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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18-1436

[Filed March 12, 2019]

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

v.

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,
Defendant-Appellee.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of March, two thousand nineteen.

PRESENT:

ROBERT D. SACK,
REENA RAGGI,
SUSAN L. CARNEY,
Circuit Judges.

FOR APPELLANT:

WILLIAM ROBERT WEINSTEIN, ESQ., White Plains, N.Y.

FOR APPELLEE:

LEIGH R. SCHACHTER, Verizon Communications, Basking Ridge, N.J. (Joshua S. Turner, Jeremy J. Broggi, and Bethany A. Corbin, Wiley Rein LLP, Washington, D.C., *on the brief*)

Appeal from a judgment of the United States District Court for the Southern District of New York (Briccetti, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment appealed from entered on April 18, 2018, is **AFFIRMED**.

Plaintiff-Appellant Michael Katz brings this putative class action against Defendant-Appellee Cellco Partnership d/b/a Verizon Wireless ("Verizon"),

asserting claims under New York state law for breach of contract and consumer fraud based on an administrative charge that Verizon adds to the monthly bill of each of its subscribers. Katz was compelled to arbitrate the dispute and, dissatisfied with the outcome, he sought vacatur and de novo review of the arbitrator's legal conclusions in the District Court, arguing that the standard of review imposed by the Federal Arbitration Act violates his due process right to judicial review. The District Court declined to exercise de novo review and confirmed the arbitration decisions. Katz appeals.

We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm the judgment of the District Court.

Katz entered into a customer agreement with Verizon in 2011. The agreement contained an arbitration clause requiring the parties "to resolve disputes only by arbitration or in small claims court" and prohibiting class arbitrations. App'x 29. In December 2012, Katz sued Verizon in federal court, asserting class claims for breach of contract and consumer fraud related to the monthly administrative charge under New York's General Business Law ("GBL") section 349. He also sought a declaration that compelling arbitration on these claims would violate Article III of the United States Constitution.

On December 12, 2013, the District Court entered an order compelling arbitration and dismissing Katz's federal case. As relevant here, the District Court

rejected Katz's Article III claim because Katz could not show state action in Verizon's inclusion of an arbitration clause in its customer agreement or its acts to compel arbitration. This Court affirmed the District Court's reasoning but vacated the judgment and remanded in part with instructions to stay (instead of dismiss) the proceedings pending arbitration. *Katz v. Cellco P'ship*, 794 F.3d 341, 347 (2d Cir. 2015).

Arbitration then ensued. Between 2016 and 2017, the arbitrator issued decisions collectively granting Verizon judgment on the pleadings; ordering Verizon to pay Katz $1,500 that Verizon had previously tendered to settle the dispute, as well as $500 in attorney's fees; and denying Katz injunctive relief for himself and a putative class.

Katz then returned to the District Court, moving to vacate the arbitration decisions in substantial part and to renew his claims. As relevant here, Katz argued that the standard of review imposed by the Federal Arbitration Act violates his Fifth Amendment due process right to judicial review. The District Court rejected Katz's motions, ruling that its previous holding that Katz had not shown state action in Verizon's signing and enforcement of the private arbitration agreement is law of the case and therefore, that Katz has no viable constitutional claim. Accordingly, the court confirmed the arbitration decisions in full. Katz now appeals as to his due process claim.

Even without recourse to the law of the case, we conclude that Katz's claim fails on the merits. To state a due process claim under the Fifth Amendment, a plaintiff must show that: "(1) state action (2) deprived

him or her of liberty or property (3) without due process of law." *Barrows v. Burwell*, 777 F.3d 106, 113 (2d Cir. 2015). As we have held repeatedly, a private party's agreement to arbitration does not constitute state action, and the enforcement of such an agreement cannot ordinarily give rise to a due process claim. *See Perpetual Secs., Inc. v. Tang*, 290 F.3d 132, 138 (2d Cir. 2002) ("It is clear that [the National Association of Securities Dealers] is not a state actor and its requirement of mandatory arbitration is not state action."); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) ("[W]e find no state action in the application or enforcement of the arbitration clause."). Like NASD in *Perpetual* and *Desiderio*, Verizon is a private concern, not a state actor, and its enforcement of an arbitration agreement does not transform it into an arm of the state.

* * *

We have considered Appellant's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the District Court's judgment.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court
/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 CIVIL 9193 (VB)

[Filed April 18, 2018]

MICHEAL KATZ, individually and on behalf of all others similarly situated,
Plaintiff,

-against-

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,
Defendant.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated April 17, 2018, Plaintiff's motion to partially confirm and partially vacate the arbitrator's decisions of October 28, 2016, and June 29, 2017, is granted in part and denied in part; Plaintiff's motion to strike and/or preclude is denied; and Defendant's motion to confirm the arbitrator's decision of October 28, 2016, and June 29, 2017, is granted; accordingly, this case is closed.

Dated: New York, New York
April 18, 2018

RUBY J. KRAJICK
Clerk of Court

BY: /s/
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 CV 9193 (VB)

[Filed April 17, 2018]

MICHEAL KATZ, individually and on behalf of all others similarly situated,
Plaintiff,

v.

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,
Defendant.

OPINION AND ORDER

Briccetti, J.:

Plaintiff Michael Katz brings this putative class action against defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon"), asserting claims under New York state law for breach of contract and consumer fraud based on an administrative charge assessed by Verizon.

Before the Court are plaintiff's motion to partially confirm and partially vacate two arbitration awards (Doc. #72), and plaintiff's motion to strike from the

record and/or preclude admissibility of all of Verizon's references to an unrelated arbitration award and the court's confirmation thereof. (Doc. #83). In addition, as discussed below, the Court construes Verizon's opposition to plaintiff's motion to partially vacate as a motion to confirm the arbitration awards. (Doc. #82).

For the following reasons, plaintiff's motion to partially confirm and partially vacate is GRANTED IN PART and DENIED IN PART; plaintiff's motion to strike is DENIED; and Verizon's motion to confirm is GRANTED.

The Court has subject matter jurisdiction under 28 U.S.C. § 1332.

BACKGROUND

The following factual background is drawn from the parties' submissions in support of and in opposition to the pending motions.

Plaintiff is a former Verizon subscriber. In 2012, he assigned his account to his non-marital partner, Rita Lenda, but continued to pay the account bills. Included in those bills was a monthly administrative charge ranging from $0.40 in 2005 to $0.99 in 2012.

In 2011, plaintiff agreed to Verizon's customer agreement, which contained an arbitration clause requiring the parties "to resolve disputes only by arbitration or in small claims court." (Opp'n Ex. 1). Section 3 of the arbitration agreement provides further, in upper case letters and bold font: "This agreement doesn't allow class arbitrations even if the AAA or BBB procedures or rules would. 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." (Id.).

On December 18, 2012, plaintiff filed a complaint in this Court asserting putative class action claims for breach of contract and consumer fraud under New York's General Business Law ("GBL") Section 349, and seeking a declaratory judgment that enforcement of the arbitration agreement would violate Article III of the United States Constitution.

On March 1, 2013, plaintiff moved for partial summary judgment on his declaratory judgment claim and Verizon cross-moved to compel individual arbitration. On December 12, 2013, the Court denied plaintiff's motion, granted Verizon's motion, and dismissed the case.

On July 28, 2015, the Second Circuit affirmed the denial of plaintiff's motion for partial summary judgment and the grant of Verizon's motion to compel arbitration. However, the Circuit vacated and remanded in part with instructions to stay the proceedings pending arbitration. By Order dated August 26, 2015, this Court stayed the case pending arbitration. (Doc. #46).

On May 9, 2016, plaintiff filed an Amended Demand for Arbitration before the American Arbitration Association, which sought a declaration regarding the enforceability of Section 3 of the arbitration agreement; damages for breach of contract and consumer fraud under GBL Section 349; and individual and general

injunctive relief under GBL Section 349. The same day, Verizon moved this Court to determine whether the arbitration agreement permitted plaintiff to seek general injunctive relief.

On May 27, 2016, the Court denied Verizon's motion, holding the issue was for the arbitrator to decide in the first instance. The Court also denied plaintiff's cross-motion for attorney's fees and costs. (Docs. ##62, 63).

On October 28, 2016, the arbitrator issued a decision (the "October 2016 Decision") granting Verizon's motion for summary disposition and holding plaintiff could not seek general injunctive relief under GBL Section 349—i.e., relief "on behalf of all present and future customers of Verizon who are or may be in the future subjected to the alleged Verizon's wrongful and deceptive Administrative Charge practices." (Weinstein Decl. Ex. 1). The arbitrator found, "[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." (Id.).

On December 13, 2016, Verizon tendered a check to plaintiff for $1,500, stating the check represented a full refund of the disputed administrative charge plus the maximum amount to which plaintiff was entitled in damages. Plaintiff rejected the tender.

On June 29, 2017, the arbitrator issued a second decision (the "June 2017 Decision") granting Verizon's motion for judgment on the pleadings. The arbitrator

found plaintiff was "not a customer of Verizon and that he 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." (Weinstein Decl. Ex. 2). The arbitrator also found plaintiff had not disputed that $1,500 represented the full amount in dispute. The arbitrator thus rejected plaintiff's request for individual injunctive relief and an accounting, and ordered Verizon to pay plaintiff $1,500 without interest and $500 in attorney's fees. The arbitrator also awarded arbitrator compensation in the amount of $13,962.50, to be paid by Verizon pursuant to the arbitration agreement.

Plaintiff seeks to confirm the October 2016 Decision to the extent it holds Section 3 of the arbitration agreement is enforceable and vacate it in all other respects under Federal Arbitration Act ("FAA") Section 10(a). Plaintiff further seeks to vacate the June 2017 Decision in its entirety under FAA Section 10(a), and to vacate those parts of the October 2016 Decision and the June 2017 Decision (collectively, the "Decisions") that constitute rulings of law, on the ground that plaintiff's alleged involuntary consent to the standard of review under FAA Section 10(a)(4) amounted to a deprivation of due process under the Fifth Amendment.

DISCUSSION

I. Legal Standard

"Federal court review of an arbitral judgment is highly deferential." Pike v. Freeman, 266 F.3d 78, 86 (2d Cir. 2001). Indeed, "[a] court's review of an arbitration award is . . . 'severely limited,' so as not to

frustrate the 'twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 71–72 (2d Cir. 2012) (citations omitted).

"The confirmation of an arbitration award under FAA [Section] 9 is thus generally 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" Kerr v. John Thomas Fin., 2015 WL 4393191, at *3 (S.D.N.Y. July 16, 2015) (quoting D.H. Blair & Co. v. Gottdienier, 462 F.3d 95, 110 (2d Cir. 2006)).

