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SUPREME #	088253	**TRIAL COURT COUNTY**	MIDDLESEX
CASE TITLE	JEFFREY ACHEY, ET AL. V. CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS, ET AL.		
CASE TYPE	CIVIL	**DISPOSITION DATE**	05/01/2023
CATEGORY	LAW-CIVIL PART		
TRIAL COURT JUDGE			

PARTY/ATTORNEY

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DOCUMENTS

DOCUMENT / FILE NAME	FILING PARTY	FIRM NAME/ATTORNEY NAME	SOURCE	DATE POSTED	DOCUMENT STATUS	SUPREME MODE
AMICUS CURIAE BRIEF WITH APPENDIX	CHAMBER OF COMMERCE OF THE USA & NJ CJI	LOWENSTEIN SANDLER LLP - GAVIN J ROONEY	UPLOAD	06/26/2023	SUBMITTED	C-UNASSIGNED-1
MOTION FOR LEAVE TO APPEAR AMICUS CURIAE	CHAMBER OF COMMERCE OF THE USA & NJ CJI	LOWENSTEIN SANDLER LLP - GAVIN J ROONEY	SYSTEM GENERATED	06/26/2023	SUBMITTED	M-UNASSIGNED-2
AFFIDAVIT/CERTIFICATION IN SUPPORT	CHAMBER OF COMMERCE OF THE USA & NJ CJI	LOWENSTEIN SANDLER LLP - GAVIN J ROONEY	UPLOAD	06/26/2023	SUBMITTED	M-UNASSIGNED-2
AFFIDAVIT/CERTIFICATION IN SUPPORT	CHAMBER OF COMMERCE OF THE USA & NJ CJI	LOWENSTEIN SANDLER LLP - GAVIN J ROONEY	UPLOAD	06/26/2023	SUBMITTED	M-UNASSIGNED-2
CERTIFICATION OF SERVICE	CHAMBER OF COMMERCE OF THE USA & NJ CJI	LOWENSTEIN SANDLER LLP - GAVIN J ROONEY	SYSTEM GENERATED	06/26/2023	SUBMITTED	C-UNASSIGNED-1

FEES AND PAYMENTS

Fee Type	Fee Amount	Fee Status	Fee Paid	Date Paid	Amount Due
FILING FEE	$50.00	FEE PENDING	$0.00	6/26/2023 12:00:00 AM	$50.00
	$50.00		**$0.00**		**$50.00**

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JEFFREY ACHEY, et al., on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS AND VERIZON COMMUNICATIONS, INC., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY Docket No.: 088253 ON PETITION FOR CERTIFICATION FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-003639-21-T2 Civil Action SAT BELOW: Hon. Greta Gooden Brown, J.A.D. Hon. Patrick DeAlmeida, J.A.D. Hon. Stephanie Ann Mitterhoff, J.A.D.

BRIEF OF PROPOSED AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE IN SUPPORT OF THE PETITION FOR CERTIFICATION OF DEFENDANTS-RESPONDENTS CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS, AND VERIZON COMMUNICATIONS, INC.

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PRELIMINARY STATEMENT

The Federal Arbitration Act ("FAA") prohibits courts from disfavoring arbitration as a means of resolving disputes and, with narrow exceptions, directs courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

Rather than do what the FAA requires, the Appellate Division heavily relied on an out-of-state case criticizing the Verizon arbitration provision as supposedly creating an "'inferior forum'" and strained to justify its refusal to enforce that provision through multiple errors of law and unreasonable constructions of that agreement. In this brief, Amici focus on two key errors with broad implications for businesses.

First, the Appellate Division erred when it held that "the 'cumulative effect'" of the entire customer agreement rendered its arbitration provision unenforceable. Under established precedent, a party may not avoid an arbitration provision by arguing the alleged unconscionability of contractual provisions outside of the arbitration provision.

Second, when it turned to the arbitration provision itself, the Appellate Division erred in holding that the parties' agreement to use staged, bellwether-style proceedings to handle mass claims is unconscionable. The Appellate

Division ignored the sound public policy reasons—consistent with the efficiencies of individual arbitration—that support the use of a "bellwether" process for resolving mass arbitrations. Mass arbitrations are ripe for abuse, leading to blackmail settlements. A bellwether process defangs that threat by following the same procedure used by courts that adjudicate mass torts.

STATEMENT OF INTEREST OF AMICI CURIAE

As detailed in the attached Certification of Jonathan Urick, the Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, such as the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

As detailed in the attached Certification of Alex R. Daniel, the New Jersey Civil Justice Institute ("the Institute") is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations

dedicated to improving New Jersey's civil justice system. The Institute believes that a balanced civil justice system and the enforcement of agreements to engage in alternative dispute resolution fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

Many of the Chamber's and the Institute's members and affiliates regularly rely on arbitration agreements. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. The Chamber's and the Institute's members and affiliates have structured millions of contractual relationships around the use of arbitration precisely to achieve those benefits.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Statements of Procedural and Factual History in Defendants-Respondents' opening brief before the Appellate Division, see Defs.' App. Div. Br. at 5-9, and add the following for further context.

Section 6 of the My Verizon Wireless Customer Agreement ("the Agreement") addresses the recent phenomenon of mass arbitrations, where plaintiffs' attorneys purport to enroll thousands of clients, often through an online process, to prosecute the same or similar claims against a business.

Section 6 provides that in such an event, the arbitrators and the parties will use a staged bellwether procedure to choose ten test cases to resolve first. The parties can then use the data about the merits and reasonable value of the claims drawn from those cases to facilitate settlement of the remaining cases or can proceed to arbitrate additional cases.

As a recent report published by the Chamber's Institute for Legal Reform details, mass arbitrations are subject to abuse.[1] Unlike class actions, where plaintiffs' lawyers predominantly communicate with a few named plaintiffs to initiate a case, and the subsequent court-supervised class-certification process provides some guarantees about the characteristics of unnamed class members, mass arbitrations require individualized vetting and attention from plaintiffs' lawyers for each arbitration claim that they file (or threaten to file). Plaintiffs' lawyers *should* be vetting their clients to ensure that they have a basis for presenting an arbitral claim and communicating with their clients throughout the process—indeed, those steps are mandated by rules of professional conduct.[2]

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[1] U.S. Chamber of Commerce Institute for Legal Reform, Mass Arbitration Shakedown: Coercing Unjustified Settlements at 18-19 (Feb. 2023), https://bit.ly/3qTzu1q (discussing the rise of mass arbitrations).

[2] See, e.g., ABA Model R. of Prof. Conduct 3.1 cmt. 2 ("The filing of an action . . . or similar action taken for a client" requires lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."); Harry M. Reasoner, et al., Business & Commercial Litigation in Federal Courts § 85.14 (5th ed. Supp. 2021) ("Like Fed. R. Civ. P. 11, Model Rule 3.1 and analogous state rules generally

But recent experience suggests that plaintiffs' lawyers are not following these requirements. See Mass Arbitration Shakedown, supra note 1 at 30-40. For example, in a recent mass arbitration involving Intuit, the maker of TurboTax, plaintiffs' counsel had to drop thousands of arbitration claims because, as Intuit's counsel explained, it turns out their clients were not in fact customers of Intuit or had never incurred the disputed charge.[3] Other companies targeted by mass arbitrations have had similar experiences.[4] This pattern confirms that lawyers cannot blindly trust the unverified information typed into online forms by strangers recruited to be arbitration claimants.

Through mass arbitration, plaintiffs' counsel seek to create coercive settlement leverage based not on the merits of the claims but on the fact that many businesses—like Verizon—agree to pay the costs of arbitration. Under the American Arbitration Association consumer fee schedule, if a customer requests

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impose a duty of investigation on the lawyer."); see also ABA Model R. of Prof. Conduct 1.4 (requiring lawyer to communicate and consult with client).

