JAMS NEW YORK

----------X

Vincent Emilio,

Claimant,

-v-

Sprint Spectrum L.P., PARTIAL FINAL AWARD

Respondent.

----------X

At the request of the parties, this Partial Final Award sets forth my ruling on a motion by Respondent Sprint Spectrum L.P. ("Sprint"), pursuant to Rule 2 of the 2005 JAMS Class Action Procedures, for reconsideration of and to vacate my October 25, 2006 decision ("Decision") on the enforceability of the class action preclusion clause contained in Sprint's customer service agreement applicable to this dispute, based on the Supreme Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010). My Decision held that the arbitration clause at issue permitted the arbitration to proceed on behalf of a class, based on a finding that "the class action preclusion provision in the Arbitration Agreement is unenforceable because it violates the anti-waiver provisions of Kan. Stat. 50-625."

BACKGROUND

The Arbitration Demand in this case was filed with JAMS on January 4, 2005, by Claimant Vincent Emilio ("Emilio" or "Claimant"), "individually and on behalf of all others similarly situated," against Respondent Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint" or "Respondent"). Claimant is a resident of Mt Vernon, New York. Sprint is alleged to be a "global telecommunications company, structured as a Delaware limited

partnership with its principal offices located in Kansas. Sprint is alleged to be wholly owned by Sprint Corporation, a Kansas corporation with its principal executive offices located in Kansas.

The Arbitration Demand asserts that Respondent charges and collects New York State Excise Tax ("Excise Tax") from wireless telephone customers, even though the obligation to pay Excise Tax under New York law is imposed solely and directly on Respondent, *i.e.*, Respondent is not authorized under New York law to pass this tax obligation on to consumers.

The Arbitration Demand asserts that Claimant brings this class action individually and on behalf of a class comprised of "all persons who, during the period commencing six years prior to the filing of this arbitration demand and continuing to the present (the "Class Period"), were Sprint wireless telephone service customers who paid "New York State Excise Tax" ("Excise Tax(es)") as part of their monthly charges (the "Class")".

The Arbitration Demand asserts that Respondent has "unlawfully, deceptively and inequitably" collected the Excise Tax in a "wholly improper attempt to obtain reimbursement for amounts that Respondent has and had no right to pass on to its customers," and that as a result of Respondent's conduct, "Claimant and the Class are and have been wrongfully subjected to the Excise Tax."

In the Arbitration Demand, Claimant and the putative Class seek an injunction, as well as compensatory damages, restitution and/or other relief to redress Respondent's "unlawful, deceptive and inequitable conduct," which is claimed to violate New York Tax Law Sec. 186-e, New York General Business Law Sec. 349, and to constitute unjust enrichment. In an Amended Demand, submitted on June 2, 2006, Claimant added a

claim for violation of the Kansas Consumer Protection Act, Kan. Stat. 50-623 *et seq.* Sprint did not oppose the amendment, but reserved all of its rights and defenses regarding the amended claims asserted by Claimant.

Pursuant to Sprint's Terms and Conditions of Service ("Agreement"), under the heading "MANDATORY ARBITRATION OF DISPUTES," Claimant is required to arbitrate "ANY AND ALL CLAIMS, CONTROVERSIES OR DISPUTES * * * ARISING OUT OF OR RELATING TO" Sprint's Services. (Capital lettering in original.)

Under the heading "MANDATORY ARBITRATION OF DISPUTES," the Agreement also provides that:

> "YOU AND SPRINT FURTHER AGREE THAT NEITHER SPRINT NOR YOU WILL JOIN ANY CLAIM WITH THE CLAIM OF ANY OTHER PERSON OR ENTITY IN A LAWSUIT, ARBITRATION OR OTHER PROCEEDING; THAT NO CLAIM EITHER SPRINT OR YOU HAS AGAINST THE OTHER SHALL BE RESOLVED ON A CLASS-WIDE BASIS; AND THAT NEITHER SPRINT NOR YOU WILL ASSERT A CLAIM IN A REPRESENTATIVE CAPACTIY ON BEHALF OF ANYONE ELSE. IF FOR ANY REASON THIS ARBITRATION PROVISION DOES NOT APPLY TO A CLAIM, WE AGREE TO WAIVE TRIAL BY JURY."

(Capital lettering in original.)

In a subsequent paragraph, headed "Miscellaneous," the Agreement provides that it "is governed by and must be construed under federal law and the laws of the State of Kansas, without regard to choice of law principles."

Kansas has enacted a comprehensive Unfair Trade and Consumer Protection Act, Kansas Statutes, Chapter 50, Article 6 (the "KCPA"). The KCPA is designed, *inter alia*, to "simplify, clarify and modernize the law governing consumer transactions," and to "protect consumers from suppliers who commit deceptive and unconscionable practices."

Kan. Stat. 50-623. The KCPA prohibits a "supplier" from engaging in any deceptive act or practice, or any unconscionable act or practice in connection with a "consumer transaction." A "consumer transaction" is defined as "a sale, lease, assignment or other disposition for value of property or services within this state * * * to a consumer." Kan. Stat. 50-624(c). Deceptive acts and practices are defined in Kan. Stat. 50-626; unconscionable acts and practices are defined in Kan. Stat. 50-627.