"An arbitration award may be vacated if: (i) the award was procured by 'corruption, fraud or undue means'; (ii) the arbitrators exhibited 'evident partiality' or 'corruption'; (iii) the arbitrators were guilty of 'misconduct' or 'misbehavior' that prejudiced the rights of any party; or (iv) the arbitrators 'exceeded their powers.'" Singh v. Raymond James Fin. Servs., Inc., 2014 WL 11370123, at *2 (S.D.N.Y. Mar. 28, 2014) (quoting 9 U.S.C. § 10(a)), aff'd, 633 F. App'x 548 (2d Cir. 2015) (summary order). "In addition, as 'judicial gloss on the[se] specific grounds for vacatur of arbitration awards, . . . the court may set aside an arbitration award if it was rendered in 'manifest disregard of the law.'" Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 451 (2d Cir. 2011) (citations omitted).

"[T]he burden of proof necessary to avoid confirmation of an arbitration award is very high, and a district court will enforce the award as long as 'there is a barely colorable justification for the outcome

reached.'" Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 103–04 (2d Cir. 2013) (quoting Rich v. Spartis, 516 F.3d 75, 81 (2d Cir. 2008)).

II. Motions to Vacate and/or Confirm

A. Confirmation of the Decisions

Plaintiff seeks to partially confirm and partially vacate the Decisions. Verizon opposes the motion to vacate and, although Verizon does not cross-move to confirm the Decisions, Verizon states, "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." (Opp'n at 1 n.1).

"[W]hen a party moves for the court to consider the merits of an arbitration award, the court may treat that motion as a motion to confirm." Sanluis Devs., L.L.C. v. CCP Sanluis, L.L.C., 556 F. Supp. 2d 329, 332 n.1 (S.D.N.Y. 2008).

Accordingly, because Verizon requested that the Court confirm the Decisions in their entirety, and because a motion to confirm and a motion to vacate an arbitration award "submit identical issues for judicial determination," Sanluis Devs., L.L.C. v. CCP Sanluis, L.L.C., 556 F. Supp. 2d at 333, the Court construes Verizon's opposition as a motion to confirm the Decisions.

B. October 2016 Decision

Neither party contests the portion of the October 2016 Decision confirming the enforceability of Section 3 of the arbitration agreement.

However, plaintiff seeks to vacate parts of the October 2016 Decision on the grounds that the arbitrator exceeded his authority and manifestly disregarded the law.

The Court is not persuaded.

1. Exceeded Authority

Plaintiff argues Section 3 of the arbitration agreement, which prohibits the arbitrator from awarding general injunctive relief, makes plaintiff's claim for general injunctive relief under GBL Section 349 non-arbitrable. Plaintiff thus argues the arbitrator exceeded his authority by ruling GBL Section 349 does not permit general injunctive relief.

The Court disagrees.

"[A]n arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties' agreement." Jock v. Sterling Jewelers Inc., 646 F.3d 113, 122 (2d Cir. 2011). The Court must "uphold an award so long as the arbitrator 'offers a barely colorable justification for the outcome reached.'" Id. (citation omitted). However, the court must vacate an award when "the law or the parties' agreement categorically prohibits the arbitrator from reaching an

issue so that, in reaching that issue, the arbitrator exceeds her authority." Id. at 123. When "the challenge is to an 'award deciding a question which all concede to have been properly submitted [to the arbitrator] in the first instance,' vacatur under the excess-of-powers standard is appropriate only in the 'narrowest' of circumstances." Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 754 F.3d 109, 113 (2d Cir. 2014) (quoting Jock v. Sterling Jewelers Inc., 646 F.3d at 122) (footnote omitted).

Here, plaintiff requested the arbitrator issue an injunction on behalf of "all of its existing and future New York customers." (Weinstein Decl. Ex. 3 ¶ 83; see also id. Ex. 1), thus conceding the question was properly submitted in the first instance. Vacatur under the excess-of-powers standard therefore is appropriate only in the narrowest of circumstances.

Those circumstances are not present here. As this Court previously held, "the issue presented regarding the relief sought in arbitration addresses the remedies the arbitrator may award, not whether a particular dispute may be properly arbitrated in the first instance." (Doc. #63 at 16); see also Schatz v. Cellco P'ship, 842 F. Supp. 2d 594, 604 (S.D.N.Y. 2012). Accordingly, the arbitrator's decision that Section 3 is enforceable affects the remedies the arbitrator may award, but it does not prohibit the arbitrator from determining whether GBL Section 349 permits general injunctive relief.

Therefore, the arbitrator did not exceed his powers under Section 3 of the arbitration agreement by holding

GBL Section 349 does not permit general injunctive relief.

2. Manifest Disregard of the Law

Plaintiff next argues the arbitrator manifestly disregarded the law by holding plaintiff was not entitled to general injunctive relief under GBL Section 349.

The Court disagrees.

"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.

Here, plaintiff's arguments amount to a mere disagreement with the outcome of the arbitration. Cf. Bradley v. Merrill Lynch & Co., Inc., 344 F. App'x 689, 690 (2d Cir. 2009) ("Other than disagreeing with the outcome, [appellant] has failed to provide any support for her claims that the arbitration panel . . . displayed a manifest disregard of the law."). Moreover, the arbitrator had valid grounds for his decision, as GBL Section 349 is silent as to whether private individuals may bring claims for general injunctive relief.

Therefore, the arbitrator did not manifestly disregard the law by holding plaintiff was not entitled to general injunctive relief under GBL Section 349.

C. June 2017 Decision

Plaintiff seeks to vacate parts of the June 2017 Decision on the grounds that the arbitrator exceeded his powers and manifestly disregarded the law. Plaintiff also seeks to vacate the June 2017 Decision in its entirety on the grounds that there was evident partiality or corruption in the arbitrator, and the arbitrator was guilty of misconduct.

The Court is not persuaded.

1. Exceeded Authority

Plaintiff first argues the arbitrator exceeded his authority by awarding attorney's fees in the amount of $500 without requesting documentation from plaintiff and without the parties having attempted to agree on the issue. According to plaintiff, Verizon's tender required plaintiff to provide Verizon with information regarding the amount of attorney's fees owed, and

Verizon to then tender payment for attorney's fees; the arbitrator only had the authority to reach the issue if the parties could not agree on the amount.

The Court must vacate an award when "the law or the parties' agreement categorically prohibits the arbitrator from reaching an issue so that, in reaching that issue, the arbitrator exceeds her authority." Jock v. Sterling Jewelers Inc., 646 F.3d at 123.

Here, there was no agreement—plaintiff rejected Verizon's tender. Thus, the issue of attorney's fees was properly before the arbitrator.

Therefore, the Court finds the arbitrator did not exceed his powers by awarding attorney's fees in the amount of $500.

2. Manifest Disregard of the Law

Plaintiff next argues the arbitrator manifestly disregarded the law by ruling that Verizon must pay plaintiff $1,500 without interest. Specifically, plaintiff argues the arbitrator did not justify his decision and ignored controlling cases—Radha Geismann, M.D., P.C. v. Zocdoc, Inc., 850 F.3d 507 (2d Cir. 2017), and Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 66 N.Y.2d 321 (1985)—in forcing Verizon's tender of $1,500 on plaintiff.

The Court disagrees.

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).

Here, plaintiff has failed to identify authority clearly on point that rejects the possible rationales for the arbitrator's decision. In fact, there is support for the arbitrator's decision to enter judgment in the amount of Verizon's tender. Leyse v. Lifetime Entm't Servs, LLC, 679 F. App'x 44, 48 (2d Cir. 2017) (summary order) (when defendant deposits full amount of plaintiff's claim in account payable to plaintiff, court may enter judgment for plaintiff in that amount). Thus, plaintiff has failed to establish the arbitrator intentionally defied the law.

Because the arbitrator did not intentionally defy the law, he did not manifestly disregard the law by ruling Verizon must pay plaintiff $1,500 without interest.

3. Misconduct

Plaintiff also argues the arbitrator is guilty of misconduct for denying plaintiff the right to take limited discovery and for opining during a December 16, 2016, telephone conference that plaintiff wanted discovery so he could use it in another case against Verizon.

The Court disagrees.

A court may vacate an arbitration award "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C.

§ 10(a)(3). "[M]isconduct occurs under this provision only where there is a denial of 'fundamental fairness.'" Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d at 104 (citation omitted). "Thus, under [the Second Circuit's] narrow construction, when a party seeks to vacate an arbitration award based on evidence that is 'too remote' an arbitration decision may not be opened up to evidentiary review." Id. (citation omitted). The exclusion of testimony concerning collateral issues not material to the arbitrator's decision does not violate fundamental fairness. See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 546 (2d Cir. 2016).

Here, the discovery plaintiff sought was collateral to the issues on which the arbitrator resolved the case—namely, Verizon's tender offer and plaintiff's lack of standing. Thus, 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." Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d at 546.

Moreover, the December 16, 2016, telephone conference in which the arbitrator opined that plaintiff wanted discovery so plaintiff could use it in another case against Verizon does not constitute arbitrator misconduct. In particular, plaintiff fails to show how the arbitrator's statement during the telephone conference denied him fundamental fairness.

Therefore, the arbitrator is not guilty of misconduct for denying plaintiff the right to take limited discovery

or because of his statements during the December 16, 2016, telephone conference.

4. Partiality

Finally, plaintiff argues there was evident partiality on the part of the arbitrator because Verizon paid his mandatory fees, which plaintiff argues were more than nine times the amount to which he was entitled. Plaintiff also relies on the December 16, 2016, telephone conference in which the arbitrator opined plaintiff wanted discovery so plaintiff could use it in another case against Verizon as evidence of partiality.

The Court disagrees.

Evident partiality must be shown by clear and convincing evidence, Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d at 106, and "may be found only 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration,'" id. at 104 (citation omitted). "Although a party seeking vacatur must prove evident partiality by showing 'something more than the mere appearance of bias,' '[p]roof of actual bias is not required.'" Id. at 104 (citations omitted) (alterations in original). "Rather, 'partiality can be inferred from objective facts inconsistent with impartiality.'" Id. (citation omitted). "A showing of evident partiality must be direct and not speculative." Id. The same standard applies for cases alleging evidence of corruption. See id. An arbitrator's statement that he would issue a ruling in one party's favor does not "rise to the level of bias or corruption

necessary to vacate an arbitration award under § 10(a)(2)." Id. at 106.