[3] See Decl. of Roger Cole ¶¶ 21-22, In re Intuit Free File Litig., No. 3:19-cv-2546-CRB, Dkt. 192 (N.D. Cal. Dec. 7, 2020).

[4] See, e.g., In re CenturyLink Sales Pracs. & Sec. Litig., MDL No. 17-2795, 2020 WL 3513547, at *2-3 (D. Minn. June 29, 2020) (reporting that after mass arbitration claimants were selected solely "based on their responses to questionnaires," defendant found that it "could not identify any potential customer account that could be connected with some" claimants, with some even "claim[ing] to receive services at addresses in states in which [the defendant] does not provide services"); Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1065 (N.D. Cal. 2020) (determining that 869 arbitration claimants had failed to provide sufficient evidence to allow court to find that they had arbitration agreements with defendant).

a hearing (even a telephonic or Zoom hearing), Verizon must pay $4,900 in AAA fees per case, win or lose. And the lion's share of these fees—$4,200—must be paid almost immediately after the arbitration is filed.[5] In a mass arbitration, the AAA slightly reduces the initial filing fees, gradually lowering the business's cost per case to $4,525.10. When aggregated in a mass arbitration, these fees become astronomical. That looming gigantic payment obligation—which lands before a business has even had time to verify whether the claimant was party to an arbitration agreement with it, much less an opportunity to offer any defense to the claims—creates leverage to force blackmail settlements.

Consider a business threatened with 50,000 arbitrations—the number that Samsung is currently facing,[6] and fewer than the number of mass arbitrations that Uber (60,000)[7] and Amazon (75,000)[8] recently faced. Under the AAA's

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[5] The filing fees and arbitrator fees are charged as soon as the case is accepted for administration, and the case-management fee is charged as soon as the AAA deems the case ready to enter the arbitrator-selection phase. AAA, Consumer Arbitration Rules: Costs of Arbitration (Nov. 1, 2020), https://bit.ly/3DebCbk.

[6] Skye Witley & Christopher Brown, Samsung's Biometric Data Clash Opens New Mass Arbitration Front, Bloomberg Law (Oct. 21, 2022), https://bit.ly/3ssefBe; Christopher Brown, Samsung Facing Almost 50,000 Arbitration Claims Over Selfies, Bloomberg Law (Oct. 11, 2022), https://bit.ly/3gEIgLL; Pet. to Compel Arbitration, Wallrich v. Samsung Elecs. Am., Inc., No. 1:22-cv-05506, Dkt. 1 (N.D. Ill. Oct. 7, 2022).

[7] Andrew Wallender, Uber Settles 'Majority' of Arbitrations for at Least $146M, Bloomberg Law (May 9, 2019), https://bit.ly/3z5E0LD.

[8] Amanda Robert, Amazon Drops Arbitration Requirement After Facing 75,000 Demands, ABA J. (June 2, 2021), https://bit.ly/3URJuTj.

current fee schedule, if the business commits to paying the consumer's filing fee (as often is the case) and the claimants request telephonic or Zoom hearings, the business's immediate upfront cost would be over $201 million.[9] And the business would be required to pay this amount even if it wins every case (and even if the claimants were not in fact customers of the company or failed to show up to the hearing).

Businesses cannot simply refuse to pay the fees. The AAA, for example, warns that if a business fails to timely pay an invoice, the AAA "may decline to administer future consumer arbitrations with that business." The nonpayment of fees thus could end the company's arbitration program.[10]

Plaintiffs' law firms have exploited these dynamics to try to achieve quick and lucrative settlements. After all, a business facing the threat of $200 million in AAA fees may find it difficult to reject a $20 million settlement demand, even if the underlying claims are meritless. Unsurprisingly given these realities, mass arbitrations have proliferated in recent years.

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[9] Specifically, the business would pay $4,125,000 in filing fees, the 50,000 consumers' $2,525,000 filing fees, and $195,000,000 in case-management and arbitrator fees. See AAA, Consumer Arbitration Rules, supra note 5.

[10] AAA, Consumer Arbitration Rules, supra note 5. See Fishon v. Peloton Interactive, Inc., 336 F.R.D. 67, 68 (S.D.N.Y. 2020) (after more than 2,700 Peloton consumers filed individual arbitration demands with AAA, Peloton failed to pay required fees and AAA refused to accept any more demands against Peloton).

A half-century ago, Judge Friendly famously recognized that class actions can lead to "blackmail settlements."[11] Today, for plaintiffs' firms threatening mass arbitrations, blackmail settlements are the entire point. "[A]busive mass arbitrations are the 21st-century equivalent of the abusive class actions that characterized the last part of the 20th century—claims that can be brought solely for the purpose of extracting a settlement unrelated to the merits by leveraging the threat of huge costs."[12] Georgetown Professor J. Maria Glover has stated candidly—after interviewing plaintiffs' lawyers who originated the mass-arbitration strategy—that "[t]he mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure" through the imposition of "astounding" fees that "can spell financial catastrophe for a potential defendant."[13] Professor Glover concluded that the settlement pressure imposed by a mass arbitration—even one asserting "more dubious claims"—can be greater than that imposed by a certified class action.[14]

Companies dealing with a mass arbitration thus face a Hobson's choice: either pay the overwhelming bill for arbitration fees in order to have an

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[11] Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).
[12] Mass Arbitration Shakedown, supra note 1 at 8.
[13] J. Maria Glover, Mass Arbitration, 74 Stan. L. Rev. 1283, 1345, 1349, 1380 (2022).
[14] Id. at 1350; see also id. at 1352 ("Simply put, mass arbitration shows that when it comes to in terrorem effects[,]" "the leverage of a large number of individual arbitrations can sometimes exceed the leverage created by aggregate proceedings.").

opportunity to investigate and defend against the claims on the merits, or accept under duress a settlement that reflects the AAA fees rather than the merits of the claims. Companies adopt arbitration as a means of fair dispute resolution to avoid the exorbitant costs of addressing meritless class actions, but the cost of blackmail settlements made possible by mass arbitrations operate as the same kind of unfair 'tax' on businesses. Some, like Amazon, which faced more than 75,000 arbitration demands in 2021, abandoned their arbitration clauses and thus the mutual benefits of arbitration for dispute resolution.[15] Other businesses have had to pass along the cost of this tax to their customers in the form of higher prices and to employees in the form of lower wages or fewer jobs. None of these results is desirable.

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[15] Robert, supra, note 8. Public reports indicate that large mass arbitrations also have been pursued against DoorDash, Postmates, FanDuel, DraftKings, Chegg, Chipotle, CenturyLink, Dollar Tree, and many other companies. See, e.g., Glover, 74 Stan. L. Rev. at 1387-90; Alison Frankel, Mass Consumer Arbitration Is On! Ed Tech Company Hit With 15,000 Data Breach Claims, Reuters (May 12, 2020), https://reut.rs/3z1uwAU; Justin Elliott, TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud, ProPublica (Feb. 23, 2022), https://bit.ly/3TLz0Uh.

ARGUMENT

I. THE FAA PROHIBITS COURTS FROM DISCRIMINATING AGAINST AGREEMENTS TO ARBITRATE AND REQUIRES ENFORCEMENT OF SUCH AGREEMENTS AS WRITTEN.

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citations omitted); see also Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231-32 (2013).

In enacting the FAA, Congress intended "to place arbitration agreements upon the same footing as other contracts." Gilmer, 500 U.S. at 24. The final provision of Section 2, referred to as the "Savings Clause," "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citations and internal quotations marks omitted).

By enacting this language, "Congress precluded States from singling out arbitration provisions for suspect status." Doctors Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). This includes arbitration clauses that call for individualized arbitration. Epic Sys., 138 S. Ct. at 1623. And the FAA bars the

use of discriminatory state-law rules even if the rule is cast as "a doctrine normally thought to be generally applicable, such as … unconscionability." Concepcion, 563 U.S. at 341; cf. Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012) (per curiam) (vacating unconscionability holding and remanding for reconsideration "under state common-law principles that are not specific to arbitration and not preempted by the FAA"). While "the interpretation of a contract is ordinarily a matter of state law," state-law interpretations violate the FAA if they are "unique" or "restricted" to arbitration because "courts would not interpret contracts other than arbitration contracts the same way." DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 54-55 (2015).

