UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

PLAINTIFF'S REPLY 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 AND SUMMARY OF ARGUMENT[1]

Procedurally, Verizon concedes "the absence of disputed material facts" (Verizon Opp. Br. 5), and that the issues raised by Plaintiff's motion for summary judgment on her individual declaratory judgment claims must therefore be decided "as a matter of law" (Verizon Opp. Br. 5-6). Thus, the essential undisputed facts identified in Plaintiff's opening brief (Pl. DJM Br. 1-3) are indeed undisputed, including that: (i) Plaintiff is a Verizon customer who has paid the administrative charge on which her breach of contract claim is based, and is subject to Verizon's Customer Agreement requiring her to bilaterally arbitrate all disputes otherwise properly brought in federal court (*see* Customer Agreement, ECF DKT ##19-1, 21-2); (ii) Verizon's "Customer Agreement contains [the arbitration agreement] and … acceptance of the Customer Service Agreement is necessary to obtain equipment and services from Verizon"; (iii) Plaintiff has never been given the right to refuse to consent to the arbitration agreement and still receive equipment and services from Verizon; and (iv) the Court has jurisdiction over this matter under CAFA.

Again, the first ground for Plaintiff's motion, based on *Wellness Int'l Network Ltd. v. Sharif,* 135 S. Ct. 1932, 1942, 1948 (2015), is that "consent" to arbitration under the FAA and the concomitant waiver of the constitutional right to an Article III adjudicator must be "voluntary," including the right to refuse arbitration and still receive equipment and services from Verizon. In the absence of "voluntary consent," the arbitration agreement is unenforceable.

The principal legal issue raised by Verizon in opposition to Plaintiff's motion that this Court concededly must decide is whether the "voluntariness" of Plaintiff's waiver of her right to an Article III adjudicator and her consent to arbitration is governed by the standard prescribed by

[1] Capitalized terms in this brief are as defined in Plaintiff's June 22, 2018 brief in support of her motion for summary judgment on her individual claims for declaratory judgment (ECF DKT #18), which is referred to as "Pl. DJM Br. __." Verizon's July 23, 2018 brief in opposition to Plaintiff's motion (ECF DKT #24) is referred to as "Verizon Opp. Br. __." Plaintiff's July 23, 2018 brief in opposition to Verizon's motion to compel (ECF DKT #23) is referred to as "Pl. MTC Opp. Br. __."

Wellness (including the right to refuse), or by state law governing contract formation (Verizon Opp. Br. 3, 11). Under decisions in the Sixth and other circuits, the contractual waiver of a constitutional right is a matter of federal law, and must be "knowing and voluntary." And under the *Wellness* standard, Plaintiff's consent here cannot be "voluntary" because, simply stated, consent cannot be "voluntary" without "the right to refuse." Verizon's attempts to superficially distinguish *Wellness* ignore that "the right to refuse" is one of the bedrock principles required for a valid waiver of a constitutional right, including but not limited to the *same* right to an Article III adjudicator specifically addressed in *Wellness* and at issue here.

Verizon's lead argument—that Plaintiff must but cannot establish "state action" to assert a "somehow Article III violation" (Verizon Opp. Br. 1, 2, 7-8)—wrongfully twists Plaintiff's *Wellness* "voluntary consent" claim into a claim that Article III is being violated, and Verizon's assertion of a "state action" defense based on the mischaracterization is entirely misplaced. The irrelevance of "state action" is confirmed by the fact that *none* of the long list of Supreme Court cases regarding the enforceability of arbitration agreements cited by Verizon, from *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612 (2018), on down (Verizon Opp. Br. 1-2), or the leading Sixth Circuit cases regarding the contractual waiver of constitutional rights and the enforceability of arbitration agreements, or the cases relied on by the District Court to reject the "heightened" "knowing and voluntary" standard in *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), mentions the term "state action."

