UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LORRAINE ADELL, individually and on behalf of all others similarly situated, Plaintiff, vs. CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, Defendant.	)	CASE NO. 1:18-cv-623-CAB

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT ON HER INDIVIDUAL CLAIMS FOR DECLARATORY JUDGMENT

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I. INTRODUCTION

By her motion for partial summary judgment on her individual declaratory judgment claims, Plaintiff Lorraine Adell ("Plaintiff") requests declarations that, if granted by the Court, will each preclude (i) the enforceability of the arbitration agreement imposed by defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon") on Plaintiff, and (ii) the arbitrability of Plaintiff's state law breach of contract claim.[1]

Plaintiff's motion seeks two declarations: (i) that the waiver of Plaintiff's personal constitutional right to the exercise of the Article III judicial power in connection with her state law contract claim against Verizon brought within the diversity jurisdiction of the federal courts under the Class Action Fairness Act of 2005 ("CAFA") is not "voluntary," and therefore not enforceable, because of the absence of the right to refuse to consent to non-Article III arbitration under the Federal Arbitration Act ("FAA") and still receive her equipment and services from Verizon; and (ii) that Plaintiff's agreement to bilaterally arbitrate her state law claim brought within the diversity jurisdiction of the federal courts under CAFA is not enforceable because of the "inherent conflict" between arbitration under the FAA and CAFA's express purposes as stated by Congress. *E.g.*, Complaint ¶¶ 47-50.[2]

The facts underlying and necessary to decide Plaintiff's motion are few and undisputed:

(i) Plaintiff, who resides in South Euclid, Ohio, has been a Verizon customer since September 3, 2015, and has paid the administrative charge at issue in the action. *See*

[1] Plaintiff's breach of contract claim under Ohio law is based on the imposition by Verizon of a monthly administrative charge that Plaintiff alleges is being used to recover general operating costs rather than the "governmental related costs" "unambiguously" required under the terms of Verizon's Customer Agreement. Class Action Complaint ¶¶ 3, 38-45, 53-57 (ECF DKT #1) ("Complaint").

[2] Although Plaintiff's motion is directed to her individual claims for declaratory judgment, her action is brought both individually and on behalf of a class of Verizon customers nationwide comprising the "Declaratory Judgment Class," and on behalf of a separate class of Verizon customers with Ohio area codes comprising the "Ohio Class" for breach of contract. Plaintiff's individual declaratory judgment motion is a necessary predicate to obtaining declaratory judgment as to the entire Declaratory Judgment Class. Complaint ¶¶ 50-51.

accompanying Declaration of Plaintiff Lorraine Adell, dated June 15, 2018 ("Adell Decl."), ¶¶ 2-4, Exs. 1-2.

(ii) Verizon's Customer Agreement with Plaintiff and Verizon's other customers includes an arbitration agreement governed by the FAA that (i) requires Plaintiff and Verizon's other customers to bilaterally arbitrate all disputes otherwise properly brought in federal court, (ii) precludes class action arbitrations, and (iii) limits the relief the arbitrator can award solely to individual relief. *See* accompanying Declaration of William R. Weinstein, dated June 22, 2018 ("Weinstein Decl."), ¶¶ 2-4, Exs. 1-3. Additionally, Section 8 of the arbitration agreement provides that if the prohibition on class actions is not enforceable regarding Plaintiff's dispute, then the arbitration agreement will not apply. *Id.*

(iii) Verizon has admitted in federal court "that the Customer Agreement contains [the arbitration agreement] and that acceptance of the Customer Service Agreement is necessary to obtain equipment and services from Verizon[.]" Weinstein Decl., Ex. 4, at ¶ 12.