Here, the arbitration agreement provided for Verizon's payment of the arbitrator's fees. Moreover, even if those fees exceeded the amount to which the arbitrator was entitled—something that is not at all clear from plaintiff's submissions—plaintiff has failed to put forth anything but speculation that the higher fees affected the arbitrator's impartiality. Likewise, the telephone call in which the arbitrator professed his view that plaintiff desired discovery to use in another case against Verizon, insofar as it is a statement of his opinion, is insufficient to show partiality.

Therefore, plaintiff has failed to show evident partiality on the part of the arbitrator either because Verizon paid his fees or from the December 16, 2016, telephone conference.

D. Due Process

Plaintiff seeks to vacate those parts of the Decisions that constitute rulings of law. Plaintiff argues his consent to arbitration, which provides for an inferior system of justice without true judicial review, was involuntary. Therefore, plaintiff argues, his right to due process of law under the Fifth Amendment was violated.

"To state a [Fifth Amendment] Due Process claim, a plaintiff must show that: (1) state action (2) deprived him or her of liberty or property (3) without due process of law." Barrows v. Burwell, 777 F.3d 106, 113 (2d Cir. 2015).

Verizon argues plaintiff's claim fails because the Court's holding that plaintiff cannot show state action in the signing of the private arbitration agreement is law of the case.

The Court agrees.

The law of the case doctrine provides "when a court has ruled on an issue, 'that decision should generally be adhered to by that court in subsequent stages in the same case.'" United States v. Carr, 557 F.3d 93, 102 (2d Cir. 2009) (quoting United States v. Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002)). The doctrine is properly applied only when the parties had a full and fair opportunity to litigate the initial determination. See Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d at 219.

"Application of the law of the case doctrine is discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." Sagendorf-Teal v. Cty. of Rensselaer, 100 F.3d 270, 277 (2d Cir. 1996) (citation and internal quotation marks omitted). 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.'" Johnson v. Holder, 564 F.3d 95, 99–100 (2d Cir. 2009) (quoting United States v. Quintieri, 306 F.3d at 1230). An intervening change of law requires a change in controlling law. See Ali v. Mukasey, 529 F.3d 478, 490 (2d Cir. 2008).

In its December 12, 2013, Memorandum Decision, the Court rejected plaintiff's claim that the arbitration

agreement unconstitutionally requires him to forfeit his Article III rights because there was no evidence "the government had anything to do with either Verizon's decision to include an arbitration agreement in its customer contracts, or Verizon's decision to compel arbitration with its customers." (Doc. #39 at 10). Thus, it is law of the case that the "requisite state action is absent" from plaintiff's agreement to arbitrate. (Id. (quoting Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999)).

Plaintiff argues the Court's December 12, 2013, holding does not apply here because it did not deal with an identical issue to the one currently before the Court. Plaintiff seems to rely on the difference between the Article III separation of powers claim previously before the Court and the Fifth Amendment due process claim currently before the Court.

Plaintiff's argument is inapposite because state action as to plaintiff's Fifth Amendment due process claim can be analyzed under the same framework as his Article III claim. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d at 206.

Plaintiff further argues Congress's enactment of FAA Section 10(a)(4) creates state action. Plaintiff's argument lacks any support. Further, it is unpersuasive as it would have this Court impute state action into every valid arbitration agreement.

Finally, plaintiff argues the Supreme Court's decision, Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015), constitutes an intervening change of law such that the Court should depart from the law of

the case. Plaintiff argues Wellness Int'l Network, Ltd. v. Sharif "confirms by analogy" the need for plaintiff to be aware of the need for consent and the right to refuse arbitration. (Pl. Br. at 24).

The Court disagrees.

In Wellness Int'l Network, Ltd. v. Sharif, the Supreme Court held Article III of the Constitution permits bankruptcy judges to adjudicate Stern v. Marshall, 564 U.S. 462 (2011) claims—i.e., claims seeking only to augment the bankruptcy estate that would otherwise exist without regard to any bankruptcy proceeding—with the parties' knowing and voluntary consent. 135 S. Ct. at 1941, 1948. In contrast, plaintiff's due process claim deals with the constitutionality of waiving judicial review of arbitration proceedings. Thus, plaintiff's reliance on Wellness Int'l Network, Ltd. v. Sharif is misplaced.

It is law of the case that the requisite state action is absent in the signing of the arbitration agreement. Plaintiff's Fifth Amendment due process claim thus fails for lack of state action.

III. Motion to Strike

Plaintiff seeks to strike all references in Verizon's opposition to Schatz v. Cellco P'ship, AAA Case No. 20-1300-1262 (Jan. 25, 2015)—an arbitration award—and Schatz v. Cellco P'ship, 2016 WL 1717212 (S.D.N.Y. Apr. 28, 2016)—the court decision confirming the award. Verizon cited the award and the decision confirming it for the proposition that the arbitrator did not manifestly disregard the law in holding GBL Section 349 does not permit general injunctive relief.

(Opp'n at 10). Plaintiff argues the arbitration agreement governing the Schatz arbitration applies only to that case, and therefore any citations to it—and the decision confirming it—are prohibited.

Plaintiff's motion borders on the frivolous.

The language plaintiff relies on in the Schatz arbitration agreement states: "An arbitration award and any judgment confirming it apply only to that specific case; it can't be used in any other case except to enforce the award itself." (Doc. #84 at Ex. 1).

This language restricts the binding application of an award and judgment to the specific case and parties covered by the arbitration agreement. However, it says nothing about prohibiting arbitrators or courts from relying on the rationale of the award or judgment in other matters. And plaintiff offers no support for his argument that such language prohibits this Court from considering judicial precedent. Nor, in the Court's view, could he.

Therefore, the Court will not strike references in Verizon's opposition to the Schatz arbitration award and the court decision confirming the award.

CONCLUSION

Plaintiff's motion to partially confirm and partially vacate the arbitrator's decisions of October 28, 2016, and June 29, 2017, is GRANTED IN PART and DENIED IN PART.

Plaintiff's motion to strike and/or preclude is DENIED.

Defendant's motion to confirm the arbitrator's decisions of October 28, 2016, and June 29, 2017, is GRANTED.

The Clerk is instructed to terminate the pending motions (Docs. ##72, 83) and close this case.

Dated: April 17, 2018
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 14-138 (Lead), 14-291 (XAP)

[Filed July 28, 2015]

MICHAEL A. KATZ, individually and on behalf of all others similarly situated,
Plaintiff-Appellant-Cross-Appellee,

–v.–

CELLCO PARTNERSHIP, DBA VERIZON WIRELESS,
Defendant-Appellee-Cross-Appellant.

August Term, 2014

(Argued: March 5, 2015 Decided: July 28, 2015)

Before:

WESLEY, LIVINGSTON, and CARNEY, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York (Briccetti, J.). Plaintiff-Appellant-Cross-Appellee Michael A. Katz initiated a putative class action against Defendant-Appellee-Cross-Appellant Cellco Partnership d/b/a Verizon Wireless ("Verizon"), asserting various state law claims and seeking declaratory judgment that application of

the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, to compel arbitration of those claims pursuant to a contractual arbitration clause is unconstitutional. Katz moved for partial summary judgment on his declaratory judgment claim while Verizon cross-moved to compel arbitration and to stay proceedings. The District Court denied declaratory relief, compelled arbitration of all claims, and dismissed the action. We AFFIRM IN PART and VACATE and REMAND IN PART.

WILLIAM ROBERT WEINSTEIN, Law Offices of William R. Weinstein, White Plains, NY, *for Plaintiff-Appellant-Cross Appellee.*

ANDREW G. MCBRIDE, (J. Michael Connolly, *on the brief*), Wiley Rein LLP, Washington, DC, *for Defendant-Appellee Cross-Appellant.*

WESLEY, *Circuit Judge*:

In an effort to more efficiently manage their dockets, some district courts in this Circuit will dismiss an action after having compelled arbitration pursuant to a binding arbitration agreement between the parties. That is what happened here. After the District Court (Briccetti, J.) found Michael A. Katz's state law claims against Cellco Partnership d/b/a Verizon Wireless ("Verizon") to be arbitrable, the court compelled arbitration but denied Verizon's request to stay

proceedings.[1] By dismissing the case, however, the District Court made the matter immediately appealable as a final order, provoking additional litigation—specifically, this appeal. Although we recognize the administrative advantages of a rule permitting dismissal, we hold that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"), requires a stay of proceedings when all claims are referred to arbitration and a stay requested. Moreover, Katz's various constitutional challenges to the FAA are meritless, as explained by the well-reasoned opinion of the District Court. Accordingly, we AFFIRM the District Court's judgment denying summary judgment and compelling arbitration, VACATE the District Court's dismissal of the action, and REMAND with instructions to stay the action pending arbitration.

BACKGROUND

Katz sued Verizon on behalf of a putative class of New York-area Verizon wireless telephone subscribers, asserting breach of contract and consumer fraud claims under New York state law on the basis of a monthly administrative charge assessed by Verizon. Katz alleged that—contrary to Verizon's representations that the administrative charge was imposed for recovery of government related costs—the charge was actually a discretionary pass-through of Verizon's general costs and, so, constituted a concealed rate increase.

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[1] Plaintiff-Appellant-Cross-Appellee Katz appeals the denial of his motion for partial summary judgment and the grant of Verizon's motion to compel arbitration, while Defendant-Appellee-Cross-Appellant-Verizon appeals the denial of its request to stay proceedings.

Katz's contract with Verizon incorporated the company's wireless customer agreement, which contained an arbitration clause that invoked the FAA and required the arbitration of disputes arising from the agreement or from Verizon's wireless services. Thus, in addition to his state law claims, Katz also sought a declaratory judgment that application of the FAA to those claims was, on various grounds, unconstitutional.[2]

The parties filed cross-motions. Katz moved for partial summary judgment for declaratory relief, which Verizon opposed as foreclosed by controlling precedent. Verizon moved to compel arbitration and to stay proceedings. Katz conceded in response that "Verizon's Customer Agreement is enforceable under the FAA with respect to his and all of Verizon's other customers' state law claims for breach of contract and consumer fraud . . . but only if the application of the FAA to those state law claims does not violate Article III of the United States Constitution."[3] *Katz v. Cellco P'ship*, No. 12 CV 9193(VB), 2013 WL 6621022, at *4 n.2 (S.D.N.Y. Dec. 12, 2013) (internal quotation marks and emphasis omitted). Katz also argued that should arbitration be compelled, his action ought to be dismissed, not stayed, pending arbitration.

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[2] Katz principally argues that application of the FAA to compel arbitration of his state law claims violates Article III separation of powers principles and constitutes an impermissible rule of decision.