As for the inherent, irreconcilable conflict between CAFA and the FAA, Verizon essentially places all of its eggs in one basket—that *Epic* purportedly has laid down an immutable rule that unless a statute expressly exempts arbitration under the FAA, there can be no conflict sufficient to override the FAA (Verizon Opp. Br. 3-4, 16-19). To read it that way, *Epic*

would have had to overrule all of the cases saying that an "an 'inherent conflict' between arbitration and the [statute's] underlying purposes" can override the FAA (*e.g.*, Pl. DJM Br. 17). Furthermore, if there was an absolute rule, then *Epic's* rejection of an irreconcilable conflict between the NLRA and the FAA based on an extensive detailed analysis of the language, purposes and history of the NLRA, 138 S. Ct. at 1624-28, would be mere dicta, entirely superfluous. It is beyond challenge that class actions inherently conflict with and interfere with the FAA, and Verizon wholly ignores the findings, purposes and extensive statutory scheme of CAFA, and the essential elements of the *Epic* conflict analysis, to deny the existence of a true conflict that must be resolved in CAFA's favor under controlling Supreme Court precedent.

II. UNDER *WELLNESS,* WHICH CONTROLS, PLAINTIFF DID NOT VOLUNTARILY WAIVE HER RIGHT TO AN ARTICLE III ADJUDICATOR OR VOLUNTARILY CONSENT TO ARBITRATION

A. As A Matter Of Federal Law, Under *Wellness,* The "Voluntary" Waiver Of The Constitutional Right To An Article III Adjudicator And Consent To Arbitration Must Include The Right To Refuse

Under the law of the Sixth Circuit, the standard governing the contractual waiver of a constitutional right is a matter of federal and not state law. *K.M.C. Co., Inc. v. Irving Trust Co.,* 757 F.2d 752, 755-56 (6th Cir. 1985). And under federal law, that waiver must be "knowing and voluntary." *Id. Accord Hergenreder v. Bickford Senior Living Grp., LLC,* 656 F.3d 411, 420 (6th Cir. 2011) (quoting *K.M.C. Co.*). Although *K.M.C. Co.* and *Hergenreder* deal specifically with the waiver of the right to a jury trial, in *K.M.C.* the context of the waiver was a private contract in connection with trial by magistrate, and in *Hergenreder* the purported waiver was under an arbitration agreement, as here. The waiver of the constitutional right to a jury trial and the right to an Article III adjudicator are closely related, concomitant rights.[2]

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[2] Verizon's arbitration agreement includes both an Article III waiver and a jury trial waiver. *See* August 18, 2015 Arbitration Agreement (ECF DKT #19-1), at p.6 of 8 and p.8 of 8.

Again, the precise language in *Wellness* setting out the standard for the "voluntary" waiver of the right to an Article III adjudicator—the standard Plaintiff contends is applicable to "arbitration by consent" as well—bears repeating, 135 S. Ct. at 1948:

> It bears emphasizing, however, that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* [*v. Withrow,* 538 U.S. 580 (2003)] makes clear that the key inquiry is whether "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before the non-Article III adjudicator. *Ibid.*; see also *id.,* at 588, n. 5, 123 S. Ct. 1696 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent").

Although Verizon correctly points out that that the specific facts in *Wellness* involved consent to bankruptcy court adjudication of a claim otherwise subject to Article III adjudication, the *standard* for consent to the non-Article III court was based on *Roell,* which as Verizon also concedes, addressed adjudication by non-Article III magistrate judges (Verizon Opp. Br.11). The Supreme Court didn't decide that *Roell* was inapplicable because it dealt with magistrates rather than bankruptcy judges—because the *Wellness requirement for a "knowing and voluntary" waiver of the Article III adjudicator—including the right to refuse as "a prerequisite to any inference of consent"*—is an over-arching principle applicable across the board to the waiver of the constitutional right to an Article III adjudicator. And this is regardless of whether the specific context is adjudication by a bankruptcy judge, a magistrate judge, or "arbitration with consent"—the three non-Article III forums *all* specifically discussed in detail in *Wellness.*

Verizon is silent regarding the extensive discussion of arbitration in *Wellness*—the implications of *Wellness* to "arbitration by consent" were well-appreciated by all of the Justices in their four separate opinions. *See* Pl. DJM Br. 6-7. And despite Verizon's attempt to distinguish *Wellness* as not relevant to arbitration, it *conceded* in its June 22, 2018 brief in support of its motion to compel arbitration (ECF DKT #21-1, at 15) that *Wellness* includes a "clear

endorsement of agreements to arbitrate"—that is, agreements that are the product of *voluntary* consent. *See* 135 S. Ct. at 1942 (citing early cases involving adjudication by arbitrators "with consent of the parties"). Verizon can't have it both ways—its concession substantially confirms that the *Wellness* "voluntary" standard applies to the arbitration agreement in this case.