(iv) Plaintiff has never been given the right to refuse to consent to the arbitration agreement and still receive equipment and services from Verizon. Adell Decl., ¶ 5.[3]

(v) The Court has jurisdiction over this matter under CAFA because: (i) Plaintiff is a citizen of Ohio (Adell Decl., ¶ 2), and Verizon is deemed a citizen of Delaware and New Jersey under CAFA, § 1332(d)(10) (Weinstein Decl., ¶ 5, Ex. 4 at ¶ 3); (ii) the members of the proposed classes number more than 100, and, in fact, number in the millions both nationwide and within Ohio (Weinstein Decl., ¶¶ 6-8, Exs. 5, 6); and (iii) the amount in controversy exceeds $5,000,000, based on the administrative charges imposed monthly by Verizon on the Ohio Class

[3] Plaintiff emphasizes that her motion challenges only the enforceability of Verizon's arbitration agreement, which is severable and subject to a separate, discrete challenge under federal law. *See, e.g., Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010). Plaintiff is not challenging her agreement to be bound by the other terms of the Customer Agreement that govern her receipt of equipment and services from Verizon.

on whose behalf the Plaintiff has asserted her breach of contract claim during the more than 8 year Class Period (Complaint ¶ 10(b)) (Weinstein Decl., ¶ 8).

"A summary judgment shall be granted only if 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,'" based on "'particular parts of materials in the record, including … documents, … affidavits or declarations, … admissions, … or other materials.'" *Dish Network LLC v. Fun Dish, Inc.*, 112 F. Supp. 3d 627, 632 (N.D. Ohio 2015) (CAB) (quoting Fed. R. Civ. P. 56(a)). Here, the documents, declarations and admissions placed in the record by Plaintiff confirm that the facts are undisputed, and establish a proper factual foundation for granting Plaintiff's motion.

"The Declaratory Judgment Act states that '[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration.'" *Pilgrim Motorsports Sales & Serv. v. Ohio*, No. 1:04-cv-372, 2006 WL 2583389, at *2 (N.D. Ohio Sept. 5, 2006) (CAB) (quoting 28 U.S.C. § 2201). Although the determination to issue declaratory judgment is discretionary, "[i]n the Sixth circuit, declaratory judgments are favored when (1) the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when (2) it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* (citing *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 325-26 (6th Cir. 1984)). The parties agreed in their May 16, 2018 Joint Scheduling Motion (ECF DKT #12, at p. 2, ¶ 4, p. 3)—which was granted in relevant part by the Court's May 21, 2018 Order (ECF DKT #15)—that the arbitrability issues to be raised by the parties' cross-motions should be decided before proceeding to the merits of Plaintiff's contract claim. Because the cross-motions will "clarify and settle" the arbitrability issues and determine whether this matter will proceed on the merits in

court at all, the discretionary standard for the Court to decide Plaintiff's declaratory judgment motion is satisfied.

Regarding the merits of Plaintiff's first declaratory judgment claim, "[a]rbitration under the [FAA] is a matter of consent, not coercion" (Complaint ¶ 25 and cited cases). And the standard for "voluntary" consent to arbitration and the waiver of Plaintiff's constitutional right to an Article III decisionmaker for her common law contract claim—including the right to refuse—is controlled by the Supreme Court's decision in *Wellness Intern. Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), and a long line of Article III and early arbitration cases on which it is based, all considering whether consent to the non-Article III adjudication was "voluntary." The legislative history and the intent of the principal drafter of the FAA also provide compelling corroboration for application of the "voluntariness" requirement prescribed by *Wellness* to arbitration.

Regarding the merits of Plaintiff second declaratory judgment claim, Congress' express statutory findings and purposes stated in CAFA and the "strong and liberal" federal policy described in the legislative history for the creation in 2005 of a constitutional right to an Article III adjudication—including restoring the Framers' intent regarding federal court adjudication of "interstate cases of national importance under diversity jurisdiction" and "assur[ing] fair and prompt recoveries for class members with legitimate [consumer] claims"—must override the "strong and liberal" policy of encouraging arbitration under the FAA. Simply stated, CAFA and its express purposes and its complex scheme for the creation of "minimal diversity" and detailed procedures for the class-wide adjudication of consumer claims inherently conflict, and cannot be reconciled, with the purposes of the FAA as articulated in recent Supreme Court cases. In this instance, CAFA must control and override the FAA, rendering Verizon's arbitration agreement and its class action waiver unenforceable.