Kan. Stat 50-634 sets forth the "private remedies" available to consumers under the KCPA. "A consumer who suffers loss as a result of a violation of this act may bring a class action for the damages caused by an act or practice," Kan. Stat. 50-634(2)(d). "Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, a consumer may bring a class action for declaratory judgment, an injunction and appropriate ancillary relief" against an act or practice that violates the KCPA, Kan. Stat. 50-634(2)(d). The KCPA further provides that "[e]xcept as otherwise provided in this act, a consumer may not waive or agree to forego rights or benefits under this act." Kan. Stat. 50-625. There is no exception to this provision in the KCPA that pertains to waiver of the right to bring a class action.

As noted above, my Decision held that the class action preclusion provision in the Sprint Arbitration Agreement is unenforceable because it violates the anti-waiver provisions of Kan. Stat. 50-625.[1] Although the Decision was set forth in a partial Final Award, Sprint did not seek judicial review.

[1] I rejected Emilio's contention that the class action preclusion provision was unconscionable under Kansas law.

DISCUSSION

The *Stolt-Nielsen* Court addressed the specific question of "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]." 130 S.Ct. at 1764. The Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1776 (emphasis in original). The Court held that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed [that] the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775.

Sprint argues that based upon *Stolt-Nielsen*, class arbitration proceedings cannot be compelled where, as here, the parties expressly agreed that they would *not* arbitrate on a class-wide basis, and rather agreed to arbitrate with each other on a purely bilateral basis. Moreover, Sprint asserts that "*Stolt-Nielsen* makes clear that the FAA preempts any interpretation of the KCPA that would render the arbitration agreement unenforceable or require class arbitration."

Stolt-Nielsen, however, says nothing about preemption or the unenforceability of class preclusion provisions based upon state law. Sprint cites no case that has adopted this reading of *Stolt-Nielsen*. Indeed, those courts that have addressed the relationship between *Stolt-Nielsen* and the preemption of state law have rejected this argument. *See, e.g., Fensterstock v. Education Partners*, 611 F.3d 124, 133 (2d Cir. 2010); *Litman v. Cellco P'shp*, 2010 WL 2017665, at *4 n.5 (3d Cir. May 21, 2010); *Puleo v. ChaseBank USA, N.A.*, 605 F.3d 172, 182 n.5, 194 (3d Cir. 2010); *McArdle v. AT&T Mobility LLC*,

2010 WL 1875812, at *1, *2 (N.D. Cal. May 10, 2010); *Mathias v. Rent-A-Center, Inc.*, 2010 WL 3715059, at *5 (E.D. Cal. Sept. 15, 2010).[2]

Sprint has cited only one case that addresses the effect of *Stolt-Nielsen* where the court has found a class preclusion provision unenforceable. In *Fensterstock v. Education Partners*, the plaintiff filed a putative class action in the Southern District of New York. The defendant moved to compel arbitration, based upon an arbitration clause that included a class action preclusion provision. The court held that the class action preclusion provision was unconscionable under California law and denied the motion to compel. On appeal, the Second Circuit affirmed the determination that the provision was unconscionable and unenforceable. Based upon a severability provision, the defendant requested that the class preclusion provision be excised and that the case be referred to [class] arbitration. The court declined, and held, based upon *Stolt-Nielsen*:

> In the present case, the Note's arbitration clause is not silent, but expressly states that "the arbitration of Claims *must proceed on an individual (non-class, non-representative) basis*." (Note, Terms and Conditions Statement at 4 (emphasis added).) Thus, the parties plainly did not agree that arbitration may be conducted on a class-wide basis, and we do not see that an order for class-wide arbitration can be premised on the Note's severability provision: Our conclusion that a given agreement is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement. Thus, excising the Note's class action and class arbitration waiver clause leaves the Note silent as to the permissibility of class-based arbitration, and under *Stolt-Nielsen* we have no authority to order class-based arbitration.

Plaintiff was therefore permitted to pursue his claims in court as a class action.

---

[2] Sprint points out that following the issuance of the Stolt-Nielsen decision, at least one court and several arbitrators have reconsidered and vacated and/or reversed clause construction awards. I note, however, that none of these cases involved a class preclusion provision found to be unenforceable under state law.

Relying on *Fensterstock*, Sprint argues that Sprint cannot be compelled to arbitrate on a class-wide basis, and that "[e]ven if the Arbitrator were to give the class action waiver no effect, what would remain is an arbitration agreement that is silent as to the issue of class arbitration (as was the case in *Stolt-Nielsen*), and the Arbitrator would still be compelled to direct the parties to proceed with a bilateral arbitration." This proposal, however, would give Sprint the benefit of a class preclusion provision that has been found unenforceable *and* the benefit of an arbitral forum. In essence, Sprint proposes that the Arbitration Agreement be enforced as written, notwithstanding the finding of unenforceability. Neither *Stolt-Nielsen* nor *Fensterstock* supports such a result.

Had this issue arisen in the posture of the *Fensterstock* case, Sprint would be required to defend a putative class action in court (or, *if plaintiff and Sprint agreed*, could proceed with a class-wide arbitration). I therefore find that Sprint cannot be compelled to proceed with a class-wide arbitration, but also that plaintiff cannot be compelled to proceed with a bilateral arbitration, and must be given the opportunity to pursue his class claims in a court action.

SO ORDERED.

Kathleen A Roberts

KATHLEEN A. ROBERTS
ARBITRATOR

DATED: March 10, 2011

I, Kathleen A. Roberts, do hereby affirm upon my oath as Arbitrator, that I am the individual described herein as Arbitrator and who executed this instrument, which is my PARTIAL FINAL AWARD.

Kathleen A Roberts

KATHLEEN A. ROBERTS
ARBITRATOR

March 10, 2011