Finally, but no less importantly, the United States Supreme Court has instructed that the FAA requires courts "'to enforce arbitration agreements according to their terms, including . . . the rules under which that arbitration can be conducted.'" Epic Sys., 138 S. Ct. at 1621 (quoting American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 233 (2013) (emphasis in original quote)). In Concepcion, the Court overturned a state-court rule that refused to enforce arbitration provisions requiring individualized proceedings (and barred class actions) because the FAA allowed the parties to specify the rules under which the arbitration may be conducted. Similarly, in Epic Sys., the Court emphasized that the judiciary must be alert to "new devices and formulas that

would achieve the same result. . . . And a rule seeking to declare individualized proceedings off limits is . . . just such a device." Epic Sys., 138 S. Ct. at 1623. As we discuss below, the Appellate Division's disdain of the bellwether procedure to address mass arbitrations is just such a device.

II. THE APPELLATE DIVISION IMPROPERLY RELIED UPON THE "CUMULATIVE" EFFECT OF CONTRACT SECTIONS OUTSIDE OF THE ARBITRATION PROVISION THAT ARE IRRELEVANT TO THE ANALYSIS.

The FAA obligates courts to respect and enforce agreements to arbitrate. But here, the Appellate Division made multiple errors of law which, when taken together, make clear its hostility towards arbitration. Achey v. Cellco P'ship, __ N.J. Super. __, __ (App. Div. May 1, 2023) (slip op. at 12) (asserting that the Verizon arbitration agreement imposed an "'inferior forum'" on customers (quoting MacClelland v. Cellco P'Ship, 609 F. Supp. 3d 1024, 1045 (N.D. Cal. 2022)). Such refusals to enforce arbitration agreements was exactly why Congress passed the FAA, and such hostility to arbitration seriously concerns the business community.

When assessing the enforceability of an arbitration provision, a court's review is limited to the arbitration provision itself. Portions of the contract beyond the arbitration provision are irrelevant to the analysis. This is because "[u]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Buckeye

Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006); see also Delta Funding Corp. v. Harris, 189 N.J. 28 (2006) (same); Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 195 (2019) ("[A]rbitration agreement[s] [are] severable and enforceable, notwithstanding a plaintiff's general claims about the invalidity of the contract as a whole." (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)). Rather, an "arbitration agreement may be valid even if the underlying contract is not." Id. at 211.

These principles are well settled, yet the Appellate Division disregarded them when it refused to enforce the Agreement's arbitration provision by relying upon the so-called "cumulative" effect of *other* provisions found *elsewhere* in the Agreement. Specifically, the Appellate Division held that the Agreement's (1) integration clause, (2) requirement that customers dispute their invoices within 180 days, and (3) limitation on consequential, punitive, or treble damages, all violated public policy and therefore impugned the enforceability of the arbitration provision. Id. at 15. Importantly, each of those challenged provisions appear outside of the arbitration provision. Accordingly, they should not have entered the court's analysis under the controlling authority cited above. If the arbitration provision itself is enforceable, then it matters not whether other provisions may be found unconscionable. That decision is for the arbitrator, not the court.

But this error in the Appellate Division's analysis is only part of the problem. The court also strained to cast the Agreement's integration clause as unconscionable. Yet integration clauses are standard in countless contracts and serve a valid purpose of invoking the parol evidence rule. See, e.g., Panaccione v. Holowiak, No. A-5461-06T3, 2008 WL 4876577, at *7 (App. Div. Nov. 12, 2008). Here, for example, the clause simply confirmed the parties' intent that the Agreement controls and supersedes any prior or oral agreements: "This agreement and the documents it incorporates"—including a customer's "Service terms and conditions," and the bills they receive—"form the entire agreement between us" and a customer "can't rely on any other documents, or on what's said by any Sales or Customer Service Representatives." (Pa84, Pa91.)

Further, and contrary to the Appellate Division's suggestion that the integration clause gave Verizon a "free pass" to commit fraud, (see Achey, slip op. at 16, 18), New Jersey law confirms that integration clauses do not extinguish claims for fraudulent inducement. Harker v. McKissock, 12 N.J. 310, 321-22 (1953). Unfortunately, the Appellate Division's analysis did not reflect these foundational principles of New Jersey contractual interpretation and law.[16]

[16] The Appellate Division also held that a provision requiring customers to dispute any Verizon invoice within 180 days of receipt "violate[d] public policy." Achey, __ N.J. Super. __ (slip op. at 16). But such provisions requiring the customer's diligence in timely reviewing and disputing invoices are fully enforceable, as courts elsewhere have held. See Beth Israel Med. Ctr. v. Verizon

And if this Court were to affirm, it would require a significant change in contractual practice within this State.

III. THE MASS-ARBITRATION BELLWETHER PROCEDURE IS NOT UNCONSCIONABLE.

The Appellate Division's distortion of generally applicable contract principles to disfavor arbitration also infected its analysis of the Section 6 bellwether clause. Not only did the court ignore the Supreme Court's mandate to enforce arbitration agreements according to their terms (see Section I, supra), it went out of its way to identify flaws in the provision, while overlooking the procedure's many known benefits.

There is nothing untoward about bellwether procedures for handling mass claims. When mass claims are coordinated before a single judge using the procedures for Multi-County Litigation ("MCL"), Rule 4:38A, or Multi-District Litigation ("MDL"), 28 U.S.C. § 1407, judges often use bellwether proceedings to resolve the lawsuits rather than try each one individually. Although bellwether trials are not impervious to abuse, one federal judge has described such trials as "one of the most innovative and useful techniques for the resolution of complex cases." Hon. Eldon E. Fallon, Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323, 2323 (2008).

Bus. Network Servs., Inc., No. 11 CIV. 4509 RJS, 2013 WL 1385210, at *3 (S.D.N.Y. Mar. 18, 2013).

Under the bellwether process, a few representative cases are selected and tried while the remaining cases are stayed. Id. at 2340-41. This process encourages settlement in two ways. First preparing for trial forces litigants to attain a more realistic assessment of what evidence and arguments they can present. Id. at 2341-42. Second, the outcome of the bellwether trials provides "real-world evaluations of the litigation by multiple juries." Id. at 2325. As the Fifth Circuit has explained, bellwether trials "can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts." In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997); see also In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., MDL No. 1358, 2007 WL 1791258, at *2-3 (S.D.N.Y. June 15, 2007). As one expert in the MDL process has observed, "nothing encourages global MDL settlement like setting bellwether trials." Hon. Stephen R. Bough & Anne E. Case-Halferty, A Judicial Perspective on Approaches to MDL Settlement, 89 UMKC L. Rev. 971, 976 (2021) (quoting Special Master David Cohen).

This process is remarkably effective at achieving settlement. Since 1968, when Congress passed the MDL statute, fewer than 3% of all cases consolidated into an MDL had to be remanded back for individual trials—which means that

transferor courts terminated 97% of cases themselves.[17] And the overwhelming majority of cases terminated by MDL courts were settled.[18] Verizon's bellwether clause adapts the MDL approach for mass arbitration. After the parties arbitrate 10 test cases, the parties can use mediation or individual settlement proposals to resolve the remaining cases. If any cases do not settle, the process is then repeated as long as necessary to resolve all of the cases. Because all of the cases except for the ones selected as test cases are held outside of arbitration while this process unfolds, the process defers the assessment of arbitration fees—and the burdens of trial—until each tranche of cases is actually arbitrated. And for most cases, a global settlement is reached on terms that are informed by the results of the test cases—meaning that most claimants never need to take the step of preparing for and proceeding with arbitration.