II. PLAINTIFF IS ENTITLED TO DECLARATORY JUDGMENT ON HER CLAIM THAT HER CONSENT TO ARBITRATION UNDER THE FAA WAS NOT "VOLUNTARY," AND THEREFORE UNENFORCEABLE

A. The Right To An Article III Adjudication Of Plaintiff's Common Law Contract Claim Under CAFA Is A Personal Constitutional Right

"When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern v. Marshall,* 564 U.S. 462, 484 (2011), *quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 90 (1982) (Rehnquist, J. concurring in judgment). There can be no dispute that Plaintiff's claim for damages for breach of contract claim is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Northern Pipeline,* 458 U.S. at 90. *Cf. Northstar Disposal Serv. VI, LLC. v. Degirolamo,* No. 4:16-MC-0056, 2016 WL 6275125, at *2 (N.D. Ohio Oct. 27, 2016) (CAB) (*Stern* tortious interference claim "arose under state common law, was between two private parties, did not flow from the federal statutory scheme, [and] was not a matter of public right").

"Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States … serves to protect primarily personal, rather than structural, interests." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848 (1986). And as Chief Justice Marshall recognized almost 200 years ago in *Cohens v. Virginia,* 19 U.S. 264, 378 (1821), regarding a claim like Plaintiff's properly brought within the diversity jurisdiction of the Article III courts:

> [T]he second class [of cases defined by Article III, § 2] comprehend[s] "controversies between … ["Citizens of different States"]. If these be the parties, … *the[y] have a constitutional right to come into the Courts of the Union*. (emphasis added)

B. *Wellness* Controls The Standard For Voluntary Consent To Non-Article III Adjudication By Arbitrators—Including The Right To Refuse

As the Supreme Court and the Sixth Circuit have stated in numerous decisions, "[a]rbitration under the [FAA] is a matter of consent, not coercion." *E.g., Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 201 (6th Cir. 2016) (quoting *Volt*). And in *Wellness*, the Court prescribed the following standard of consent for the waiver of the individual right to the Article III judicial power, 135 S. Ct. at 1949 (emphasis added):

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

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

> Adjudication by consent is nothing new. Indeed, "[d]uring the early years of the Republic, federal courts, *with the consent of the litigants*, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." … *[S]ee, e.g., Thornton* v. *Carson*, 11 U.S. 596, 7 Cranch 596, 597, 3 L. Ed. 451 (1813) (affirming damages awards in two actions that "were referred, *by consent under a rule of Court to arbitrators*"); *Heckers* v. *Fowler*, 69 U.S. 123, 2 Wall. 123, 131, 17 L. Ed. 759 (1865) (observing that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law," and "is now universally regarded … as the proper

> foundation of judgment"); *Newcomb* v. *Wood*, 97 U.S. 581, 583, 24 L. Ed. 1085 (1878) (*recognizing "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators* and refer a case pending before it").[4]

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

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

Indeed, Chief Justice Roberts, in his dissent, takes both the majority and Justice Alito to task for comparing bankruptcy judges and arbitrators, 135 S. Ct. at 1958-59:

> The majority also points to 19th-century cases in which courts referred disputes to non-Article III referees, masters, or arbitrators. *Ante*, at 8. In those cases, however, it was the Article III court that ultimately entered final judgment. *E.g., Thornton* v. *Carson*, 11 U.S. 596, 7 Cranch 596, 600, 3 L. Ed. 451 (1813)[.]
>
> The concurrence's comparison of bankruptcy judges to arbitrators is similarly inapt. *Ante*, at 1 (opinion of ALITO, J.).

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

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

[4] A court's order compelling arbitration under FAA § 4 is comparable to the described references to arbitration "under a rule of court." *See Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 279 (1932) (executory agreement to arbitrate maritime dispute "may be made a rule of court" under FAA).