Finally, Verizon argues that, "[u]nsurprisingly, Plaintiff has not cited, and Verizon Wireless is not aware of, a single decision applying [*Wellness*] in the arbitration context" (Verizon Opp. Br. 12). That fact is not "unsurprising," because as Plaintiff noted in her opening brief (Pl. DJM Br. 8-9), "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." Any suggestion by Verizon that the *Katz* District Court decided the issue in its most recent opinion (Verizon Opp. Br. 12-13) is overreaching. In that decision, involving Katz's motion to vacate an arbitration award, the District Court rejected Katz's reliance on *Wellness* as "an intervening change in the law" sufficient to depart from the "law of the case doctrine," because *Wellness* did not deal with the waiver of the right to judicial review of arbitration proceedings under the due process clause. *See Katz v. Cellco P'Ship d/b/a Verizon Wireless,* 2018 WL 1891145, at *7-8 (S.D.N.Y. Apr. 17, 2018). And although Verizon states that "multiple courts have recognized the reasoning of [*Wellness*] does not apply in the arbitration context" (Verizon Opp. Br. 3), aside from its misplaced reliance on *Katz,* the only other case identified by Verizon is an unpublished decision of the Maryland Court of Special Appeals, *Brown v. Santander Consumer USA Inc.*, No. 2202, 2017 WL 4023144, at *3 (Md. Ct. Spec. App. Sept. 13, 2017), whose citation by Verizon is prohibited by Maryland court rules, and whose conclusion that *Wellness* "ha[s] nothing to do with arbitration" is contradicted by

Wellness itself and Verizon's own concession that it does. *See* Pl. MTC Opp. Br. (ECF DKT #23), at 11 n.3.[3]

B. The "Voluntariness" Standard Set Out In *Wellness*, And Not State Law, Must Govern In Connection With The Waiver Of The Constitutional Right To An Article III Adjudicator

As noted above, Sixth Circuit law provides that the enforceability of contractual waivers of constitutional rights are governed by federal and not state law, and that federal law requires the application of the "knowing and voluntary" standard. *See K.M.C. Co.,* 757 F.2d at 755-56; *Hergenreder,* 656 F.3d at 420. *See also In re County of Orange,* 784 F.3d 520, 528, 530-31 (9th Cir. 2015) ("knowing and voluntary" standard under federal law governs enforceability of jury trial waiver in diversity cases) (citing *Hergenreder*).

As further noted in Plaintiff's opening brief (Pl. DJM Br. 9), 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 "knowing and voluntary" 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, as also noted by Plaintiff (Pl. DJM Br. 9), in *Stutler v. T.K. Constructors Inc.,* 448 F.3d 343, 344, 345-47 (6th Cir. 2006), the Sixth Circuit limited the application of *Morrison* and *Cooper* only to federal statutory claims, and not 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

[3] Plaintiff concededly was unaware of *Brown* when she submitted her June 22, 2018 brief in support of her declaratory judgment motion, although as noted above, citation to *Brown* by Verizon is prohibited by Maryland law. And Plaintiff's counsel vigorously disputes Verizon's suggestion that the recent District Court decision in *Katz* renders as "beyond disingenuous" her characterization of the *Wellness* issue as one "of first impression nationwide" (Verizon Opp. Br. 13 n.4). The *Katz* District Court did *not* decide the issue for the reasons described above, and due process, not the waiver of the right to an Article III adjudicator, was the subject of the motion. However, Plaintiff apologizes to the Court if it finds in any way misleading Plaintiff's characterization of the *Wellness* issue in this case as one "of first impression nationwide." But it undisputedly *is* an issue of first impression in the Sixth Circuit and every other federal circuit and district court nationwide, with the alleged but incorrect exception of *Katz.*

grounds as exist at law or in equity for the revocation of any contract" would render the arbitration agreement unenforceable. 448 F.3d at 346-47.