This process also makes it feasible for defendants to defend against large mass arbitrations. As discussed above (at pages 8-9, supra), plaintiffs' firms

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[17] See U.S. Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2021, 3 (2021), https://bit.ly/3feso28 (since 1968, "a total of 17,357 actions have been remanded for trial and 647,396 actions have been terminated in the transferee court.").

[18] NYU Center on Civil Justice, What the Data Show: Mapping Trends in Multidistrict Litigation (Sept. 2015), https://bit.ly/3zoDwAp (72% of MDL cases terminated between 2000 and 2015 were settlements); see also Federal Judicial Center, Manual for Complex Litigation, Fourth § 20.132 (2004) ("Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.").

have orchestrated numerous mass arbitrations with tens or hundreds of thousands of claims. Each targeted business must pay tens or hundreds of millions of dollars in up-front arbitration fees simply to have the right to defend itself, no matter how meritless the underlying claims might be. This dynamic coerces businesses to succumb to extortionate settlements. The lawyers may benefit. But everyone else suffers, as the increased cost of business ripples out into the economy in the form of higher prices and lower wages. The bellwether process prevents this abuse by making it feasible to resolve mass claims on terms that reflect their actual merits, rather than the threatened amount of aggregated arbitration fees. There is nothing unconscionable about adopting arbitration procedures that promote merits-based resolutions rather than blackmail settlements.

As it did with its criticism of the supposed "cumulative" impact of supposedly unconscionable provisions outside of the arbitration agreement, the Appellate Division strained to find something offensive in a bellwether procedure that is otherwise standard practice in our courts. To that end, the Court found that "[d]espite defendants' assurance to the contrary," "the agreement prejudices plaintiffs by failing to toll the statute of limitations while the bellwether process is underway." Achey, __ N.J. Super. __ (slip op. at 14).

As with the mischaracterization of an integration clause as an "exculpatory" provision, the Appellate Division applied an unreasonable interpretation that is unsupported by the text and contradicted by Verizon's own assurances. The bellwether clause itself expressly provides that the claimant's sending of a notice of claim "preserves" the claim, thereby tolling any statute of limitations. (Pa87) (emphasis added). To the extent there is any argument that the word "preserves" does not "preserve" a claim under a statute-of-limitation analysis, that decision was for the arbitrator and not the court. See Delta Funding Corp., 189 N.J. at 38 ("Under federal arbitration law, it is ordinarily the role of an arbitrator and not the courts to interpret ambiguous provisions of an arbitration agreement."). The court also erred by failing to credit the more reasonable interpretation (that is, "preserves" means preserves for limitations purposes) advocated by Verizon itself. Indeed, when faced with an ambiguity, a court is required to interpret the text in a manner that does not render it unconscionable. Doyle v. U.S. Sec'y of Labor, 285 F.3d 243, 251 (3d Cir. 2002). The Appellate Division did the opposite.[19]

[19] The Appellate Division's worry about "delay" from bellwether proceedings (Achey, slip op. at 14) is also misplaced. The use of bellwethers results in faster resolutions through settlement than trying each and every case, as evidenced by the disposition of cases in MCL and MDL proceedings.

The Appellate Division's also demonstrated its apparent disdain for arbitration by striking the entire arbitration agreement. Assuming the Appellate Division had the ability to review the customer agreement and did not have to refer Plaintiffs' unconscionability challenges to the arbitrator, it should have engaged in a severability analysis, struck provisions it found unconscionable, and enforced the balance. Instead, the court nullified the arbitration provision in its entirety. This, too, violates the Appellate Division's own precedent and constitutes clear error. See Strickland v. Foulke Mgmt. Corp., 475 N.J. Super. 27, 42 (App. Div. 2023).

CONCLUSION

For the reasons set forth above, Amici respectfully request that the Court reverse the Appellate Division's decision below and compel arbitration.

Respectfully submitted,

Dated: June 26, 2023

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2013 WL 1385210
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

BETH ISRAEL MEDICAL CENTER, et al, Plaintiffs,
v.
VERIZON BUSINESS NETWORK SERVICES, INC. et al., Defendants.

No. 11 Civ. 4509(RJS).
|
March 18, 2013.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge.

***1** Plaintiffs Beth Israel Medical Center and St. Luke's–Roosevelt Hospital Center, along with their parent company, Continuum Health Partners, Inc. (collectively, "Plaintiffs"), bring this action against Defendants Verizon Business Network Services, Inc., Verizon Communications Inc., Verizon New York, Inc., and Verizon Services Corp. (collectively "Verizon" or "Defendants") for claims relating to various alleged overcharges for telecommunications services. Plaintiffs assert violations under Sections 201 and 207 of the Federal Communications Act, 47 U.S.C. §§ 201 and 207, as well as state law claims for (1) breach of contract, (2) unjust enrichment, (3) money had and received, (4) fraud, and (5) violation of Section 349 of the New York General Business Law. Before the Court is Verizon's motion to dismiss Plaintiffs' breach of contract claim to the extent it relates to a certain long-distance contract, as well as Plaintiffs' unjust enrichment, money had and received, fraud, and Section 349 claims, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, Verizon's motion is granted.

I. BACKGROUND [1]

Plaintiffs allege that Verizon engaged in "gross[ ]" overbilling for more than ten years, resulting in millions of dollars of faulty charges made pursuant to a number of telecommunications services contracts between the parties. (FAC ¶¶ 1, 47.) Beginning in 1998, Plaintiffs allege that Verizon improperly charged them $2.5 million for services that had been pre-paid pursuant to a contract with GE Capital. (*Id.* ¶¶ 44–45.) Similarly, Plaintiffs assert that from 1998 to 2009 Verizon charged for voice use of so-called T–1 network connections, when those network connections were only configured for less expensive data use. (*Id.* ¶¶ 38–40.) Though Verizon admitted that Plaintiffs never requested and could not use voice services over the T–1 connections, it insisted that Plaintiffs were required to file an "exemption certificate" to avoid the charges. (*Id.* ¶ 41.) Likewise, Plaintiffs assert that from 2005 to 2009 Verizon charged them for Transparent Local Area Network circuits ("T–LAN"), which had become obsolete and redundant when Verizon installed Dense Wavelength Division Multiplexing technology ("DWDM") at the hospitals. (*Id.* ¶¶ 24–26.) Though the parties' contract required that Verizon disconnect the T–LAN service when the DWDM service was activated, Verizon failed to do so. (*Id.* ¶ 26.) Again, though Verizon admitted the services were redundant, it insisted Plaintiffs were not entitled to a refund because they did not submit a disconnect request. (*Id.* ¶ 29.)

Plaintiffs also assert that, from 2005 to 2008, Verizon improperly charged them for Intelligent Dedicated Sonet Ring service ("IDSR") that had been rendered redundant by installation of the DWDM technology. (*Id.* ¶¶ 33–34.) Though Verizon admitted the impropriety of these charges, it refunded Plaintiffs less than half of the overpayment, claiming Plaintiff's demand was barred by a two-year statute of limitations. (*Id.* ¶ 36.) In addition, Plaintiffs claim that from April 2008 to June 2009 Verizon improperly billed them for long-distance services. (*Id.* ¶ 12.) Though the parties' contract stated Verizon would charge Plaintiffs 3.3 cents per minute for interstate calls, and slightly more for intrastate calls, Verizon often charged as much as ten times that amount. (*Id.* ¶¶ 11–12.) Verizon has repaid roughly half of these charges but refuses to repay the remaining balance based on a contractual statute of limitations argument. (*Id.* ¶¶ 18–19.)

