. And the fact that *Hall Street* was not issued until 2008—long after the prior decisions finding no state action in the confirmation of an arbitration award were issued—also substantially undermines the "state action" holdings of cases like *Davis*, and supports the conclusion that "involuntariness" should be the controlling factor in determining a due process challenge in connection with the limited standard of review under FAA§10(a)(4).

Furthermore, and aside from the Congressionally imposed standard of review that prevents the judicial review to which Katz is entitled under the Due Process Clause, the District Court's holding regarding the absence of state action in *Katz* 1 is readily factually distinguishable from Katz's claim under the Due Process Clause (which also precludes the application of the law of the case doctrine). In *Katz* I, the District Court's conclusion that enforcing the arbitration agreement lacks state action was based substantially on "the involvement of this Court in issuing one order enforcing a private agreement to arbitrate." 2013 WL 6621022, at *8. But here, the District Court is not merely "enforcing one private agreement to arbitrate." It is evaluating and applying the "judicial gloss" of "manifest

"disregard"—which is required and whose scope is defined by the Second Circuit—onto the standard imposed by Congress under §10(a)(4) to evaluate the existing cases and other relevant legal authority relating to the arbitrator's rulings of law in order to determine whether all of this authority establishes that the arbitrator has merely made a "mistake of law" (which is acceptable) or rather has "defied" it. Indeed, the determination by the federal courts whether or not to apply the "manifest disregard" standard is state action. And, for that matter, so is the District Court's determination of the proper standard for consent in the context of arbitration—be it a waiver of the "personal right" to an Article III adjudication, or consent to the §10(a)(4) limited judicial review of the arbitrator's rulings of law under the Due Process Clause of the Fifth Amendment.

Finally, the entry by the District Court of its Judgment confirming the arbitration award—a judgment which deprives Katz of his substantive legal rights, his choses in action, his property, without meaningful judicial review—is the essence of state action. A review of the cases finding "state action" that were distinguished by the District Court in *Katz* I shows that a consistent theme through those cases is the use of the power of the courts and their judgments to interfere with or diminish the value of property rights. *See* 2013 WL 6621022, at *8. The entry of the Judgment by the District Court on the arbitrator's rulings of law without meaningful judicial review—without the protection of the law—can "seize

intangible property" just as much as a sheriff can seize "tangible property." And affirmance of a district court judgment confirming an arbitrator's rulings of law by a circuit court adds even more state action to the mix. *See also Wellness,* 135 S. Ct. at 1958-59 (Roberts, C.J., dissenting) ("only Article III judges—not arbitrators—may enter final judgments enforcing arbitration awards"). Under FAA §10(a)(4), the courts act in concert with Congress to enforce a statute that by definition is antithetical to the protection of liberty and property under the Due Process Clause.

State action should be irrelevant to the issue of the "involuntariness" of Katz's consent to the restricted standard of legal review imposed by Congress and applied by the courts under FAA §10(a)(4). But to the extent it is a necessary element in connection with Katz's "involuntary consent" Due Process claim in this appeal, the requirement for "state action" is fully satisfied.

III. The *Wellness* Standard Of Voluntary Consent—Including The Right To Refuse—Should Be Applied To Resolve Katz's Due Process Claim

It cannot be disputed that *Wellness* applies to and requires "voluntary consent" for non-Article III arbitration—including "the right to refuse." As confirmed by the extensive quotation to every component part of the opinion in the Statement of the Case, Section A above, every justice addresses the implications of arbitration by consent. And "voluntariness" is either the sole or one of the principal reasons that the arbitration in *Todd Shipyards, Davis* and *Bowen* was held not to

violate Due Process. *See Todd*, 943 F.2d at 1063-64; *Davis*, 59 F.3d at 1193 (citing *Todd*); *Bowen*, 254 F.3d at 940 (citing *Todd*).[17]

In fact, putting aside the District Court's misapplication of the law of the case doctrine, then based on its determination that the Article III and Due Process issues "should be analyzed under the same framework," Opinion at 15 [A121], *Wellness* either controls or must otherwise be applied because *Wellness* and its reliance on *Roell* "adheres … not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996)—that the use of a non-Article III adjudicator must be on consent, and that such consent requires "the right to refuse" "*as a prerequisite to any inference of consent,*" 135 S. Ct. at 1942, 1948 (citations and quotations omitted) (emphasis added).

The short version of the issue in this appeal as framed is "whether Katz's involuntary consent—i.e., consent without the right to refuse—to the standard of review imposed by Congress under §10(a)(4)" violates Due Process. But the issue can also be stated conversely in the positive: "whether voluntary consent under the

[17] It is well-established that the contractual waiver of a constitutional right like trial by jury is governed by federal law, and that the waiver must be knowing and voluntary. *See Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007); *see also, e.g., Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (citing *Simler v. Conner*, 372 U.S. 221, 221-22 (1983) (per curiam)). And the Second Circuit in *Merrill Lynch* applied the *Telum* contractual jury waiver standard to arbitration, 500 F.3d at 188, in effect starting the initial loop that *Wellness* now tightly knots together.

FAA to the standard of review imposed by Congress under §10(a)(4) must include the right to refuse." Holding that *Wellness* with its standard of voluntary consent applies under the FAA will correct the violation of Due Process for Katz (whose consent was involuntary), and is a natural application of the cases concluding that voluntariness eliminates any potential Due Process violations in connection with arbitration. And aside from the applicability of *Wellness* as a matter of law, its application to the FAA is supported by the doctrine of constitutional avoidance. As stated in *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979) (citations omitted):

> A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question. ... Due respect for the coordinate branches of government … counsels against unnecessary constitutional adjudication. And if "a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided," *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), a court should adopt that construction.

Under *Wellness*, the right to refuse is a prerequisite to any inference of "voluntary consent" to arbitration under the FAA. Based on Katz's involuntary consent under the standard prescribed by *Wellness* and the application of that standard to FAA §10(a)(4) with its preclusion of meaningful judicial review, de novo review by the District Court of the arbitrator's rulings of law is necessary to correct any Due Process violations.

CONCLUSION

The District Court's Opinion and Judgment denying Katz's motion to vacate the portions of the arbitrator's Decisions that constitute rulings of law on due process grounds based on his involuntary consent should be reversed, and Katz's motion granted in its entirety by this Court. Additionally, the case should be remanded to the District Court to review those rulings of law de novo.

Dated: August 24, 2018

Respectfully submitted,

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