Verizon characterizes Plaintiff's candid discussion of *Stutler* as "confusing" (Verizon Opp. Br. 11 n.3), but it is nothing of the sort. Unlike *K.M.C. Co.* and *Hergenreder,* neither *Stutler,* nor *Morrison* or *Cooper,* addresses the waiver of a constitutional right, but solely the enforceability of the arbitration agreement in isolation. Furthermore, *Stutler,* which analyzed the issue of applicable state contract law in diversity cases under the framework set out in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938), quoted a critical limitation in *Erie* to the requirement that state law be applied: "*[e]xcept in matters governed by the Federal Constitution* or by acts of Congress, the law to be applied in any case is the law of the state." *Stutler*, 448 F.3d at 47 (quoting *Erie,* 304 U.S. at 78) (emphasis added).

The federal law that governs the waiver of a constitutional right like the right to an Article III adjudicator addressed in *Wellness* is derived from and governed by the Constitution. As noted in *In re County of Orange,* 784 F.3d at 531, "the federal knowing and voluntary standard is not a generally applicable federal rule, but rather a federal constitutional minimum." Thus, unlike the basic issue of enforceability of an arbitration agreement under the FAA, the standard for the waiver of the constitutional right to an Article III adjudicator is one of the "matters governed by the Federal Constitution," *Erie,* 304 U.S. at 78, and thus an exception under *Erie* to the controlling application of state contract law. In this context, the formation of contracts under state law addressed in *Stutler* and other arbitration cases is inapplicable.

Plaintiff's position, characterized by Verizon as "confusing," was and is made quite clear in Plaintiff's opening brief (Pl. DJM Br. 10): "It is the Constitution as interpreted by the Supreme Court that controls nationwide, and it is *Wellness* that sets out the uniform controlling standard."

"It is not up to Congress … [to] 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."

1. Plaintiff's Waiver of Her Constitutional Right to an Article III Adjudicator and Her Consent to Arbitration Was Not "Voluntary" under *Wellness*

Verizon has had every chance but has not, and *cannot,* dispute that Plaintiff "has never been given the right to refuse to consent to the arbitration agreement and still receive equipment and services from Verizon." Instead, Verizon, who has failed to meet its burden to dispute this undisputed fact, tries to impose an additional burden on Plaintiff requiring her to establish "that she was somehow forced or coerced into accepting Verizon Wireless service" (Verizon Opp. Br. 15). In other words, under Verizon's *ipse dixit,* Plaintiff's consent was "voluntary" because the *Wellness* standard doesn't apply. But the essence of "voluntary" under *Wellness* is the right to refuse arbitration and yet still agree to it. And in light of the undisputed absence of "the right to refuse," Verizon cannot satisfy the necessary condition precedent for "voluntariness."

By comparison, it is instructive to see when an agreement to arbitrate *is* "voluntary." Commodities Futures Trading Commission Regulations 17 C.F.R. §§ 166.5(b) & (c) govern the use of arbitral dispute resolution with customers. Section 166.5(b) requires that "the use by customers of dispute settlement procedures shall be voluntary." Under § 166.5(c)(1), "[s]igning the agreement must not be made a condition for the customer to utilize the services offered by the Commission registrant." And § 166.5(c)(7) requires extensive cautionary language in large boldface type making it clear that consent to arbitration must "be voluntary," and *not* a condition

of opening an account. *This* is "voluntary." Walking away, the "option" Verizon proposes, is not.[4]

2. The Court can take Judicial Notice of the Absence of Customer Choice in connection with Obtaining Wireless Telephone Equipment and Services, including from Verizon

As recently observed by Chief Justice Roberts for the Court in *Riley v. California,* 134 S. Ct. 2473, 2484 (2014), "modern cell phones … are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." The necessity of cell phones in modern society recognized by the Supreme Court in *Riley* was further explained by Chief Justice Roberts during the November 29, 2017 oral argument in *Carpenter v. United States,* No. 16-402, 138 S. Ct. 2206 (2018), which reversed the Sixth Circuit and held that a warrant supported by probable cause was required for the government to obtain wireless telephone cell-site records.[5] In response to the government's assertion that "there is an element … of voluntariness in deciding to contract with a cell company," Chief Justice Roberts squarely contradicted the argument, as follows: "*[T]hat sounds inconsistent with our decision in Riley, though, which emphasized that you really don't have a choice these days if you want to have a cell phone.*" Transcript at 80-81 (emphasis added).