***2** Plaintiffs claim that Verizon's failure to notify them of the double billing, or the need to file an exemption

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certificate or disconnect request, breached Verizon's duty to disclose and constitutes a "deceptive and fraudulent business practice" under state and federal law. (*Id.* ¶¶ 30–32, 42–43, 48.) Moreover, Plaintiffs allege that Verizon's overbilling was systematic (*id.* at ¶ 51) and that Verizon deliberately attempted to thwart their attempts to recover the overpayments (*id* . ¶ 55). Plaintiffs also note that another area hospital, Maimonides Medical Center, sued Verizon for similar overcharges in 2009 (*id.* ¶ 60) and that Verizon has routinely "victimized" customers, including the federal government's General Services Administration (*id.* ¶ 61).

Plaintiffs initiated this action on June 30, 2011. (Doc. No. 1.) Verizon filed its motion to dismiss on March 5, 2012. (Doc. No. 28.) Plaintiffs filed their opposition brief on April 23, 2012, and the motion was fully briefed on May 17, 2012 when Verizon filed its reply. (Doc. Nos.37, 40.) The Court heard oral argument on June 29, 2012. (Doc. No. 41.)

II. DISCUSSION

A. Legal Standard

For a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept all well-pleaded allegations contained in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,* 493 F.3d 87, 98 (2d Cir.2007); *Grandon v. Merrill Lynch & Co.,* 147, F.3d 184, 188 (2d Cir.1998). To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "A claim has facial plausibility where the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). By contrast, a pleading that only "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (quoting *Twombly,* 550 U.S. at 555). If the plaintiff "ha[s] not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly,* 550 U.S. at 570.

B. Breach of Contract

Dismissal of a breach of contract claim is appropriate where a contract's clear, unambiguous language excludes a plaintiff's claim. *See, e.g., Advanced Mktg. Group, Inc. v. Bus. Payment Sys., LLC,* 300 F. App'x 48, 49 (2d Cir.2008). Moreover, "[t]he general rule is recognized that parties may by contract provide for a time shorter than the statutory period as a limitation of time for required action." *See, e.g., Brown & Guenther v. N. Queensview Homes, Inc.,* 239 N.Y.S.2d 482, 483 (App.Div.1963). Plaintiffs seek relief for, *inter alia,* Verizon's overcharges for long-distance service provided from April 2008 until June 2009. (FAC ¶¶ 11–12.) Verizon concedes that it overcharged Plaintiffs during this period but contends that its liability is contractually limited to the amount already refunded to Plaintiffs. (Mem.21–25.) Thus, Verizon argues that Plantiffs' breach of contract claim must be dismissed to the extent it seeks a refund under this contract. (*Id.*) The Court agrees.

***3** On July 29, 2005, the parties entered into a long-distance services contract that reads in pertinent part:

> Payment. Customer agrees to pay all [Verizon] charges (except Disputed amounts, as defined below) within 30 days of invoice date.... Amounts not paid or Disputed on or before 30 days from invoice date shall be considered past due, and Customer agrees to pay a late payment charge.... A "Disputed" amount is one for which Customer has given [Verizon] notice, adequately supported by bona fide explanation and documentation. *Any invoiced amount not Disputed within 6 months of the invoice date, shall be deemed to be correct and binding on Customer.*

(Opp'n 22; Decl. of Gavin J. Rooney, dated Mar. 2, 2012, Doc. No. 30 ("Rooney Decl."), Ex. B ¶ 11 (emphasis added).) As is clear, the contract unambiguously deems correct and binding "[a]ny invoiced amount" undisputed within six months of the invoice date. *See, e.g., This Is Me, Inc. v. Taylor,* No. 89 Civ.

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1339(MJL), 1996 WL 20745, at *1 (S.D.N.Y. Jan. 17, 1996) ("The intent to shorten the period of limitations must ... be clearly and unequivocally set forth in the agreement itself."). Plaintiffs attempt to create ambiguity where none exists, insisting that the "deemed correct" provision indicates that the contract pertains to *unpaid* balances, and not to invoices paid in full that were later discovered to contain overcharges. (Opp'n 26–30.) However, that reading strains to avoid the plain meaning of the text. *See* *Wells v. Bank of New York Co.,* 694 N.Y.S.2d 570, 574 (Sup.Ct.1999) (enforcing a "deemed correct" provision in a bank's regulations to bar suit for payment of forged checks that were not brought to the bank's attention within the provided notification period). Accordingly, Plaintiffs' breach of contract claim, insofar as it pertains to overcharges stemming from the cited long-distance services contract, is dismissed.

C. Unjust Enrichment & Money Had and Received

A valid and enforceable contract precludes quasi-contractual recovery in New York. *See, e.g., Rensselaer Polytechnic Inst. v. Varian, Inc.,* 340 F. App'x 747, 749 (2d Cir.2009). Accordingly, Plaintiffs' unjust enrichment and money had and received claims are barred because there is an enforceable contract governing these claims. (*See* Mem. 20.)

In an attempt to avoid this finding, Plaintiffs cite two cases that purportedly stand for the proposition that an unjust enrichment claim may be sustained even in the face of a valid contract. However, in both of those cases, the courts found that the conduct complained of occurred *outside* of the contracts that existed between the parties. *See* *Allstate Insurance Co. v. Lyons,* 843 F.Supp.2d 358, 376 (E.D.N.Y.2012) (permitting unjust enrichment claims to proceed because they were "predicated on conduct not covered by the contract" (internal quotation marks omitted)); *Williamson v. Stallone,* 905 N.Y.S.2d 740, 748 (Sup.Ct.2010) ("The trustee's claim is equitable and not based on provisions in the agreement."). Thus, the cases do not abrogate the longstanding principle that a plaintiff may not state a claim for unjust enrichment or money had and received when, as here, the complained of conduct is covered by a contract.

***4** Plaintiffs vainly rely on dicta in these opinions that "where one party to a contract accidentally pays another more than the contract requires, the overpayer has an unjust enrichment claim to recover the excess." *Lyons,* 843 F.Supp.2d at 376 (citing *Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C.,* 790 N.Y.S.2d 84, 85 (2005)). However, Plaintiffs deprive these statements of any context. In fact, courts relying on the same precedent have held that this exception applies only where "the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled," not where the quasi-contract claim "simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y., Inc.,* 18 N.Y.3d 777, 790 (2012). This is because "a party may not bring an unjust enrichment suit where it could instead bring a claim for breach of contract covering the same subject-matter." *Spirit Locker, Inc. v. EVO Direct, LLC,* 696 F.Supp.2d 296, 305 (E.D.N.Y.2010). Indeed, it is telling that, at oral argument, Plaintiff's were unable to name a single quasi-contract claim that would not be covered by their breach of contract claims. (Tr., dated June 29, 2012, 35:7–37:18.)

Thus, while Plaintiffs have asserted facts supporting that they were improperly billed for the GE Capital pre-paid services, the T–LAN and IDSR services, and the T–1 voice use, they have not asserted facts supporting that these overcharges were extraneous to the parties' contracts. To the contrary, Plaintiffs have openly pled that these charges all arose from the parties' contracts. Therefore, Plaintiffs' unjust enrichment and money had and received claims are dismissed.

D. Common Law Fraud

To state a claim for fraud, a plaintiff must show that: (1) the defendant made a false representation as to a material fact; (2) the defendant had the intent to defraud; (3) the false representation induced reliance; and (4) the plaintiff was harmed as a result. *NY. Univ. v. Cont'l Ins. Co.,* 87 N.Y.2d 308, 318 (1995); *Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank,* 57 F.3d 146, 153 (2d Cir.1995). Additionally, under Federal Rule of Civil Procedure 9(b), fraud claims must be pled with particularity. Consequently, "[c]onclusory statements and allegations are not enough to meet the Rule 9(b) pleading requirements." *Musalli Factory for Gold & Jewelry Co. v. JP Morgan Chase Bank, N.A.,* 382 F. App'x 107, 108 (2d Cir.2010). Plaintiffs allege that Verizon's long-term practice of overbilling constitutes fraud. (FAC ¶ 70.) However, because Plaintiffs have failed to satisfy the aforementioned criteria, their fraud claim must be dismissed.