As *Wellness* further observes, 135 S. Ct. at 1947, "the cases in which this Court has found a violation of a litigant's right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article court." In *Stern*, even though Pierce had consented to the adjudication of his defamation claim in the bankruptcy court, he "had nowhere else to go if he wished to recover from Vickie's estate," and thus, he "did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings." 131 S. Ct. at 2614-15. In *Northern Pipeline*, the 1978 Act did not require the consent of the parties for the referee to adjudicate claims beyond those involving property in the possession of the court, 458 U.S. at 79 n.31, and this lack of consent was an important factor in the concurrence in the judgment of Justice Rehnquist (joined by Justice O'Connor), who described the non-Article III adjudication under the 1978 Act as "against [Marathon's] will." *Id.* at 91.

By contrast, in *Schor*, where no Article III violation was found, Schor had the express right under the relevant federal law and regulations to proceed either in federal district court or before the CFTC, and had expressly agreed to proceed in front of the CFTC after the broker initially filed suit in federal court. 478 U.S. at 837-38, 848-49. And in *Thomas v. Union Carbide Agric. Prods., Co.*, 473 U.S. 568 (1985), no Article III violation was found in connection with a private "civilian" arbitration program under the applicable statute, *id.* at 574 n.1, 590, where a follow-on registrant "explicitly consent[ed] to have his rights determined by arbitration," *id.* at 592, the arbitration was between "voluntary participants," *id.* at 589, and the binding arbitration program had specifically been negotiated and agreed to among representatives of both the major chemical manufacturers and follow-on registrants, *id.* at 575.

To the best of Plaintiff's knowledge, the issue of the applicability of the standard of consent prescribed by *Wellness* to arbitration under the FAA is an issue of first impression, not

only in the Sixth Circuit but nationwide. The Sixth Circuit has applied a "knowing and voluntary" standard in the arbitration context, but never in the specific context of the waiver of the personal right to an Article III adjudicator and the Supreme Court cases discussed above addressing that issue. For example, in both *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003), and *Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th Cir.2004), the Sixth Circuit applied the standard in the context of the validity of arbitration clauses in employment agreements where an employee's statutorily created federal civil rights were at issue.

However, in *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 344, 345-47 (6th Cir. 2006), the Sixth Circuit held that *Morrison* and *Cooper*, as well as the decision of the Supreme Court in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000), constituted a sort of "federal common law" that applied only to federal statutory claims, and that these three cases did not apply to state law claims brought under diversity jurisdiction. According to *Stutler*, these state law claims were governed solely by FAA § 2 and its requirement that only state law contract defenses based on "such grounds as exist at law or in equity for the revocation of any contract" could render the arbitration agreement unenforceable. 448 F.3d at 346-47.

In a pre-*Wellness* decision, *Katz v. Cellco P'ship d/b/a Verizon Wireless*, No. 12-cv-9193, 2013 WL 6621022, at *13 (S.D.N.Y. Dec. 12, 2013), *aff'd in part, rev'd in part*, 794 F.3d 341 (2d Cir. 2015), the District Court did reject the applicability of the "heightened" "knowing and voluntary" standard for the waiver of the personal right to an Article III adjudicator in connection with arbitration under the FAA, citing to a number of cases in support. However, like the District Court's decision in *Katz*, all of the cited authority was also pre-*Wellness.* And the affirmance of the decision by the Second Circuit was "[f]or substantially the reasons identified in the District Court's" decision, 794 F.3d at 344, and did not address the Supreme Court's decision

in *Wellness*—which had been issued 18 months after the *Katz* District Court decision and only two months before the Second Circuit's decision.

Plaintiff respectfully submits that the Supreme Court in *Wellness*, and all of the Justices, clearly understood that the majority decision and its discussion of arbitration and the standard for voluntary consent—including the right to refuse—necessarily applies to arbitration. It is not up to Congress to prescribe the standard for the waiver of a constitutional right, including the personal right to an Article III adjudicator, any more than Congress can prescribe the standard for waiver of rights under the Fifth and Sixth Amendments. Nor can Congress limit the standard for waiver of the Article III right to the happenstance patchwork of whether one state or another would render the contract unenforceable. It is the Constitution as interpreted by the Supreme Court that controls nationwide, and it is *Wellness* that sets out the uniform controlling standard.