The combined lack of choice in having cell phones and in having to waive the right to an Article III adjudicator is how Plaintiff, all Verizon customers, and essentially the entire country have been stripped of their Article III rights. Adopting the *Wellness* "voluntariness" standard will restore the proper constitutional balance envisioned by the Framers.

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[4] Verizon several times cites to *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), as somehow undermining Plaintiff's motion. *See, e.g.,* Verizon Opp. Br. 2, 11 n.3, 15. But *Concepcion* did not address or even mention either the term "constitutional right" or "voluntary" in the decision. *Concepcion* was a state law preemption decision, 563 U.S. at 340, 352, and not a case regarding the proper standard under federal law for the "voluntary" waiver of the personal constitutional right to an Article III adjudicator.

[5] Transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcript/2017#list.

3. Verizon Agreed that Its Customers Could Receive Equipment and Services from Verizon Even If the Arbitration Agreement Is Not Enforceable

Finally, Verizon tries to turn the issue of "voluntariness" on its head, arguing that it cannot be forced "to enter into a contract involuntarily on terms it [i]s unwilling to accept"—i.e., without an arbitration agreement. Verizon Opp. Br. 3, *see also* 15. In other words, Verizon has the right under the FAA to insist on arbitration or not do business with customers, but customers don't have the right to refuse arbitration and still do business with Verizon.

Verizon's argument is meritless under *Wellness*, but more importantly, it's inconsistent with the terms of its Customer Agreement.—which Verizon agrees is enforceable and that a customer has the right to continue to receive equipment and services from Verizon *even if the arbitration agreement is not enforceable*. *See* August 18, 2015 Customer Agreement (ECF DKT #19-1), at 8 (Arbitration Agreement § 8:"IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION (3) CANNOT BE ENFORCED, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY."); *id.* at 8 of 8 ("If any part of this agreement, including anything regarding the arbitration process (except for the prohibition on class arbitrations as explained in part 8 of the dispute resolution section above), is ruled invalid, that part may be removed from the agreement."). Verizon has already contractually eliminated the purported Hobson's choice it has fabricated.

C. "State Action" Is Irrelevant To The Determination Of The Voluntariness Of Consent And Waiver Of The Right To An Article III Adjudicator Under *Wellness* And The FAA

Simply stated, Verizon is manufacturing a "constitutional violation" that Plaintiff is not asserting in order to piggy back its "lack of state action" defense into the case (Verizon Opp. Br. 1, 2, 7-8). Although Plaintiff's *Wellness* claim involves the constitutional right to an Article III

adjudicator, and whether the proper standard for the "voluntary" waiver of that right requires "the right to refuse" under *Wellness,* Plaintiff seeks only a declaration regarding the proper standard governing that waiver, and not that the FAA violates Article III. If *Wellness* controls, the arbitration agreement is unenforceable; if not, then the Court should deny Plaintiff's motion on this *Wellness* claim. Verizon's reliance on a "state action" defense is entirely misplaced.

That "state action" is irrelevant to the *Wellness* consent issue raised by Plaintiff explains why *none* of the long list of Supreme Court cases regarding the enforceability of arbitration agreements cited by Verizon, from *Epic* on down, mentions "state action" (Verizon Opp. Br. 1-2). *None* of the leading cases in the Sixth Circuit regarding the contractual waiver of constitutional rights and the standard for the enforceability of arbitration agreements cited above mentions "state action." *See K.M.C. Co.; Hergenreder; Morrison; Cooper; Stutler.*[6] *And none* of the cases relied on by the District Court to reject the "heightened" "knowing and voluntary" standard in *Katz,* 2013 WL 6621022, at *13, mentions the term "state action." *Cf. Morales v. Sun Constructors, Inc.,* 541 F.3d 218, 224 (3d Cir. 2008); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1372 & 1371 n.12 (11th Cir. 2005); *Am. Heritage Life Ins. Co. v. Orr,* 294 F.3d 702, 711 (5th Cir. 2002); *Williams v. Imhoff,* 203 F.3d 758, 763 (10th Cir. 2000); *Sydnor v. Conseco Fin. Servicing Corp.,* 252 F.3d 302, 307 (4th Cir. 2001); *Awuah v. Coverall N. Am., Inc.,* 703