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1. Rule 9(b)'s Particularity Requirement

While Rule 9(b) does not require a plaintiff to plead the elements of fraud with "great specificity," a plaintiff must still "specifically plead those events which give rise to a strong inference that the defendant[ ] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." *Connecticut Nat'l Bank v. Fluor Corp.,* 808 F.2d 957, 962 (2d Cir.1987). Plaintiffs do not point to any intentionally misleading statement made by Verizon. Instead, Plaintiffs claim that the invoices themselves are misstatements sufficient to satisfy the elements of fraud. That is, Plaintiffs do not assert that Verizon fraudulently claimed to provide a service it did not in fact provide. Plaintiffs assert only that Verizon's stated charge for services provided was a lie. In support of the argument that the "false" amounts due may be considered *per se* fraudulent statements of fact, Plaintiffs cite a one-page, unreported disposition from the Appellate Division holding that invoices submitted by a plaintiff indicating systematic overbilling were sufficient to assert a state fraud claim. *Citibank (S.Dakota), N.A. v. Ramirez,* 867 N.Y.S.2d 373 (App.Div.2008). *Citibank,* however, does not speak to the requirements of 9(b) at all. Plaintiffs also cite *Moore v. PaineWebber, Inc.* for the proposition that erroneous invoices may satisfy Rule 9(b). 189 F.3d 165 (2d. Cir.1999). However, there the court inferred from the complaint that the defendant's false invoices were part of a larger scheme of *deliberately* false statements intended to deceive the plaintiff into believing a life insurance plan was also an individual retirement account. *Id.* at 173. Because there is nothing in the FAC to support a similar inference of scienter in this matter, the Court finds that Plaintiffs' fraud claim fails to satisfy Rule 9(b)'s particularity requirement.

2. The Omissions Theory of Fraud

***5** Plaintiffs also contend that Verizon is liable for fraud because it failed to disclose "material information as concerns its improper billing." (FAC ¶ 70.) Ordinarily, nondisclosure does not constitute fraud absent a duty to speak. *In re Bristol Myers Squibb Co. Sec. Litig.,* 586 F.Supp.2d 148, 159 (S.D.N.Y.2008). Thus, the elements of a fraudulent concealment claim are essentially those of an affirmative fraud claim, except a plaintiff must also allege a duty to disclose. *Banque Arabe,* 57 F.3d at 153; *Swersky v. Dreyer,* 219 A.D.2d 321, 327 (App.Div.1996). Plaintiffs argue that Verizon had a duty to disclose because: (1) the Federal Truth–in–Billing Rules require it, *see* 47 C.F.R. § 64.2401; (2) Verizon had superior knowledge; and (3) Verizon previously communicated half-truths and made partial or misleading statements (*see, e.g.,* FAC 131). However, Plaintiff's adoption of a fraudulent concealment theory does not relieve them of the obligation to plead facts giving rise to the inference of fraudulent intent. Therefore, Plaintiff's fraudulent concealment theory fails for the same reason its ordinary fraud claim fails.

Accordingly, the Court concludes that Plaintiffs have failed to assert particularized facts giving rise to an inference of fraud, and Plaintiffs' fraud claim is dismissed. [2]

E. New York General Business Law § 349

Section 349 makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). To state a claim under Section 349 a plaintiff must allege: "(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material way; and (3) the plaintiff was injured as a result." *Spagnola v. Chubb Corp.,* 574 F.3d 64, 74 (2d Cir.2009). Verizon contends that Plaintiffs have not pled facts supporting the first two elements. The Court agrees.

1. Consumer–Oriented Conduct

Section 349 is "directed at wrongs against the consuming public." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20, 24 (1995). In order to make out a claim under Section 349, Plaintiffs must show that Verizon's "acts or practices have a broader impact on consumers at large." *Oswego Laborers',* 85 N.Y.2d at 25. The consumer-oriented requirement is met only if the

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challenged conduct "potentially affect[s] similarly-situated consumers." *Id.* at 26–27. Therefore, Section 349 does not extend to private contract disputes unique to the parties. *Wilson v. Nw. Mut. Ins. Co.,* 625 F.3d 54, 64 (2d Cir.2010). Accordingly, consumer-oriented conduct may be found where a bank engages with a customer walking in off the street, *Oswego Laborers',* 85 N.Y.2d at 25, but it will not lie where two sophisticated parties construct a unique contract to govern their interactions, *New York Univ. v. Cont'l Ins. Co.,* 87 N.Y.2d 308, 320–21 (1995).

***6** Plaintiffs maintain that they have sufficiently alleged consumer-oriented conduct, pointing to the FAC's identification of Maimonides Medical Center ("Maimonides") as a "similarly-situated" victim of Verizon's overbilling. (FAC ¶ 60.) However, the bare allegation that Verizon overbilled another hospital does not suggest the "broader impact on consumers at large" required to state a claim under Section 349.[3] *See Oswego Laborers',* 85 N.Y.2d at 25; *see also Shema Kolainu–Hear Our Voices v. ProviderSoft, LLC,* 832 F.Supp.2d 194, 205 (E.D.N.Y.2010) ("Extending this analysis, marketing a software product only to a subset of not-for-profit corporations does not qualify as consumer-oriented conduct.").

Plaintiffs cite a number of cases in which other plaintiffs were able to satisfy the consumer-oriented requirement by showing that the defendant's conduct potentially affected similarly-situated consumers. (Pl.Br.10.) For example, in *M & T Mortgage Corporation v. White,* the court held that a mortgage company's deceptive practices concerning home purchases and accompanying mortgages could be harmful to the public at large. 736 F.Supp.2d 538, 571 (E.D.N.Y.2010). However, the court there relied on the ordinary, consumer nature of the transaction in finding that "similarly vulnerable consumers could ... fall victim to similar practices." *Id.* The court continued, "[t]he disparity in bargaining power favors a finding of consumer-oriented practice, as the statute was intended to protect 'small-time individual consumers' and not sophisticated commercial entities." *Id.* at 572 (quoting *Exxonmobil Inter–Am., Inc. v. Advanced Info. Eng'g Services, Inc.,* 328 F.Supp.2d 443, 449 (S.D.N.Y.2004)). Here, Plaintiffs are sophisticated entities operating within unique contractual arrangements. They cannot rely on a "disparity in bargaining power" or potentially wide-ranging effects to establish that similarly vulnerable consumers may be affected. *Id.*

Plaintiffs also rely on *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.,* in which this Court determined that the plaintiff had sufficiently pled consumer-oriented conduct to survive a motion to dismiss. 851 F.Supp.2d 494, 499 (S.D.N.Y.2011). In so ruling, this Court recognized that the consumer-oriented requirement must be liberally construed. *Id.* However, that case has no bearing on the matter at hand, since the complaint in that case specifically alleged that the defendant represented *"to consumers"* that it would not honor warranties on the plaintiff's products. *Id.* Here, Plaintiffs make *no* specific allegation that Verizon's alleged overbilling directly affected consumers at large. Rather, Plaintiffs make only conclusory assertions that other customers have been affected by Verizon's alleged systematic overbilling. (FAC ¶ 61.) Thus, the FAC—under any construction—does not allege consumer-oriented conduct as required by Section 349.