[3] Katz maintains this concession on appeal. *See* Plaintiff-Appellant-Cross-Appellee Br. 4 n.2.

The District Court denied Katz's motion, ruling that application of the FAA to compel arbitration of Katz's state law claims is constitutional. The District Court next found that Katz's claims were arbitrable, as Katz had conceded, and granted Verizon's motion to compel arbitration. Having compelled arbitration of all claims, the District Court then dismissed—rather than stayed—the action, but recognized that whether district courts have such dismissal discretion remains an open question in this Circuit.

For substantially the reasons identified in the District Court's thorough memorandum decision, we agree with the court's decision that the FAA neither violates Article III of the Constitution nor imposes an unconstitutional rule of decision under *United States v. Klein*, 80 U.S. 128 (1871). Accordingly, we affirm the District Court's denial of Katz's motion for partial summary judgment as well as its grant of Verizon's motion to compel arbitration. We address here only whether dismissal was the appropriate disposition.

DISCUSSION[4]

I. To Stay or Not To Stay

The question whether district courts retain the discretion to dismiss an action after all claims have

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[4] We review *de novo* the denial of a motion for summary judgment, *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013), the grant of a motion to compel arbitration, *Opals on Ice Lingerie v. Bodylines Inc.,* 320 F.3d 362, 368 n.2 (2d Cir. 2003), and the denial of a motion to stay proceedings pending arbitration, *Mediterranean Shipping Co. S.A. Geneva v. POL–Atlantic*, 229 F.3d 397, 402 (2d Cir. 2000).

been referred to arbitration, or whether instead they must stay proceedings, remains unsettled. The Supreme Court has yet to decide the issue. *See Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000) ("The question whether the District Court should have taken that course [*i.e.*, to dismiss rather than to stay the case after all claims were compelled to arbitration] is not before us, and we do not address it."). And this Court has previously suggested different conclusions. *Compare McMahan Sec. Co. v. Forum Capital Mkts.*, 35 F.3d 82, 85–86 (2d Cir. 1994) ("Under the [FAA], a district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding. The FAA leaves no discretion with the district court in the matter." (citation omitted)), *with Oldroyd v. Elmira Sav. Bank,* 134 F.3d 72, 76 (2d Cir. 1998) ("[I]f the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration."), *and Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002) ("We urge district courts in these circumstances to be as clear as possible about whether they truly intend to dismiss an action or mean to grant a stay pursuant to [FAA Section 3], which supplies that power . . . .").[5]

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[5] Our prior decisions have not directly addressed the question posed here. Both *McMahan* and *Oldroyd* principally analyzed the arbitrability issues there presented; whether a stay was necessary was ancillary to the arbitrability determination. *McMahan*, 35 F.3d at 85–86; *Oldroyd*, 134 F.3d at 76–77. And, similar to the Supreme Court's ruling in *Green Tree*, *Salim Oleochemicals*

The Courts of Appeals are about evenly divided. Several Circuits have held or implied that a stay must be entered, *see, e.g., Cont'l Cas. Co. v. Am. Nat'l Ins.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005); *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269–71 (3d Cir. 2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955–56 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (per curiam); while others have suggested that district courts enjoy the discretion to dismiss the action, *see, e.g., Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 & n.21 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 637–38 (9th Cir. 1988). Most recently, the Fourth Circuit noted internal tension between panel opinions requiring a stay and permitting dismissal, but declined to resolve the issue because it was not squarely presented. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012) (comparing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999), with *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001)).

II. The Federal Arbitration Act Requires a Stay

We join those Circuits that consider a stay of proceedings necessary after all claims have been referred to arbitration and a stay requested. The FAA's

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addressed the final decision status of a dismissal under Section 16 of the FAA and assumed, without holding, that dismissal was a permissible disposition. *Salim Oleochemicals*, 278 F.3d at 93.

text, structure, and underlying policy command this result. Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall*** on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). The plain language specifies that the court "shall" stay proceedings pending arbitration, provided an application is made and certain conditions are met.[6] It is axiomatic that the mandatory term "shall" typically "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Congress's "use of a mandatory 'shall' . . . impose[s] discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001). Nowhere does the FAA abrogate this directive or render it discretionary. And though courts may disregard a statute's plain meaning

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[6] Although the statutory text refers to an action brought "upon ***any*** issue referable to arbitration," 9 U.S.C. § 3 (emphasis added), we address here only the disposition of actions in which ***all*** claims have been referred to arbitration.

where it begets absurdity, *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), that is manifestly not the case here.

Far from it. A mandatory stay comports with the FAA's statutory scheme and pro-arbitration policy. The statute's appellate structure, for example, "permits immediate appeal of orders hostile to arbitration . . . but bars appeal of interlocutory orders favorable to arbitration." *Green Tree*, 531 U.S. at 86. The FAA authorizes immediate interlocutory review of an order refusing to compel arbitration or denying a stay of proceedings; it would make little sense to receive a conclusive arbitrability ruling only after a party has already litigated the underlying controversy. *See* 9 U.S.C. § 16(a)(1)(A)–(B) ("An appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 . . . [or from an order] denying a petition under section 4 . . . to order arbitration to proceed."). By contrast, the FAA explicitly denies the right to an immediate appeal from an interlocutory order that compels arbitration or stays proceedings. *See id.* § 16(b)(1)–(2) ("[A]n appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 . . . [or] directing arbitration to proceed under section 4."). The dismissal of an arbitrable matter that properly should have been stayed effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order. Affording judges such discretion would empower them to confer appellate rights expressly proscribed by Congress.

For similar reasons, a mandatory stay is consistent with the FAA's underlying policy "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). A stay enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award.[7]

We recognize that efficient docket management is often the basis for dismissing a wholly arbitrable matter. *See, e.g., Lewis Tree Serv., Inc. v. Lucent Techs., Inc.*, 239 F. Supp. 2d 332, 340 (S.D.N.Y. 2002) (finding that "no useful purpose will be served by granting a stay"); *Reynolds v. de Silva*, No. 09 Civ. 9218(CM), 2010 WL 743510, at *9 (S.D.N.Y. Feb. 24, 2010) (finding it an "inefficient use of the Court's docket to stay the action"). But this is not reason enough. While district courts no doubt enjoy an inherent authority to manage their dockets, *Link v. Wabash R.R.*, 370 U.S. 626, 630–31 (1962); *Marion S. Mishkin Law Office v. Lopalo*, 767 F.3d 144, 148 (2d Cir. 2014), that authority cannot trump a statutory mandate, like Section 3 of the FAA, that clearly removes such discretion. *See Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999)

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[7] For example, the FAA specifies circumstances in which judicial participation in the arbitral process is permitted. Arbitrating parties may return to court, *inter alia*, to resolve disputes regarding the appointment of an arbitrator or to fill an arbitrator vacancy, 9 U.S.C. § 5; to compel attendance of witnesses or to punish witnesses for contempt, *id.* § 7; and to confirm, vacate, or modify an arbitral award, *id.* §§ 9–11.

("[J]udges must place enforcement of the [Prison Litigation Reform Act's administrative-exhaustion requirement] over a concern for efficient docket management."); *In re Prevot*, 59 F.3d 556, 566 (6th Cir. 1995) ("A court has the inherent power to manage its docket, subject of course to statutes requiring special treatment for specified types of cases."); *Marquis v. FDIC*, 965 F.2d 1148, 1154 (1st Cir. 1992) ("It is beyond cavil that, absent a statute or rule to the contrary, federal district courts possess the inherent power to stay pending litigation when the efficacious management of court dockets reasonably requires such intervention.").

In sum, while we recognize the impetus for a rule permitting dismissal, we conclude that the text, structure, and underlying policy of the FAA mandate a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay requested.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is AFFIRMED IN PART and VACATED and REMANDED IN PART for further proceedings before the District Court consistent with this decision.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 CIV 9193 (VB)

[Filed December 12, 2013]

MICHEAL A. KATZ, individually and on behalf of all others similarly situated, Plaintiff,	)
v.	)
CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, Defendant.	)

MEMORANDUM DECISION

Briccetti, J.:

Plaintiff Michael Katz brings this putative class action against defendant Cellco Partnership, doing business as Verizon Wireless ("Verizon"), asserting claims under New York state law for breach of contract and consumer fraud based on an administrative charge assessed by Verizon. Plaintiff also seeks a declaratory judgment that the arbitration agreement included in Verizon's customer agreement with plaintiff is not enforceable with respect to plaintiff's claims because, plaintiff argues, compelling plaintiff to arbitrate

pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, is an improper delegation of Article III power to a non-Article III forum in violation of the United States Constitution.

Now pending are plaintiff's motion for partial summary judgment on his declaratory judgment claim (Doc. #17), and defendant's cross-motion to compel individual arbitration. (Doc. #21). For the following reasons, plaintiff's motion is DENIED, and defendant's motion is GRANTED.

The Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d).

BACKGROUND

The parties have submitted briefs, statements of facts, and declarations with supporting exhibits, which reflect the following factual background.

Verizon provides wireless telephone service to more than one million customers with New York State area codes. These customers have been charged and have paid a certain "Administrative Charge." The parties agree plaintiff Michael Katz was one such New York customer from at least February 2001 until at least July 2012.

According to the amended complaint, the Administrative Charge is a monthly per-line charge ranging from $0.40 when it was first implemented in October 2005 to $0.99 when this action was commenced. Plaintiff alleges Verizon's customer agreements, monthly bills, and other customer information imply the

Administrative Charge is being imposed for the recovery of government-mandated or government-related costs. Plaintiff alleges the Administrative Charge is not, however, imposed for those reasons – rather, it is a discretionary pass-through of Verizon's general costs. In effect, plaintiff argues, the Administrative Charge is a concealed rate increase.

Plaintiff asserts New York state law claims for breach of contract and consumer fraud and seeks to represent a class of Verizon's New York customers.

By motion for summary judgment on his declaratory judgment claim, plaintiff "seeks a declaration that the application of the FAA to Plaintiff's state law claims violates Article III of the United States Constitution, and thus that Verizon's Arbitration Agreement is not enforceable with respect to Plaintiff's claims and Plaintiff cannot be judicially compelled to arbitrate those claims." (Plaintiff's Mem. of Law in Opp. To Verizon's Mt. to Compel (Doc. # 27) [hereinafter "P.Opp."] at 1.)

Defendant's cross-motion to compel individual arbitration is based on the following provisions in plaintiff's February 28, 2011, Verizon customer agreement:[1]

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[1] The parties have submitted different customer agreements to their respective motions; however, plaintiff does not challenge defendant's use of the February 2011 agreement for its motion to compel arbitration. Additionally, the Court finds no material difference between the parties' respective agreements in that the customer agreements contain substantially similar arbitration agreements that preclude class arbitration.