[6] Verizon's citation to "*Glennon v. Dean Witter Reynolds, Inc.*, No. 3-93-0847, 1994 WL 757709, at *10 (M.D. Tenn. Dec. 15, 1994), *aff'd on other grounds*, 83 F.3d 132 (6th Cir. 1996) (refusing to vacate arbitration award on constitutional grounds because arbitral relief did not constitute state action)" is both misleading and inapposite (Verizon Opp. Br. 7-8). The Sixth Circuit did not decide the "state action" issue, 83. F.3d at 138-39, and in fact "assume[d] without deciding that due process protections attach in this case." Verizon should have placed the parenthetical after the district court citation, but even then the issue was whether an arbitration panel's punitive damage award in a case where Dean Witter was a "voluntary" participant constituted "state action." 1994 WL 757709, at *14. This case deals with entirely different issues and facts.

Plaintiff also notes that she is unaware of any decision by this Court regarding the enforceability of an arbitration agreement that discusses "state action" as a component of that issue.

F.3d 36, 44 (1st Cir. 2012). Indeed, in *Katz,* 2013 WL 6621022, at *13, the District Court's waiver analysis was removed and distinct from its "state action" analysis.

If Verizon were correct and "state action" was applicable to the narrow "voluntariness" issue for which Plaintiff seeks a declaratory judgment, then no arbitration agreement could ever be unenforceable under state law based on the purported absence of "state action." This necessary but absurd extension of Verizon's argument confirms why none of the Supreme Court and Sixth and other Circuit Court cases addressing the proper standard for the enforceability of arbitration agreements and the waiver of the constitutional rights mentions or analyzes the issue.[7]

III. THE INHERENT, IRRECONCIABLE CONFLICT BETWEEN CAFA AND THE FAA MUST BE RESOLVED IN FAVOR OF CAFA UNDER *EPIC* AND CONTROLLING SUPREME COURT PRECEDENT

As Verizon would have it, *Epic* purportedly has laid down an immutable rule that unless a statute expressly exempts arbitration under the FAA, there can be no conflict sufficient to override the FAA (Verizon Opp. Br. 3-4, 16-19). Verizon however, cannot dispute that there is an inherent, irreconcilable conflict between class actions and the fundamental attributes of arbitration under the FAA. *Epic,* 138 S. Ct. at 1622. And Verizon cannot dispute that CAFA's express findings, purposes and text, confirmed by its legislative history, and the complex class action procedural scheme it creates, are intended to ensure the exercise of federal diversity jurisdiction over "minimally diverse" class actions to benefit consumers nationwide. *See*

[7] Assuming arguendo that "state action" was relevant to the narrow "voluntariness" issue for which Plaintiff seeks declaratory judgment, "state action" is satisfied here. First, as stated by the Supreme Court in upholding the constitutionality of the FAA in *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 279 (1932), the FAA is the result of the exercise of "[t]he [indisputable] general power of the Congress to provide remedies in matters falling within the … jurisdiction of the federal courts, and to regulate their procedure"—i.e., to make a *voluntary* executory agreement to arbitrate "a rule of court." Second, because the proper standard for "voluntariness" is a matter of federal law, the Court must exercise its most important Article III judicial power—determining whether the *Wellness* standard or state law is applicable, and "to say what the law is," *Marbury v. Madison,* 5 U.S. 137, 177 (1803)—an act of constitutional adjudication that goes far beyond the mere enforcement of an arbitration agreement. And third, the decision by this Court whether to enter the "rule of court" compelling arbitration and then enter judgment on that decision is a quintessential act of the Article III judicial power. *Cf. Wellness,* 135 S. Ct. at 1958-59 (Roberts, C.J., dissenting).These elements, taken in combination, clearly reach the level of judicial involvement required for "pervasive and substantial" state action under *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478 (1988).

complete CAFA text (ECF DKT #19-11); select CAFA legislative history (ECF DKT #19-12); Pl. DJM Br. 12-20. Nor can Verizon dispute another, extraordinary purpose of CAFA under § 2(b)(2): "*to restore the intent of the framers*"—a purpose so powerful that Verizon simply ignores it altogether.[8] It seems self-evident that a diversity jurisdiction statute like CAFA intended to "restore the intent of the framers" should take priority over a statute like the FAA that "bestow[s] no federal jurisdiction but rather requir[es] an independent jurisdictional basis." *Hall St. Assoc., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 581-82 (2008).