***7** In the alternative, Plaintiffs argue that the consumer-oriented requirement is satisfied if Verizon's conduct caused public harm. (Opp'n 11.) In *Securitron Magnalock Corp. v. Schnabolk,* the Second Circuit held that corporate competitors may bring a claim under Section 349 so long as harm to the public at large is at issue. 65 F.3d 256, 264 (2d Cir.1995). The "critical question" in such cases is whether the matter harms the public interest in New York. *Id.*

Plaintiffs assert that Verizon's overcharges drained the hospitals of critical resources that could have been directed at serving the public. (Opp'n 12.) However, the hypothetical harm alleged by Plaintiffs lacks the certain, specific, and direct public impact required to support a finding of consumer-oriented conduct. For example, in *Securitron,* a jury found that the defendant violated Section 349 when it falsely represented to various public entities, including school systems and the New York City Fire Department, that its competitor's locks were unfit for use. *Securitron,* 65 F.3d at 260–61. The Second Circuit upheld the jury's finding, concluding that the defendant's deliberately deceptive acts interfered with agency functions, resulting in unnecessary investigations that diverted resources away from legitimate dangers and that also caused consumers to unnecessarily cancel contracts with the plaintiff. *Id.* at 264. Similarly, in *Lyons,* the court declined to dismiss the plaintiff's claims because the defendant's deceptive acts—which siphoned millions of dollars out of an insurance company—"likely

increased the premiums of consumers." 843 F.Supp.2d at 376. Thus, in both cases, the courts found likely injury to the general public before concluding that the plaintiffs had alleged consumer-oriented conduct. In contrast to the direct governmental and consumer harm in *Securitron* and the massive and reverberating scheme in *Lyons,* Plaintiffs here allege a routine case of overbilling. Such a narrow, private dispute simply does not provide a basis for a Section 349 claim.

Finally, Plaintiffs allege that Verizon's practice of making unilateral and material changes to contract terms through its website causes public harm. (FAC ¶ 23). However, again, Plaintiffs have not specified any harm to the public at large from changed contract terms. Therefore, Plaintiffs have failed to allege consumer-oriented conduct sufficient to satisfy the first element of Section 349.

2. Materially Misleading Act or Practice

An act or practice is impermissibly deceptive under Section 349 when it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers',* 85 N.Y.2d at 26. Ordinarily, when the alleged deceptive act or practice is fully disclosed to a plaintiff, the "deception" cannot amount to a materially misleading act or practice under Section 349. *See, e.g., WorldHomeCenter.com,* 851 F.Supp.2d at 499 (citing *Watts v. Jackson Hewitt Tax Serv. Inc.,* 579 F.Supp.2d 334, 346 (E.D.N.Y.2008)).

***8** As is clear in the FAC, any information necessary to discover the alleged overbilling was provided to Plaintiffs in their invoices. While Plaintiffs assert that the bills themselves were misleading and confusing (FAC ¶¶ 53, 59)—thereby masking the information—Plaintiffs cite no authority for the proposition that a complete, if arguably confusing, disclosure may be considered misleading under Section 349. Plaintiffs do contend that an *omission* can amount to a materially misleading practice. *See Oswego Laborers',* 85 N.Y.2d at 26. However, "in the case of omissions ... the statute does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation." *Id.* Instead, the statute applies "where the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Id.* Plaintiffs allege no such failure on Verizon's part. Indeed, while Plaintiffs claim that Verizon failed to disclose, *inter alia,* the need to file an exemption certificate or disconnect request, they nowhere assert that Verizon concealed the harm alleged—overbilling—which was disclosed in each of Plaintiffs' invoices.

Accordingly, because the Court concludes that Plaintiffs have failed to allege either a consumer-oriented practice or a materially misleading act, their Section 349 claims are dismissed.

III. CONCLUSION

This case concerns a contractual dispute between two sophisticated parties with full relief available under the terms of those contracts. Accordingly, for the reasons set forth above, Defendants' motion to dismiss Plaintiffs' breach of contract claim—at least to the extent it concerns the cited longdistance contract—is granted. Similarly, the Court grants Defendants' motion to dismiss Plaintiffs' unjust enrichment, money had and received, fraud, and Section 349 claims. The Clerk of Court is respectfully requested to close the motion pending at Docket Number 28. In addition, IT IS HEREBY ORDERED THAT the parties shall submit a joint letter to the Court no later than March 29, 2013 setting forth the next contemplated steps in this case. IT IS FURTHER ORDERED THAT the parties shall submit a proposed case management plan to the Court no later than March 29, 2013. A template may be found at: http://www.nysd.us courts.gov/cases/show.php?db=judge_info & id=347.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1385210

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Footnotes

1 The facts are taken from the First Amended Complaint ("FAC"). In ruling on the instant motion, the Court has considered Defendants' Memorandum of Law ("Mem."); Plaintiffs' Memorandum in Opposition ("Opp'n"); and Defendants' Reply ("Reply"); as well as the declarations and exhibits attached thereto.

2 Verizon further contends that Plaintiffs' fraud claim is impermissibly duplicative of its breach of contract claim. *See* *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.,* 500 F.3d 171, 183 (2d Cir.2007). However, because Plaintiffs have failed to allege fraud with particularity as is required under Rule 9(b), the Court does not reach this issue.

3 Not surprisingly, the Magistrate Judge assigned to Maimonides' case also recommended dismissal of its Section 349 claim because Maimonides failed to allege consumer-oriented conduct. *See Maimonides Med. Ctr. v. Verizon N.Y., Inc.,* No. 09 Civ. 54(CBA) (RML) (E.D.N.Y. May 13, 2010), Doc. No. 37.

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2020 WL 3513547
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

IN RE: CENTURYLINK SALES PRACTICES AND SECURITIES LITIGATION
This Document Relates to

MDL No. 17-2795 (MJD/KMM)
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Civil File Nos. 17-2832,
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Signed 06/29/2020

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MEMORANDUM OF LAW & ORDER

Michael J. Davis, United States District Court Judge

I. INTRODUCTION

***1** This matter is before the Court on CenturyLink, Inc. and Its Operating Companies' Motion to Disqualify Counsel and Require Corrective Notice. [Docket No. 634] The Court heard oral argument on June 23, 2020.

The Court denies the motion. CenturyLink cannot establish standing to bring a disqualification motion against Keller.

CenturyLink has not pointed to ethical breaches that "so infect[ ] the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims." Colyer v. Smith, 50 F. Supp. 2d 966, 971–72 (C.D. Cal. 1999). The actions at issue here do not constitute ethical violations that are "manifest and glaring" such that they confront the court "with a plain duty to act." Id. at 972 (citation omitted). Concerns regarding Keller's clients' right to make an informed, individual decision to opt out of this litigation are adequately addressed by enforcing the Court's prior orders and requiring opt-out requests to be individually signed by each class member seeking to opt out.

II. BACKGROUND

A. Keller Lenkner LLC

Keller Lenkner LLC ("Keller") is a Chicago-based law firm with 24 attorneys, dozens of paralegals and client-services professionals, and three technology experts. (Postman Decl. ¶¶ 2, 5.) Keller avers that its practice is based on pursuing individual arbitrations in consumer and employee cases. (Id. ¶ 2.) It asserts that its strategy is that by "litigating a large number of similar claims in arbitration [it] can more effectively vindicate claims that have long been passed over or severely discounted by other firms due to the existence of class-action waivers." (Id.) It notes that it can efficiently simultaneously represent thousands of individuals in arbitrations because most arbitral rules allow "desk" arbitrations, where arbitrators decide disputes on the papers without live testimony and numerous similar claims are assigned to the same arbitrator. (Id. ¶ 4.)

Defendant CenturyLink, Inc. ("CenturyLink") asserts that Keller's litigation strategy is to interfere with class actions by soliciting and stockpiling thousands of class members whose claims Keller threatens to present collectively in arbitration. (Unthank Decl. ¶ 17.) According to CenturyLink, Keller uses the threat of tens of millions of dollars in arbitration fees as leverage to extract global settlements from defendants. (Id. ¶¶ 17, 32-34.) Keller currently represents more than 50,000 individual clients pursuing arbitrations. (Id. ¶ 18.) Keller can earn substantial attorney's fees if Keller negotiates a mass "opt out" settlement in this MDL. (Id. ¶¶ 34, 48; Unthank Decl., Ex. M at 4.) However, Keller earns no attorney's fees if clients fail to opt out of the settlement class. ([Docket No 571] Feb. 20, 2020 Mot. Hearing Tr. 31–32 (stating that Keller gets no fees from clients who fail to opt out of the class settlement); Sun Decl., Ex. E (telling clients that they will owe Keller no money if they submit a claim in the settlement).)