BOTH [VERIZON AND MR. KATZ] AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT.

. . .

WE ALSO BOTH AGREE THAT: (1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. EXCEPT FOR SMALL CLAIMS COURT CASES THAT QUALIFY, ANY DISPUTE THAT RESULTS FROM THIS AGREEMENT OR FROM THE SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY PRODUCTS OR SERVICES) WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB").

. . .

(2) UNLESS YOU AND VERIZON WIRELESS AGREE OTHERWISE, THE ARBITRATION WILL TAKE PLACE IN THE COUNTY OF YOUR BILLING ADDRESS.

. . .

(3) THIS AGREEMENT DOESN'T ALLOW CLASS ARBITRATIONS EVEN IF THE AAA OR BBB PROCEDURES OR RULES WOULD. 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.

Defendant's statement of facts asserts plaintiff agreed to the above-quoted arbitration agreement and the Verizon customer agreement dated February 28, 2011, as a whole, when he purchased a new cell phone on February 28, 2011, and agreed to a twenty-four month term of service. Defendant contends plaintiff signed a statement as part of that agreement, which provides in relevant part:

> I AGREE TO THE CURRENT VERIZON WIRELESS CUSTOMER AGREEMENT . . . . I UNDERSTAND THAT I AM AGREEING TO . . . SETTLEMENT OF DISPUTES BY ARBITRATION AND OTHER MEANS INSTEAD OF JURY TRIALS.

Plaintiff does not dispute that his signature appears at the end of the document bearing this statement, but otherwise claims he is "unable to respond to the truth of the matters asserted" by Verizon including the matters asserted in the document. Because he does not dispute he purchased a phone on February 28, 2011, or deny he signed an agreement for wireless services for a term of twenty-four months, the Court deems these facts admitted. Additionally, plaintiff agrees his claims are arbitrable pursuant to the arbitration agreement in his customer agreement if his declaratory judgment claim fails.

DISCUSSION

I. Legal Standard

"In the context of motions to compel arbitration brought under the Federal Arbitration Act, the court applies a standard similar to that applicable for a motion for summary judgment." Bensadoun v. Jobe–Riat, 316 F.3d 171, 175 (2d Cir. 2003) (citations omitted). Accordingly, the Court must grant a motion to compel arbitration if the pleadings, discovery materials before the Court, and any affidavits show there is no genuine issue as to any material fact and it is clear the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A fact is material when it "might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary" are not material and thus cannot preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A dispute regarding a material fact is genuine if there is sufficient evidence upon which a reasonable jury could return a verdict for the nonmoving party. See id. The Court "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 60 (2d Cir. 2010) (citation omitted). It is the moving party's burden to establish the absence of any genuine issue of material fact. Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 340 (2d Cir. 2010).

"A party to an arbitration agreement seeking to avoid arbitration generally bears the burden of showing the agreement to be inapplicable or invalid." Harrington v. Atl. Sounding Co., Inc., 602 F.3d 113, 124 (2d Cir. 2010) (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000)).

II. Compelling Arbitration under the FAA

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1745 (2011). Section 2 of the FAA declares that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so," Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); however, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983). Thus, the FAA reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 131 S.Ct. at 1745 (internal quotation marks and citations omitted).

"[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.' Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'"

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trustees, 489 U.S. at 479) (internal citations omitted). "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." Id.

Under Section 4 of the FAA, any party to an arbitration agreement may seek an order directing the parties to arbitrate in accordance with their agreement. See 9 U.S.C. § 4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.").

Whether the parties have agreed to submit their dispute to arbitration is a question for the Court to decide. See Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 130 S. Ct. 2847, 2855 (2010). Here, plaintiff concedes his state-law claims are arbitrable.[2] Thus, unless there is some reason the Court may not enforce the parties' agreement to arbitrate, the Court

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[2] See P.Opp. at 1 ("Plaintiff does not dispute, for the purposes of this action, that the Arbitration Agreement included in Verizon's Customer Agreement is enforceable under the FAA with respect to his and all of Verizon's other customers' state law claims for breach of contract and consumer fraud based on Verizon's Administrative Charge practices as described in Plaintiff's Complaint – *but only if the application of the FAA to those state law claims does not violate Article III of the United States Constitution*.").

must direct the parties to arbitrate plaintiff's claims in accordance with their agreement. See 9 U.S.C. §§ 3-4.

Plaintiff argues the arbitration agreement should not be enforced because application of the FAA to his state law claims violates Article III of the United States Constitution – both the structural protections of our tripartite system of government (i.e., separation of powers) and his personal right to have his claims adjudicated before an independent Article III judge – by delegating resolution of his claims to a non-Article III forum. See Stern v. Marshall, 131 S. Ct. 2594 (2011). Plaintiff also argues the FAA imposes an unconstitutional rule of decision under United States v. Klein, 80 U.S. 128 (1871).

Defendant contends there is insufficient state action for plaintiff to maintain an action under Article III. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206-07 (2d Cir. 1999) (rejecting claim that mandatory arbitration clause in National Association of Securities Dealers, Inc. registration form "unconstitutionally require[d] [plaintiff] to forfeit her . . . right to an Article III judicial forum . . . because the requisite state action [was] absent").

Notwithstanding Desiderio, defendant argues even if plaintiff could maintain this action, the FAA does not restrict the Article III jurisdiction of the federal courts because the FAA does not delegate resolution of disputes to an alternative forum created by Congress – such as was the issue in Stern v. Marshall and other cases relied on by plaintiff. See, e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986) ("The risk that Congress may improperly have

encroached on the federal judiciary is obviously magnified when Congress 'withdraw[s] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty' and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation." (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 18 How. 272, 284 (1856))). Rather, the FAA enforces private agreements to arbitrate, which does not implicate separation of powers concerns. See id. at 855 (It is "self-evident" that "Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers."). Further, because plaintiff agreed to arbitrate his claims, he waived his personal right to adjudication in an Article III court. See, e.g., Belom v. Nat'l Futures Ass'n, 284 F.3d 795, 799 (7th Cir. 2002). Last, defendant argues the FAA does not impose an unconstitutional rule of decision.

The Court agrees with defendant. There is insufficient state action for plaintiff to maintain an action under Article III; applying the FAA to compel arbitration of these claims does not violate Article III both because the FAA is not an incursion on the separation of powers and because plaintiff waived his personal right to an Article III forum by agreeing to arbitrate; and the FAA does not impose an unconstitutional rule of decision.

A. There Is Insufficient State Action for Plaintiff to Maintain His Claim

"Because the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes state action." Fabrikant v. French, 691 F.3d 193, 206 (2d Cir. 2012) (quotation marks omitted). "'Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character that it can be regarded as governmental action.'" Id. at 206 (quoting Rendell-Baker v. Kohn, 457 U.S. 830, 847 (1982)). However, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

Private conduct becomes entwined with governmental character if there is a "sufficiently *close nexus* between the State and the challenged action," such that the state is "*responsible for the specific conduct* of which the plaintiff complains." Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d at 206 (quotation marks omitted). Courts consider many factors to determine whether private action is fairly attributable to the state, and although there is no "single test" for making this determination, "[t]hree main tests have emerged," Fabrikant v. French, 691 F.3d at 206 – the "compulsion test," the "joint action test," and the "public function test."

Plaintiff relies solely on the "joint [action]" test as applied in Lugar v. Edmondson Oil Co., 457 U.S. 922

(1982), and Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988) to establish state action. (See Plaintiff's Reply Mem. of Law in Supp. of Plaintiff's Mt. for Decl. Judg., at 5.) Under the "joint action test," actions are attributable to the state when the state provides such significant encouragement that "the entity is a willful participant in joint activity with the state, or the entity's functions are entwined with state policies." Fabrikant v. French, 691 F.3d at 206.

The Court concludes state action is not present here under the "joint action" test, for the reasons set forth in Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc. There, plaintiff sought employment as a securities broker for a bank. Her employment was conditioned on registration with the National Association of Securities Dealers, Inc. ("NASD"). Registration with the NASD required plaintiff to sign a form with an agreement to arbitrate any potential employment disputes. Plaintiff argued the mandatory arbitration clause "unconstitutionally require[d] her to forfeit . . . her right to an Article III judicial forum." 191 F.3d at 206. The district court disagreed, and the Second Circuit affirmed, reasoning the NASD was a "private actor, not a state actor," id. at 206, and there was "no state action in the application or enforcement of the arbitration clause." Id. at 207 (no SEC rule or action encouraged the NASD to draft the arbitration clause or compel arbitration, and the SEC's mere approval of the NASD's registration form did not constitute coercive power or significant encouragement sufficient to hold the state liable); see also Perpetual Sec., Inc. v. Tang, 290 F.3d 132, 138-39 (2d Cir. 2002); Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 368 (7th Cir.

1999); Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1202 (9th Cir. 1998), overruled on other grounds by EEOC v. Luce, 345 F.3d 742 (9th Cir. 2003).

Here, Verizon is a private actor, not a state actor, and there is no state action in the application or enforcement of the parties' private agreement to arbitrate. There is no evidence the government had anything to do with either Verizon's decision to include an arbitration agreement in its customer contracts, or Verizon's decision to compel arbitration with its customers. See Desiderio, 191 F.3d at 207. Because "the requisite state action is absent," id. at 206, plaintiff may not maintain a claim that the arbitration agreement unconstitutionally requires him to forfeit his Article III rights.

The Court rejects plaintiff's argument that the very existence of the FAA constitutes "significant encouragement" of Verizon to include an arbitration agreement in its customer contracts, and constitutes "coercive power" over Verizon's customers. Although "the FAA was designed to promote arbitration," AT&T Mobility LLC v. Concepcion, 131 S. Ct. at 1749, in terms of both enforcing private agreements and encouraging efficient dispute resolution, that promotion hardly constitutes the kind of significant encouragement necessary to a finding of state action. Rather, this type of encouragement is more akin to the "kind of subtle encouragement [that] is no more significant than that which inheres in the State's creation or modification of any legal remedy. [The Supreme Court has] never held that the mere availability of a remedy for wrongful conduct, even

when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it." See Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. at 53 (no state action when state permitted insurers to withhold payment for disputed medical treatment pending independent review).