C. The Intent Of Congress Expressed Repeatedly In The Legislative History Of The FAA, And The Contemporaneous Understanding Of Its Primary Drafter, Confirm That Consent To Arbitration Should Be "Voluntary"

As stated in Plaintiff's Complaint (¶ 26), the legislative history of the FAA includes multiple references to the fact that its statutory mandate of enforceability of arbitration agreements was intended to apply to those entered into *voluntarily*. Several references can be found in the record of the 1923 Senate Hearings, *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) ("*1923 Hearings*") (Weinstein Decl., Ex. 7).

First, in his statement in support of the bill, Charles L. Bernheimer, Chairman of the Arbitration Committee of the New York Chamber of Commerce, referred to the fact that George Washington had included an arbitration provision in his last will and testament and asked

rhetorically: "[I]s Congress not then merely striving to emulate the example of George Washington by giving our land a law *which will make written agreements voluntarily entered into* valid, enforcible [sic] and irrevocable?" *1923 Hearings,* at 3 (emphasis added).

During the statement of W.H.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association, Senator Thomas Walsh of Montana was concerned whether the legislation would apply to contracts where, for example, one party with much greater bargaining power forced it on the other on a "take it or leave it" basis—"[e]ither you can make that contract or you can not make any contract." *Id.* at 9-10. Piatt initially stated that "it is not the intention of the bill to cover" such cases, *id.* at 9, and further stated, *id* at 10:

> *I would not favor any kind of legislation that would permit the forcing a man to sign that* [*kind of*] *a contract*[.] ... I think that ought to be protested against[.] (emphasis added)

The statement of Congressman Graham of Pennsylvania in connection with the House floor debate on H.R. 646, *Enforcement of Arbitration Agreements*, 65 Cong. Rec. 1931 (1924) (Weinstein Decl., Ex. 8), also emphasizes that arbitration under the FAA should be voluntary (here in relevant part):

> ... This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts -- *an agreement to arbitrate, when voluntarily placed in the document by the parties to it.* (emphasis added)

Further support of the intended "voluntary" nature of arbitration under the FAA is included in the Joint Congressional Hearings. *See Arbitration of Interstate Commercial Disputes, Joint Hearings on H.R. 646 and S. 1005 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. (1924) ("*Joint Hearings*") (Weinstein Decl., Ex. 9). Alexander Rose, speaking on behalf of the Arbitration Society of America, confirmed that arbitration under the legislation was supposed to be voluntary, *Joint Hearings* at 26:

> *Arbitration*, I may say to you gentlemen, does not by any means seek to supplant the courts or work in opposition to the courts, because after all it *is a purely voluntary thing*. It is only the idea that arbitration may now have the aid of the court to enforce these provisions *which men voluntarily enter into.* (emphasis added)

Finally, and of great importance, another of the principal proponents of the FAA, and one of its primary drafters, was Julius H. Cohen, a member of the Committee of Commerce, Trade and Commercial Law of the American Bar Association and general counsel of the New York State Chamber of Commerce. *See, e.g., Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008). Shortly after the FAA was signed into law in 1925, Cohen further confirmed and emphasized that arbitration under the FAA was supposed to be voluntary:

> No one is required to make *an agreement to arbitrate*. Such action by a party *is entirely voluntary*. ... [The new arbitration law] is merely a new method for enforcing *a contract freely made by the parties thereto.* (emphasis added)

See Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law,* 12 VA. L. REV. 265, 279 (1926) (Weinstein Decl., Ex. 10).