Verizon also wholly ignores one of the important factors relied on in *Epic* to reject the existence of a conflict between the NLRA and the FAA. Specifically, *Epic* stressed the importance of whether a particular statute includes "any specific statutory discussion of … class actions [as] an important and telling clue [whether] Congress has … displaced the Arbitration Act." 138 S. Ct. at 1627. The *Epic* Court also noted the NLRA's failure to "mention class or collective action procedures," *id.* at 1624—the meat of CAFA.

The key to the ultimate significance of these observations is found in the case of *Morton v. Mancari*, 417 U.S. 535, 551 (1974), which *Epic* relies on to support the existence of the "heavy burden" a party must satisfy to establish "that two statutes cannot be harmonized, and that one displaces the other." 138 S. Ct. at 1624. While *Epic,* quoting *Morton,* states that "the Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both,'" *id.* (*quoting Morton,* 417 U.S. at 551), *Morton* also sets out this critical, directly relevant rule, 417 U.S. at 550-51:

> Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

[8] To date, Plaintiff has been able to locate only one other federal statute with a comparable purpose: 50 U.S.C § 1541(a), the War Powers Resolution, which states that "[i]t is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States" regarding the use of U.S. Armed Forces in hostilities.

Here, CAFA is a specific, painstakingly detailed jurisdictional and procedural class action statute, intended primarily to benefit consumers nationwide. The FAA doesn't address jurisdiction and doesn't confer it and doesn't address class actions. And arbitration's fundamental attributes under the FAA inherently and irreconcilably conflict with the CAFA class actions that Congress has commanded the federal district courts to adjudicate. *Cf. Freeman v. Blue Ridge Paper Prod., Inc.,* 551 F.3d 405, 407-08 (6th Cir. 2008) (Congress enacted CAFA to ensure federal adjudication of nationwide class actions) (cited Verizon Opp. Br. 18).

Verizon also ignores the fact that in CAFA Congress has set out multiple precisely defined exceptions to the exercise of jurisdiction—but not an exception for the FAA. *See* Pl. DJM Br. 14-15. As stated in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* Canon 8, Omitted-Case Canon, at 93 (2012):

> [T]he judge [should not] elaborate unprovided for exceptions to a text, as Justice Blackman noted while a circuit judge: "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." (quoting *Petteys v. Butler,* 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)).

Finally, Verizon has raised two fallacious arguments regarding the CAFA conflict. First, citing 28 U.S.C. § 1332(a) as an example, Verizon states that "Plaintiff's strained interpretation would render ***any*** claim subject to federal jurisdiction inarbitrable, an absurd result." *See* Verizon Opp. Br. 18, n.9 (emphasis in original). Yes, Plaintiff agrees this is absurd, and has nothing to do with the conflict between CAFA and the FAA. Unlike § 1332(a), which says nothing about class actions, CAFA expressly confers jurisdiction and prescribes detailed procedures *for the adjudication of class actions*, "an important and telling clue" under *Epic.* 138 S. Ct. at 1627. Second, Verizon suggests that Plaintiff "contends that CAFA somehow confers an unalterable right to maintain" her class action, even if class certification was denied. Verizon Opp. Br. 18 n.8. Verizon is simply making that up, Plaintiff has never contended any such thing, and would

not. CAFA vests Plaintiff with the constitutional right to invoke the class-wide judicial power of an Article III adjudicator; it doesn't guarantee that once invoked Plaintiff will prevail on every substantive and procedural issue. But the constitutional right under CAFA clearly overrides the FAA.

IV. CONCLUSION

For all the reasons stated herein and in the other briefs filed by Plaintiff in connection with the parties' cross-motions, the Court should grant Plaintiff's declaratory judgment motion in its entirety, and deny Verizon's motion to compel arbitration and stay the action in its entirety.

Dated: August 6, 2018

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF AND THE CLASSES

L.R. 7.1(f) PAGE LIMITATION CERTIFICATION

I hereby certify that the foregoing Plaintiff's Reply Memorandum of Law in Support of Her Motion for Partial Summary Judgment on Her Individual Claims for Declaratory Judgment complies with the 15 page limitation set forth in the Court's May 21, 2018 Order (ECF DKT #15).

s/ William R. Weinstein
WILLIAM R. WEINSTEIN

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of August, 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