Further, the fact that Verizon sought a court order compelling arbitration does not transform enforcement of the parties' arbitration agreement into state action. See Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 939 n.21 (1982) ("[W]e do not hold today that 'a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law.'"); Koveleskie v. SBC Capital Markets, Inc., 167 F.3d at 368 ("In this case, the defendant, not the government, sought to compel arbitration, so there is no basis to find that Koveleskie was deprived of her [Article III] rights because of government action."); Duffield v. Robertson Stephens & Co., 144 F.3d at 1202 ("neither private arbitration nor the judicial act of enforcing it under the FAA constitutes state action"); United States v. Am. Soc'y. of Composers, Authors & Publ'rs, 708 F. Supp. 95, 97 (S.D.N.Y. 1989) ("The mere approval by this Court of the use of arbitration did not create any state action.").[3]

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[3] To the extent plaintiff relies on Shelley v. Kraemer, 334 U.S. 1 (1948), the Court declines to extend the holding of that case here. See Loren v. Sasser, 309 F.3d 1296, 1303 (11th Cir. 2002) (rejecting argument relying on Shelley v. Kraemer that threat of judicial enforcement constituted state action because "Shelley has

The cases relied on by plaintiff are not to the contrary. See, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988); Perpetual Sec., Inc. v. Tang, 290 F.3d 132 (2d Cir. 2002); Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986), rev'd on other grounds sub nom., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 18 (1987); Dieffenbach v. Attorney Gen. of Vt., 604 F.2d 187 (2d Cir. 1979).

Tulsa Prof'l Collection Servs., Inc. v. Pope involved a "nonclaim statute," a state statute setting forth the deadline for filing notices of claims against an estate. 485 U.S. at 479. Specifically, claims needed to be filed "within two months of the publication of a notice advising creditors of the commencement of probate proceedings." Id. The appellant creditor argued the provision of notice solely by publication was not sufficient for due process purposes. Id. at 483.

Having concluded the creditor had a protected property interest in its unsecured claim, id. at 485, the Court went on to determine whether the deprivation of that right could be attributed to state action. The Court rejected appellee's argument that there was no state action because the state's involvement was the "mere running" of a "self-executing statute of limitations." Id. 485-86. In contrast to a "self-executing statute of limitations" in which there is no role for the state beyond enactment of the statute, the Court concluded the nonclaim statute involved "significant state action." Id. at 487. The Court drew a distinction between the

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not been extended beyond race discrimination."); see also Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 69 (2d Cir. 1976).

"[p]rivate use of state-sanctioned private remedies or procedures [which] does not rise to the level of state action [and situations] when private parties make use of state procedures with the overt, significant assistance of state officials, [in which case] state action may be found." Id. at 486 (internal citations omitted). The Court found significant state involvement based on the following:

> The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice "immediately" after appointment. Indeed, in this case, the District Court reinforced the statutory command with an order expressly requiring appellee to "immediately give notice to creditors." The form of the order indicates that such orders are routine. Record 14. Finally, copies of the notice and an affidavit of publication must be filed with the court. § 332. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Id. at 487 (emphasis added). Because "the legal proceedings themselves trigger the time bar" for the filing of claims, the Court concluded the nonclaim statute "lack[ed] the self-executing feature" of a typical statute of limitations. Id. Further, the state's involvement in the legal proceedings triggering the time bar was substantial. Id. at 488.

Here, the involvement of this Court in issuing one order enforcing a private agreement to arbitrate is not remotely similar to the amount of "pervasive and substantial" state involvement at issue in Pope. Id. at 487.

There is also a meaningful difference between, on the one hand, a private party's use of legal proceedings to attach or foreclose on property and to enforce judgments, which also involve substantial assistance of the courts and other state actors, see, e.g., Lugar v. Edmondson Oil Co., Inc., 457 U.S. at 942 (state action found when private party invoked state-created, ex parte, prejudgment attachment procedure, which also involved using a state official to seize property); Texaco Inc. v. Pennzoil Co., 784 F.2d at 1145-47 (explaining extensive actions required to attach and seize assets and to place judgment liens on property and concluding "[e]nforcement of the state court judgment therefore necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitutes joint action for the purposes of § 1983"); Dieffenbach v. Attorney Gen. of Vt., 604 F.2d at 194-95 (state action present because "Vermont's strict foreclosure laws directly engage the state's judicial power in effectuating foreclosure," which includes the

assistance of courts and state officials), and, on the other hand, this Court's enforcement of a private agreement to arbitrate. See Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. at 58 (explaining the holding in Lugar v. Edmondson Oil Co., Inc. cannot be divorced from the context out of which it arose and noting "[i]n the present case, of course, there is no effort by petitioners to seize the property of respondents by an *ex parte* application to a state official."); Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1469 (N.D. Ill. 1997) (same and "refus[ing] to hold that every time a Court enforces a private arrangement [such as an agreement to arbitrate] it potentially violates one party's constitutional rights"); see also Texaco Inc. v. Pennzoil Co., 784 F.2d at 1147 (distinguishing cases, such as this, "where a private party is alleged to be a state actor merely because it brought suit and sought a judicial ruling").

Plaintiff simply provides no explanation beyond mere ipse dixit as to how this Court's enforcement of an arbitration agreement bears any resemblance to the state involvement in Pope, Lugar, Texaco, and Dieffenbach. Nor is the Court persuaded by plaintiff's attempt to distinguish Desiderio based on the nature of the claims at issue (i.e., state law claims as opposed to federal law claims). It is also irrelevant that the court in Desiderio referred generally to Article III and did not specifically discuss "separation of powers."

B. Compelling Arbitration Does Not Violate Article III

"Article III, § 1, of the Constitution mandates that '[t]he judicial Power of the United States, shall be

vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.' The same section provides that the judges of those constitutional courts 'shall hold their Offices during good Behaviour' and 'receive for their Services[] a Compensation[] [that] shall not be diminished' during their tenure." Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011) (quoting U.S. Const. art. III, § 1) (alteration in original).

Article III both protects our tripartite system of government, id. ("Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch." (quotation marks omitted)), and "safeguard[s] litigants' right to have claims decided before judges who are free from potential domination by other branches of government." Commodity Futures Trading Comm'n v. Schor, 478 U.S. at 848 (quotation marks omitted).

The Court concludes compelling arbitration of plaintiff's claims does not violate either the structural protections of Article III or plaintiff's right to have his claim adjudicated by an independent Article III judge.

1. The FAA Is Not an Impermissible Incursion on the Separation of Powers

Plaintiff's argument is premised on a fundamental misunderstanding of the FAA. The FAA allows for the enforcement of agreements to arbitrate. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. at 682 ("[T]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according

to their terms." (quotation marks omitted)). It neither creates alternative dispute resolution forums, nor delegates resolution of disputes to those alternative forums. Thus, the FAA does not violate the separation of powers doctrine.

When Congress creates and delegates resolution of disputes to non-Article III forums, that action raises significant concerns regarding the constitutional system of checks and balances. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986) ("The risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress 'withdraw[s] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty' and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation." (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 18 How. 272, 284 (1856))); see also Stern v. Marshall, 131 S.Ct. at 2609 ("Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III. That is why we have long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty'" (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. at 284)).

In contrast, when Congress encourages or merely enforces a private agreement to resolve disputes outside Article III courts, no such concerns regarding the separation of powers are implicated because Congress is not withdrawing any matter from judicial cognizance. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. at 854-55. Rather, it is the parties who are choosing to withdraw, by agreement, certain matters from judicial cognizance.

The Supreme Court's opinion in Schor is instructive. There, the Court considered whether Congress's grant of authority to the Commodity Futures Trading Commission (CFTC) – an independent agency created by Congress – to consider state law counterclaims in reparations proceedings violated Article III. The Court held the grant of authority did not violate Article III. Id. at 857.

The Schor Court considered several factors in reaching its decision. Id. at 851. Among them was whether Congress had "withdraw[n] from judicial cognizance" the determination of a broker's counterclaim. Id. at 854-55. The Court determined Congress had not done so. Congress had given the CFTC the authority to adjudicate the claim, but left the decision to bring the claim before the agency to the parties. In that circumstance, "the power of the federal judiciary to take jurisdiction of [those] matters is unaffected." Id. at 855. To explain how, in that circumstance, "separation of powers concerns are diminished," id., the Court compared Congress's grant of authority to the CFTC to Congress's encouragement of arbitration, concluding the latter circumstance

constituted no "impermissible incursion[] on the separation of powers":

> Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. <u>In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences</u>. This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack. *See*, *e.g.*, *Northern Pipeline, supra,* 458 U.S., at 73–74, 102 S.Ct., at 2872–2873. But this case obviously bears no resemblance to such a scenario, given the degree of judicial control saved to the federal courts, *see supra,* at 3258–3259, as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.

Id. (emphasis added); see also Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310, 322 (7th Cir. 1987) ("To justify the reparations procedure challenged in Schor, the Court analogized to a situation in which the legislature encouraged parties to arbitrate; a situation for which the Court believed it was self-evident that no impermissible incursion on the separation of powers was involved.").

Plaintiff misreads this passage when he argues that application of the FAA to compel arbitration of his claims is the equivalent of Congress delegating those claims "not just to a 'phalanx' – but to an entire 'army' 'without any [meaningful] Article III supervision or control.'" P.Opp. at 6 (quoting Schor, 478 U.S. at 855) (alteration in original). The concern raised by the Supreme Court in Schor relates to a situation in which "Congress created a phalanx of non-Article III tribunals." 478 U.S. at 855 (emphasis added). Congress did no such thing in enacting the FAA.[4]

Indeed, ultimately, "plaintiff concedes that arbitration need not be an 'impermissible incursion[n] on the separation of powers' where the parties have a

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[4] Plaintiff's reliance on Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568 (1985), is also misplaced. There, the Court addressed "whether Article III of the Constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in [a statutory] pesticide registration scheme." Id. at 571 (emphasis added). Here, Congress through the FAA is not "selecting binding arbitration" for the resolution of disputes; Congress is enforcing a private agreement that selects binding arbitration for the resolution of disputes.

choice and have willingly made it – because it is a '*basic precept*' that arbitration 'is a matter of consent, not coercion.'" P.Opp at 6 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. at 1773) (alteration in original).

Stripped of the argument that the FAA impermissibly delegates state law claims to non-Article III forums, plaintiff is left to argue the arbitration agreement is not enforceable because he did not really agree to arbitrate – on the ground that Verizon's customer agreement is a contract of adhesion. See P.Opp at 6 ("[T]his case does not involve a voluntary and willing choice to arbitrate by Plaintiff and Verizon's other customers. As Verizon concedes . . . its standard form Customer Agreement with its included Arbitration Agreement is an 'adhesion contract' – which by definition is non-negotiable and offered on a 'take it or leave it basis.'").