III. PLAINTIFF IS ENTITLED TO DECLARATORY JUDGMENT ON HER CLAIM THAT HER AGREEMENT TO BILATERALLY ARBITRATE WITH VERIZON IS UNENFORCEABLE BECAUSE CAFA INHERENTLY CONFLICTS WITH THE FAA

A. Congress's Express Findings And Purpose, The Legislative History, And The Text Of CAFA Command The Federal Courts To Adjudicate Consumer Class Actions Of Nationwide Importance

The findings and purpose of Congress in enacting CAFA are unequivocally stated in the statute, Pub. L. No. 109-02 (enacted Feb. 18, 2005), 119 Stat. 4 (Weinstein Decl., Ex. 11). *See also* Notes to 28 U.S.C. § 1711. CAFA § 2(a), 119 Stat. 4, sets out the findings of Congress, here in relevant part:

> (a) Findings.—Congress finds the following:
>
> (1) *Class action lawsuits are an important and valuable part of the legal system* when they permit the fair and efficient resolution of legitimate claims of

> numerous parties *by allowing the claims to be aggregated into a single action* against a defendant that has allegedly caused harm. (emphasis added)

And CAFA § 2(b), 119 Stat. 5, sets out the purposes of CAFA, here in their entirety (emphasis added):

> (b) Purposes.—The purposes of this Act are to—
> (1) assure fair and prompt recoveries for class members with legitimate claims;
> (2) *restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction*; and
> (3) *benefit society* by encouraging innovation and lowering consumer prices. [5]

One of the principal sources of CAFA's legislative history is Senate Report 109-14 (2005) ("S. Rep. 109-14") (Weinstein Decl., Ex. 12). This legislative history confirms the "strong" and "expansive" and "liberal" policy behind Congress's enactment of CAFA:

> Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court. S. Rep. 109-14, at 5.
>
> [T]estimony before this Committee [noted that] class action legislation expanding federal jurisdiction over class actions would fulfill the intentions of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal—if not greater—force to interstate class actions. *Id.* at 9 (quotations omitted).
>
> [T]he overall intent of these [§1332(d)(1) definitional] provisions is to strongly favor the exercise of diversity jurisdiction over class actions with interstate ramifications. In that regard, the Committee further notes that the definition of "class action" is to be liberally construed. *Id.* at 35.
>
> Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions be heard in federal court[.] *Id.* at 43. *See also Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (quoting passage in part).

[5] Aside from the express mention of "consumer" in CAFA's congressional purposes quoted above, CAFA's consumer class action focus is confirmed by § 3 of the Act, a "Consumer Class Action Bill Of Rights And Improved Procedures For Interstate Class Actions," which sets out amendments to Title 28, including new §§ 1711-1715, for the protection of consumers. *See* Weinstein Decl., Ex. 11, 119 Stat. 5-8.

The text of 28 U.S.C. § 1332(d) forcefully confirms Congress's intent that the federal courts exercise their newly-vested Article III judicial power to hear and decide "minimally diverse" class actions brought within their CAFA jurisdiction. *E.g.*, *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 386 (6th Cir. 2016) ("minimally diverse" parties).

Under 28 U.S.C. §1332(d)(2), "[t]he district courts *shall* [emphasis added] have original jurisdiction of any civil action in which the matter in controversy" satisfies (i) the prescribed numerosity and diversity of citizenship among the putative class members and the defendants, and (ii) the $5,000,000 amount in controversy requirement. By using the term "shall," Congress imposed "an obligation [that is] impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily '[t]he language of command.'") (citation omitted).

Congress, in fact, has created two exceptions to the mandatory exercise of jurisdiction by the district courts under §1332(d)(2). One exception under § 1332(d)(3)—the "Home State" exception"—grants "discretion" to the district courts based on the consideration of six factors by which they "*may* … decline to exercise jurisdiction" over cases "in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed." *See* S. Rep. 109-14 at 28 (emphasis added). The second exception under § 1332(d)(4)—the "Local Controversy" exception—*mandates* that the district courts "*shall decline* to exercise jurisdiction" where "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate" and at least one "significant" defendant or the "primary defendants" "are citizens of the State in which the action was originally filed." *See* S. Rep. 109-14 at 28-29 (emphasis added). CAFA § 1332(d)(9) also expressly excludes certain securities-related class actions under the Securities

Act of 1933 and the Securities Exchange Act of 1934 and corporate governance-related class actions from the grant of original jurisdiction under § 1332(d)(2). There is, however, *no other exception* from the mandatory exercise of CAFA jurisdiction—for the FAA or any other act of Congress. *Cf. Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 807 (1976) (28 U.S.C. § 1345 provides that the district courts shall have original jurisdiction over all civil actions brought by the Federal Government "[e]xcept as otherwise provided by Act of Congress.").

Finally, CAFA includes comprehensive definitions and procedures for the adjudication of class actions brought within its jurisdictional grant. For example, in this case, CAFA defines in § 1332(d)(10) how to determine the citizenship of Verizon, an unincorporated association, based both on the state of its principal place of business (New Jersey) and the state under whose laws it is organized (Delaware). As noted above, CAFA also provides a detailed statutory framework for a "Consumer Class Action Bill of Rights" regarding such procedural matters as the adequacy of "coupon settlements" (Weinstein Decl., Ex. 11, CAFA § 3, 119 Stat. 5-8), and the removal of CAFA class actions from state to federal court by defendants (CAFA § 5, 119 Stat. 12-13). CAFA is a detailed jurisdictional and procedural consumer class action statute.

B. The Fundamental Attributes Of Arbitration Under The FAA Are Incompatible With Class Action Litigation

As stated in ¶¶ 30-32 of Plaintiff's Complaint, the fundamental attributes of arbitration under the FAA, and the interference of class adjudication and its incompatibility with these fundamental attributes, are set out in the Supreme Court's decisions in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-86 (2010), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-45, 348-50 (2011).

Stolt-Nielsen describes the "fundamental changes" caused by the shift from bilateral arbitration to class adjudication, 559 U.S. at 686, including: (i) resolution not of "a single dispute between parties to a single agreement," but of "many disputes between hundreds or perhaps even thousands of parties"; (ii) the inapplicability of "'[t]he presumption of privacy and confidentiality' that applies in many bilateral arbitrations"; (iii) an award binding not "just the parties to a single arbitration agreement, but … the rights of absent parties as well"; and (iv) "judicial review [that] is much more limited" even though "the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

The incompatibility of class adjudication with arbitration under the FAA is similarly described in *Concepcion*, 563 U.S. at 348-50, including: (i) the sacrifice of "the principal advantage of arbitration—its informality—[making] the process slower, more costly, and more likely to generate procedural morass than final judgment"; (ii) the fact that "class arbitration *requires* procedural formality"; and (iii) the fact that "arbitrators are not generally knowledgeable in the often dominant procedural aspects of [class] certification."

The Supreme Court's recent decision in *Epic Sys. Corp. v. Lewis*, -- S. Ct. --, 2018 WL 2292444, at *7 (U.S. May 21, 2018) ("*Epic*"), quotes and reiterates *Concepcion*'s observations about the incompatibility of class adjudication with arbitration under the FAA—also including the fact that "arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings."

C. The Intent Of The Framers, As Restored And Embellished By Congress By CAFA, Overrides The FAA's Enforcement of Plaintiff's Agreement To Bilaterally Arbitrate Her State Law Contract Claim

There is an inherent conflict between the "strong and liberal" policy favoring the exercise of jurisdiction over consumer class actions under CAFA confirmed by it legislative history, and the fundamental attributes and "strong and liberal" policy favoring arbitration under the FAA. *E.g., Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592, 595, 599, 600, 601-02 (6th Cir. 1995) (strong, liberal policy favoring FAA arbitration). Thus, the issue raised in Plaintiff's motion that must be decided by the Court is not only whether the FAA can effect a waiver of Plaintiff's personal constitutional right granted by Congress under CAFA to invoke the Article III judicial power of the federal courts, but also concomitantly whether the FAA can effect a "repeal" of the expansive diversity jurisdiction over consumer class actions that Congress has *vested* in the federal courts under Article III, § 1. *Cf. Colorado River Water Cons. Dist.,* 424 U.S. at 807 ("The McCarran Amendment does not by its terms, at least, indicate any repeal of jurisdiction under § 1345.").