However, plaintiff does nothing to develop further his contract of adhesion claim.[5] He cites no law setting forth the standard for determining when an agreement may be considered an unenforceable contract of adhesion, and, consequently, fails to demonstrate that the facts here satisfy that standard. Rather, plaintiff

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[5] Plaintiff does not make clear whether he is arguing that he did not agree to the Customer Agreement as a whole – an issue that must be decided by the arbitrator, see Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) – or that he did not agree to the arbitration agreement specifically, an issue for the Court, Ipcon Collections LLC v. Costco Wholesale Corp., 698 F.3d 58, 61 (2d Cir. 2012). The Court addresses the issue as it relates to the arbitration agreement, specifically.

merely says the customer agreement is, in fact, an adhesion contract, and, therefore, he did not "voluntarily, knowingly, and intelligently" waive his Article III rights. (See Plaintiff's Reply Mem. of Law in Supp. of Plaintiff's Mt. for Decl. Judg. (Doc. #35) at 9 ("[T]he issue is whether Verizon's adhesion arbitration agreement is valid to constitute a waiver and consent to the non-Article III forum *under the Constitution*.").)

It is plaintiff's burden to establish the arbitration agreement is an unenforceable contract of adhesion, and he has plainly not done so. See Harrington v. Atl. Sounding Co., Inc., 602 F.3d 113, 124 (2d Cir. 2010). Under New York law, "a form agreement . . . is not automatically one of adhesion because '[s]uch claims are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties.'" Molino v. Sagamore, 105 A.D.3d 922, 923, 963 N.Y.S.2d 355, 357 (2d Dep't 2013) (quoting Sablosky v. Edward S. Gordon Co., Inc., 73 N.Y.2d 133, 139, 538 N.Y.S.2d 513 (1989)).

Even assuming the arbitration agreement was a contract of adhesion, "[f]or an arbitration provision to be stricken as a contract of adhesion there must be a showing of unfairness, undue oppression, or unconscionability." David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 249 (2d Cir. 1991) (quotation marks omitted); see also Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d at 207 ("A contract or clause is unconscionable when there is an absence of meaningful choice on the part of

one of the parties together with contract terms which are unreasonably favorable to the other party.") (quotation marks omitted); Klos v. Lotnicze, 133 F.3d 164, 169 (2d Cir. 1997) ("Factors to be considered in determining whether a contract of adhesion is unconscionable include whether the 'coerced' party was on notice of the offending provision, whether the 'coercing' party achieved agreement by fraud or overreaching; and whether any alternatives existed for the 'coerced' party." (internal citations omitted)).

Plaintiff admits his signature appears on the February 28, 2011, customer agreement, which includes an agreement to arbitrate, (see Lonneberg Decl., Ex. A (Doc. #23-1)), and does not deny signing the customer agreement. Nor does he dispute the accuracy of the contents of the document he signed, including the statement: "I AGREE TO THE CURRENT VERIZON WIRELESS CUSTOMER AGREEMENT . . . . I UNDERSTAND THAT I AM AGREEING TO . . . SETTLEMENT OF DISPUTES BY ARBITRATION AND OTHER MEANS INSTEAD OF JURY TRIALS." He submits no evidence Verizon refused to negotiate the terms of the arbitration agreement. Instead, he argues Verizon bears the burden to show it allows customers to propose changes, and, in any event, the presence of an integration clause proves Verizon was unwilling to negotiate. (See Plaintiff's Rule 56.1 Counter Statement and Response to Defendant's Rule 56.1 Statement, ¶ 11).

The Court rejects both arguments.

Even assuming there was no opportunity to negotiate regarding the arbitration agreement and

there was an absence of meaningful choice for plaintiff,[6] plaintiff makes no argument the contract is unfair, unduly oppressive, or unconscionable and, therefore, unenforceable. See David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London), 923 F.2d at 249. Here, as in Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., the arbitration agreement binds both Verizon and plaintiff to mandatory arbitration. Thus, the agreement "may not be said to favor the stronger party unreasonably." 191 F.3d at 207 (concluding arbitration agreement not a contract of adhesion). Based on this record, the Court concludes the arbitration agreement is enforceable. And because plaintiff concedes his claims are arbitrable, plaintiff is obligated to arbitrate his claims in accordance with the arbitration agreement.

2. Plaintiff Waived His Personal Article III Rights

"[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." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 848-49. Courts have repeatedly held that when an individual consents to arbitration, he waives his right

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[6] Although defendant identifies one service provider that does not mandate arbitration as a condition of service, defendant does not dispute the thirteen major wireless telephone service providers require arbitration agreements in their customer contracts. (See Plaintiff's Rule 56.1 Counter Statement and Response to Defendant's Rule 56.1 Statement, ¶ 24.)

to an independent Article III judge. See, e.g., Belom v. Nat'l Futures Ass'n, 284 F.3d 795, 799 (7th Cir. 2002).[7] By summary order, the Second Circuit, in effect, reached the same conclusion – that consenting to arbitration waives the right to an Article III forum – when the court affirmed an award of sanctions against a plaintiff for filing and maintaining a motion to enjoin defendants from pursuing arbitration. See Lawrence v. Wilder Richman Secs. Corp., 417 F. App'x 11 (2d Cir. 2010) (summary order). There, plaintiff claimed he would be injured because an arbitral forum "would not afford him the constitutional rights guaranteed civil litigants in Article III courts." Id. at 14. The court concluded there was no reasonable basis for pleading irreparable harm, explaining that "[a] party suffers no legally cognizable injury at all . . . by being compelled to engage in arbitration to which he has contractually agreed." Id.

Because plaintiff signed Verizon's customer agreement, which included an agreement to arbitrate, and the Court has concluded the arbitration agreement

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[7] See also Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 307 (4th Cir. 2001); Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 368 (7th Cir. 1999); McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994); Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310, 321 (7th Cir. 1987); Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815, 825 (S.D. Ohio 1999), aff'd, 317 F.3d 646, 668 (6th Cir. 2003) (en banc) (plaintiff "knowingly and voluntarily waived her right to pursue her employment claims in federal court"), Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460, 1470-71 (N.D. Ill. 1997); Illyes v. John Nuveen & Co., Inc., 949 F. Supp. 580, 584 (N.D. Ill. 1996).

is enforceable, the Court further finds plaintiff waived his personal rights to an independent Article III judge.

The Court rejects plaintiff's argument that more is required under D.H. Overmyer Co. v. Frick Col., 405 U.S. 174 (1972), to find waiver of his Article III rights. See Morales v. Sun Constructors, Inc., 541 F.3d 218, 224 (3d Cir. 2008) ("applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA"); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1372 & 1371 n.12 (11th Cir. 2005) (concluding "general contract principles govern the enforceability of arbitration agreements and [] no heightened 'knowing and voluntary' standard applies"); Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir. 2002) (with the exception of certain issues in collective bargaining agreements, "there is no requirement that an arbitration provision must clearly and unmistakably express the waiver of an individual's [constitutional jury trial] rights," citing 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) (declining to apply "a more demanding standard" to enforce arbitration agreement which resulted in waiver of jury trial right); see also Awuah v. Coverall N. Am., Inc., 703 F.3d 36, 44 (1st Cir. 2012) (no heightened notice requirement to enforce agreement to arbitrate). But see Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (en banc) (applying "knowing and voluntary waiver" standard to arbitration agreement).

C. Congress Has Not Prescribed A "Rule of Decision"

The FAA does not unconstitutionally prescribe a "rule of decision" prohibited by United States v. Klein, 80 U.S. 128 (1871). In Klein, the administrator of the estate of a former confederate rebel sued the United States under the Abandoned and Captured Property Act for the recovery of property (or proceeds of the sale of property) seized during the Civil War. Recovery under the statute was conditioned on proof that the rebel had never given any aid or comfort during the rebellion. Id. at 139. Relying on an earlier Supreme Court decision that a Presidential pardon satisfied this burden, id. at 139-42, the Court of Claims awarded Klein's estate relief. Id. at 143. While the government's appeal was pending, Congress enacted a new law providing a pardon would be taken as conclusive evidence of the opposite position – namely, that the claimant had given aid to the rebellion. Id. at 143-44. The new law also declared that upon submission of proof of a pardon, the jurisdiction of the court shall cease and the suit shall be dismissed. Id. at 144. The Supreme Court concluded the new law was unconstitutional. Id. at 146.

The Court explained that although Congress could "confer or withhold the right of appeal from its decisions," id. at 145, this law went beyond that right because it did not merely "make exceptions and prescribe regulations to the appellate power," id. at 146; rather, the effect of the law was to "prescribe a rule for the decision of a cause in a particular way." Id. In other words, under the law, "the court is forbidden

to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." Id. at 147.

Here, however, the legislation enacted by Congress does not decide the outcome of cases by declaring the effect of specific evidence in specific cases; thus, Klein is not implicated. See Robertson v. Seattle Audubon Soc., 503 U.S. 429, 438 (1992) (statute "compelled changes in law, not findings or results under old law"); Axel v. Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78, 82 (2d Cir. 1993) (statute did not "control courts' determinations"); see also Hadix v. Johnson, 144 F.3d 925, 940 (6th Cir. 1998) (statute did "not direct any particular evidentiary findings nor dictate a result in a specific case"), abrogated on other grounds by, Miller v. French, 530 U.S. 327 (2000).

Further, the fact that judicial review of arbitral decisions is limited and may sometimes result in a court's upholding an award even if that "court is convinced [the arbitrator] committed serious error," Eastern Assoc. Coal Corp. v. Mine Workers, 531 US. 57, 62 (2000), does not mean Congress has prescribed a rule of decision "of a cause in a particular way." United States v. Klein, 80 U.S. at 146. The FAA provides for enforcement and limited review of arbitral decisions for purposes of confirming an arbitral award; the law is neutral on the outcome of any particular decision. It merely enforces agreements to have disputes decided in a non-Article III forum, and concomitantly requires Courts to give effect to those decisions in accordance with the parties' agreement.

III. Dismissing Litigation Versus Staying Litigation Pending Arbitration

The only question that remains is whether the Court may dismiss this action or must stay the proceedings pending arbitration. Plaintiff argues the action should be dismissed so that plaintiff may take an immediate appeal. Defendants contend the Court is without discretion to dismiss the action under the plain language of the statute.

The Court concludes the action may be dismissed.

The Second Circuit has not addressed the issue of whether a district court has the discretion to dismiss an action when the court compels arbitration of all of the claims in the action.[8] The circuits that have are

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[8] When addressing a different issue under the FAA, the Second Circuit stated: "Under the Federal Arbitration Act ("FAA"), a district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding." McMahan Secs. Co. L.P. v. Forum Capital Mkts. L.P., 35 F.3d 82, 85-86 (2d Cir. 1994) (citing 9 U.S.C. § 3). "The FAA leaves no discretion with the district court in the matter." Id. (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). A review of the passage cited from Dean Witter Reynolds, Inc. v. Byrd, however, reveals that when the Supreme Court stated district courts do not have discretion, the Court was referring to the enforcement of agreements to arbitrate by compelling arbitration, not to staying cases pending arbitration:

> By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. [9 U.S.C.] §§ 3, 4. Thus, insofar as the language of the Act guides our disposition of this case, we

divided, see Lloyd v. HOVENSA, LLC., 369 F.3d 263, 268-69 (3d Cir. 2004) (surveying case law), and district courts within this circuit are divided. Compare Reynolds v. de Silva, 2010 WL 743510, at *8–9 (S.D.N.Y. Feb. 24, 2010) (court has discretion to dismiss), and Furchtgott-Roth v. Wilson, 2010 WL 3466770, at *9 (S.D.N.Y. Aug. 31, 2010) (same), with Empire State Ethanol & Energy, LLC v. BBI Int'l, 2009 WL 790962, at *10 (N.D.N.Y. Mar. 20, 2009) (court must stay action).

The Court agrees with plaintiff that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001) (citing Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992)); see also Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 372 (1st Cir. 2011); Sparling v. Hoffman Const. Co., Inc., 864 F.2d 635, 638 (9th Cir. 1988). But see Lloyd v. HOVENSA, LLC., 369 F.3d at 268-71. Accordingly, the action is dismissed.

CONCLUSION

Plaintiff's motion for partial summary judgment is DENIED.

> would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.

470 U.S. at 218. In light of the Supreme Court's reasoning in Dean Witter, and the fact that Second Circuit's statement in McMahan is dicta, the Court declines to read McMahan as binding as to the issue at hand.

Defendant's motion to compel individual arbitration is GRANTED, and the case is dismissed.

The Clerk is instructed to terminate the motions (Docs. #17, 21) and close this case.

Dated: December 12, 2013
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge

APPENDIX F

Excerpts, Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury

find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

* * *

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

Case # 01-16-0001-2209

[Dated June 29, 2017]

IN THE MATTER OF	)
THE ARBITRATION	)
Between	)
	)
MICHAEL A. KATZ,	)
Claimant,	)
	)
and	)
	)
CELLCO PARTNERSHIP d/b/a	)
VERIZON WIRELESS,	)
Respondent	)
	)

DECISION ON MOTION FOR JUDGMENT ON THE PLEADINGS (FIRST AMENDED DEMAND FOR ARBITRATION)

I, CHARLES T. BISTANY, the UNDERSIGNED ARBITRATOR, having been designated in accordance with an arbitration clause contained in a Verizon Wireless Customer Agreement ("Customer Agreement") dated July 16, 2016 between Claimant, Michael A. Katz, and Respondent, Verizon, and pursuant to a Court Order compelling arbitration issued by the Hon.

Vincent L. Briccetti, Judge for the United District Court for the Southern District of New York, dated February 16, 2013.

Claimant is represented by the Law Offices of William R. Weinstein, Esq. and Respondent having appeared by Joshua S. Turner, Esq. of Wiley Rein. LLP.

Respondent having moved for "Judgment on the Pleadings" designated as the "First Amended Demand for Arbitration" by Claimant and the parties having fully submitted respective Memorandum of Law in support and in opposition to their respective positions on the motion as follows:

1. Respondent's Memorandum of Law in Support of Respondent's Motion For Judgment on the Pleadings with Attachments.

2. Katz's Memorandum of Law in Opposition to Verizon's Motion for Judgment on the Pleadings.

3. Declaration of William R. Weinstein in Opposition to Verizon's Motion For Judgment on The Pleadings.

4. Declaration of Claimant ("Plaintiff") Michael Katz In Opposition to Verizon's Motion for Judgment on the Pleadings

5. Reply Memorandum of Law in Support Of Respondent's Motion for Judgment on the Pleadings.

6. Sur-reply from Claimant.

7. Respondents response to Claimants Sur-reply.

A Report of Preliminary Telephone Conference issued by this arbitrator on December 16, 2016 scheduled the parties submission of memorandum regarding the following issues:

1. Claimant's request for an accounting by Respondent to determine the split of the administrative charge between government and non-government portion of the charge.

2. Legal basis for an injunction against Respondent to enjoin wrongful charging future government administrative charges.

3. Whether or not there is a remaining issue to arbitrate after the tender of full compensation to Claimant of any alleged damages without an admission of liability.

This arbitrator, by decision on Respondent's prior motion for "Partial Summary Disposition", found that Claimant may proceed to arbitration on his individual claim and that Claimant was not entitled to any form of general injunctive relief for the benefit of anyone who is not a party to this arbitration.

Claimant presently argues that Claimant not only seeks monetary compensation but also individual injunctive relief on his individual claim. Claimant concedes that he is no longer a Verizon customer and bases his claim to individual injunctive relief on his voluntary payment of a third party's bill, more particularly, that of his non-marital partner.

Respondent argues that derivative and indirect injury is not cognizable under GBL Sec.349. Claimant concedes that he no longer is the owner of the account and that he is not billed by Verizon, although he does pay the bill in the name of his non-marital partner.

This arbitrator finds that Claimant is not a customer of Verizon and that he 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. It is clear that Claimant seeks to continue the arbitration for the purpose of obtaining individual injunctive relief against Respondent which this arbitrator believes he is not entitled.

Respondent argues that there is no remaining issue to arbitrate since Respondent has tendered full payment of compensation to Claimant in the sum $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 that the tender is incomplete relief since it does not contain individual injunctive relief and an award of attorney fees to Claimant.

Claimant's request for individual injunctive relief and an accounting against Respondent are denied.

Respondent shall pay Claimant the sum of $1,500.00, without interest.

This arbitrator finds that attorney fees must be reasonably related to the amount recovered by Claimant. Not withstanding the extensive memorandum, supporting affidavits and declarations submitted by the parties, Claimant is awarded the sum of $500.00 in attorney fees in connection with this arbitration.

For the reasons heretofore stated, Respondent's Motion for Summary Judgment on the Pleadings is granted. Respondent shall pay Claimant the sum of $1,500.00 plus attorney fees of $500.00.

The compensation of the arbitrator in the sum of $13,962.50 of which the sum of $7,962.50 has been paid and the administrative fees of the American Arbitration Association totaling $1,900.00 shall be borne as incurred.

This Decision is in full settlement of all claims submitted to this arbitration. All claims not expressly granted and are, hereby denied.

This Arbitrator's Decision on the Motion for Partial Summary Judgment Disposition dated October 28, 2016 is incorporated herein and made part hereof.

June 29, 2017 /s/ Charles T. Bistany
Date CHARLES T. BISTANY

I, CHARLES T. BISTANY, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision.

June 29, 2017	/s/ Charles T. Bistany
Date	CHARLES T. BISTANY

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION

Case # 01-16-0001-220

[Dated October 28, 2016]

IN THE MATTER OF)
THE ARBITRATION)
Between)
)
MICHAEL A. KATZ,)
Claimant,)
)
and)
)
CELLCO PARTNERSHIP d/b/a)
VERIZON WIRELESS,)
Respondent)
)

DECISION ON MOTION FOR SUMMARY DISPOSITION

I, CHARLES T. BISTANY, the UNDERSIGNED ARBITRATOR, having been designated in accordance with an arbitration clause contained in a Verizon Wireless Customer Agreement ("Customer Agreement") dated July 16, 2016 between Claimant, Michael A. Katz, and Respondent, Verizon, and pursuant to a Court Order compelling arbitration issued by the Hon. Vincent L. Briccetti, Judge for the United District

Court for the Southern District of New York, dated February 16, 2013.

Claimant is represented by the Law Offices of William R. Weinstein, Esq. and Respondents having appeared by Andrew G. McBride, Esq. of Wiley Rein. LLP. Respondent having moved for "Partial Summary Disposition" and the parties having fully submitted respective Memorandum of Law in support and in opposition to their respective positions.

The Customer Agreement provides in part as follows:

> " ... Any dispute that results from this agreement or from the services you receive from us (or from any advertising for any products or services) will be resolved by one or more neutral arbitrators before the American Arbitration Association ("AAA")..."

Claimant alleges in this arbitration that its claim is based on a monthly "Administrative Charge" imposed by Verizon on its customers wireless lines is and has been consistently, wrongfully and deceptively described in the Administrative Charge of Verizon's standard form of Customer Agreement and monthly customer bills, all to the damage of Claimant and to the public at large who are present or future customers of Verizon.

Respondent Verizon has moved for "Partial Summary Disposition" on the ground that Claimant is not entitled to "general injunctive relief" on behalf of all present and future customers of Verizon who are or may be in the future subjected to the alleged Verizon's

wrongful and deceptive Administrative Charge practices since they are not parties to this arbitration.

Claimant argues that the arbitrator does have authority to grant "general injunctive relief' against Verizon's alleged deceptive practices, notwithstanding a provision in the Customer Agreement that states as follows:

> " ... 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."

Claimant argues that New York General Business Law ("GBL"), Sec. 349 empowers Claimant to seek general injunctive relief on his behalf and on behalf of all present and future customers of Verizon.. While 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. This arbitrator finds that Claimant lacks authority under GBL Sec. 349 to seek injunctive relief on behalf of others not a party to this arbitration.

Claimant argues that AAA Consumer Rule 44 "Scope of Award", which provides that "... (a) The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court...", grants power to the arbitrator to issue "general injunctive relief". In this case there is specific and clear language in the Customer Agreement which limits injunctive relief "...in favor of the individual Party seeking

relief...". The arbitration provision of the Customer Agreement also states "...services you receive from us...". The 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.

This arbitrator finds that Claimant is bound by the terms of the Verizon Wireless Customer Agreement entered between the parties. The parties are also bound by the AAA Consumer Rules. There is no evidence of any modification to that agreement or agreement to change the AAA Consumer Rules.

For the reasons heretofore stated, Respondent's motion for "Partial Summary Disposition" is granted. Claimant may proceed to arbitration on his individual claim. Arbitrator will not award any form of injunctive relief for the benefit anyone who is not a party to this arbitration.

The administrative fees on this motion of the American Arbitration Association and the compensation and expenses of the arbitrator in the sum of $7,962.50 on this motion shall be borne as incurred.

October 28, 2016	/s/ Charles T. Bistany
Date	CHARLES T. BISTANY

I, CHARLES T. BISTANY, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Decision.

October 28, 2016	/s/ Charles T. Bistany
Date	CHARLES T. BISTANY