The Supreme Court has held on numerous occasions that Congress's intent to preclude arbitration "will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). *Accord Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

As Plaintiff's discussion of the findings and purpose of CAFA as expressed in the text and legislative history of the statute makes clear (Section III.A above), Congress intended to create an expansive personal constitutional right to invoke the Article III judicial power in connection with consumer class actions—a constitutional right entirely inconsistent with the fundamental attributes of arbitration under the FAA. But as or more importantly, Congress did so "to restore the intent of the framers" regarding Article III, § 2, diversity jurisdiction. And Congress did so by enacting a detailed jurisdictional and procedural class action statute specifically intended to protect consumers—to provide them with a "Bill of Rights."

In *Epic*, the majority upheld the primacy of the FAA over the National Labor Relations Act ("NLRA) because the NLRA's purpose is to "secur[e] to employees rights to organize unions and bargain collectively," and because "it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." 2018 WL 2292444, at *3. The NLRA does not mention the term "class action," and provides no procedures for the litigation of a class action. *Id.* at *9. Thus, the Supreme Court rejected the existence of an inherent conflict between the FAA and NLRA. *Id.* at *3.

Plaintiff acknowledges the Supreme Court's observation in *Epic* that it "has rejected *every* such effort to date (save one temporary exception since overruled)" "to conjure conflicts between the Arbitration Act and other federal statutes." *Id.* at *11 (emphasis in original). But in so holding, the Court has "stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Id.* at *11-12 (discussing examples).

Plaintiff submits that this is such a case of inherent and irreconcilable conflict. The fundamental attributes of arbitration under the FAA thwart the intentions of the Framers and

Congress in enacting CAFA, effectively repealing CAFA and the personal Article III constitutional right it creates in connection with Plaintiff's individual and class claims—rendering CAFA a nullity. Arbitration under the FAA (i) prevents "the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm"; (ii) prevents "fair and prompt recoveries for class members with legitimate claims"; (iii) "[frustrates] the intent of the framers of the United States Constitution by [preventing] Federal court consideration of interstate cases of national importance under diversity jurisdiction"; and (iv) precludes and eliminates the Congressionally intended "benefit [to] society by encouraging innovation and lowering consumer prices." *See* Complaint ¶ 33.

In the case of an inherent, irreconcilable conflict, "where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand …a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (citation and quotations omitted). This principle is even more applicable when the purpose of CAFA is to *restore the intent of the Framers* regarding Article III diversity jurisdiction.[6]

Finally, although perhaps infrequent, courts have found an inherent conflict sufficient for another statute to override the FAA. For example, in *Nat'l Credit Union Admin. Bd. v. Lormet Comm. Fed. Credit Union*, No. 1:10-cv-1964, 2010 WL 4806794, at *3-4 (N.D. Ohio Nov. 18, 2010), Judge Gaughan held, based on its purpose and legislative scheme, that the Federal Credit

[6] *See The Federalist*, No. 78, p. 468 (C. Rossiter ed. 1961) (A. Hamilton): "[When] there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression … the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and … accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."

Union Act overrides the FAA. And in *In re Anderson*, 884 F.3d 382, 388-91 (2d Cir. 2018), the Second Circuit held that a "particular core bankruptcy proceeding" under the Bankruptcy Code Act overrode the FAA, even though the bankruptcy proceeding involved a class action.

The Court should follow the same course here.

IV. CONCLUSION

For all the reasons stated herein, the Court should grant Plaintiff's motion in its entirety.

Dated: June 22, 2018

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF AND THE CLASSES

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2018, a copy of the foregoing document was electronically filed with the Court's electronic filing system, which will provide notice of the same to all parties indicated on the electronic filing receipt.

s/ William R. Weinstein
WILLIAM R. WEINSTEIN