***2** Under Keller's law firm model, it advances arbitration filing fees on behalf of its clients. (Postman Decl. ¶ 6.) Keller does not recover the filing fees and collects no attorney's fees unless it obtains recovery for its clients. (Postman Decl. ¶ 6; Sun Decl., Ex. H, Duran Decl., Ex. 4, CenturyLink Compensation Claims Retainer Agreement at 30.)

In the past 18 months, Keller has obtained more than $180 million in settlement for more than 90,000 clients. (Postman Decl. ¶ 14.) It represents that, in many of those cases, class-action attorneys brought similar claims, which resulted in class settlements; however, Keller's clients often received recoveries that were 20 times higher than those received by class members. (Id.)

B. Keller's Advertising Regarding CenturyLink Claims

During the spring of 2019, Keller and its co-counsel, Troxel Law LLP ("Troxel"), began advertising online regarding potential claims by CenturyLink customers. (Postman Decl. ¶ 16.) Keller decided whether to represent potential clients based on their responses to questionnaires. (Id.) It also had other communications with its clients, including advice it provided to clients and additional information provided by clients to Keller. (Id. ¶ 19.) Clients retained Keller by signing electronic engagement agreements. (Id. ¶ 16.) The retainer agreement stated: "At this time, your interests and the interest of other clients align. We know of no conflicts of interest that would have an adverse impact on our representation of you." ([Docket No. 513] Unthank Decl. ¶ 26, Retainer Agreement ¶ 8.)

Keller avers that it ceased actively advertising for new CenturyLink consumer clients on August 12, 2019. (Postman Decl. ¶¶ 22-23, 38.)

C. Keller's Interactions with CenturyLink

Keller first contacted CenturyLink on May 14, 2019 on behalf of "[m]ore than 9,000" clients who had retained Keller to pursue consumer fraud arbitration claims against CenturyLink. ([Docket No. 599-2] Keller Decl., Ex. 2 at 1.) The letter also stated: "As required by the applicable service agreements, we are prepared to serve individual demands for arbitration on behalf of each client with the American Arbitration Association ('AAA')." (Id.) Keller threatened

to "to proceed with every arbitration simultaneously." (Id.) Keller sought a mass settlement. ([Docket No. 513] Unthank Decl. ¶ 34.) It warned CenturyLink that, if it did not agree to a mass settlement, it would have to "pay AAA more than $30 million in initial fees and costs." (Keller Decl., Ex. 2 at 1.) Keller included a list of its clients with identifying information and an example arbitration demand to illustrate the types of causes of action and relief its clients intended to pursue. (Unthank Decl. ¶ 31.) It did not provide any information on the clients' specific claims or recovery sought.

Two weeks later, Keller sent a letter to CenturyLink identifying "nearly 3,000 additional" claimants. (Unthank Decl. ¶ 35; Unthank Decl., Ex. I.) Movants Keisha Covington, Daniel Sokey, Tiffany Van Riper, James Watkins, Jaclyn Finafrock, and Kelly Johnson were on the client lists that Keller provided to CenturyLink on May 14, 2019; June 3, 2019; June 12, 2019; and September 24, 2019. (Keller Decl. ¶ 6.)

On June 12, 2019, CenturyLink requested that Keller provide certain information about the claims that CenturyLink claims to need in order to evaluate and resolve each claim before proceeding to arbitration, as CenturyLink believed was required by the arbitration contracts. (Unthank Decl. ¶ 38; Unthank Decl., Ex. J.) CenturyLink asserted that Keller had breached the contractual pre-filing notice requirement by failing to identify customer account numbers, the conduct giving rise to the causes of action, and the relief sought. (Id.)

***3** Keller would not provide information such as account numbers, descriptions of individual claims, or the amount of actual damages sought be each claimant. (Unthank Decl. ¶¶ 38-39.) CenturyLink stated: "We would like to have a meaningful dialogue about each of your clients on an individual basis, as we all agreed to do in our contracts." (Unthank Decl., Ex. J at 2.) Keller did provide clients' names, "current physical addresses, email addresses, and phone numbers." (Unthank Decl. ¶ 39; Unthank Decl., Ex. K.) Keller stated that it would not spend "15 minutes" to discuss each claim "on an individual basis" with CenturyLink because "such a pre-demand 'dialogue' would consume more than 3,500 hours." (Unthank Decl., Ex. K at 2.) Keller threatened to simultaneously file thousands of individual arbitrations "[i]f CenturyLink is unwilling to engage in a practical, pre-arbitration discussion that addresses all of our clients' claims." (Id.)

CenturyLink asserts that its initial review of Keller's clients' claims raised concerns and a need for more information. (Unthank Decl. ¶ 44.) For example, CenturyLink could not identify any potential customer account that could be connected with some of Keller's clients; some clients claimed to receive services at addresses in states in which CenturyLink does not provide services; and some clients owed money to CenturyLink and could be subject to counterclaims. (Id. ¶ 44; Unthank Decl. ¶ 62.c (providing that 34% of the first 1,000 arbitration demands by Keller's clients show that the clients owe CenturyLink money); Unthank Decl., Ex. L.) On July 10, 2019, CenturyLink again requested that Keller engage in individualized negotiations: "CenturyLink is interested in exploring with you whether there is any process by which your clients could comply with their contractual obligations to engage in individualized resolution discussions." (Unthank Decl., Ex. L at 3.)

Keller discussed the proposed MDL class settlement terms with CenturyLink's counsel in August 2019. (Unthank Decl. ¶ 12; Unthank Decl., Ex. M at 3.)

CenturyLink provides evidence, such as a Facebook advertisement from January 2020, that Keller continued to solicit clients after learning of the proposed class settlement in this MDL. (Unthank Decl. ¶ 21; Unthank Decl., Ex. M at 3.) On September 24, 2019, Keller informed CenturyLink that it had acquired "8,293 additional ... clients," for a total of more than 22,000 clients intending to pursue individual arbitrations against CenturyLink. (Unthank Decl. ¶ 51; Unthank Decl., Ex. N.)

On October 8, 2019, CenturyLink informed Keller that it would soon be proposing a class settlement in this MDL. (Unthank Decl., Ex. O at 4.) On October 16, 2019, Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement and Provisional Class Certification. [Docket No. 466]

In December 2019, Keller initiated 1,000 individual arbitrations on behalf of 1,000 individual clients by filing 1,000 separate demands against CenturyLink with the AAA. (Postman Decl. ¶¶ 26, 59; Unthank Decl., Ex. R.)

D. Settlement of the Consumer MDL

On October 16, 2019, Plaintiffs moved for an Order (1) granting Preliminary Approval of the Settlement; (2) provisionally certifying the proposed Settlement Class; (3) conditionally appointing the proposed Class Representatives

as the Settlement Class Representatives; (4) conditionally appointing the proposed Class Counsel as the Settlement Class Counsel; (5) approving the form and manner of notice, (6) ordering that notice be disseminated to the Settlement Class; (7) establishing the deadlines for Settlement Class Members to request exclusion from the Settlement Class, file objections to the Settlement, or file Claims for a Settlement Award; and 8) setting the proposed schedule for completion of further settlement proceedings, including scheduling the final fairness hearing. [Docket No. 466] With that motion, Plaintiffs filed a Proposed Order, which included a preliminary injunction against the Releasing Parties from participating in, among other things, arbitration relating to the Released Claims. ([Docket No. 474] Proposed Order ¶ 10.) CenturyLink and the Proposed Intervenors filed a brief in support of Plaintiffs' motion. [Docket No. 481]

***4** On January 10, 2020, CenturyLink also filed a Supplemental Brief in support of the motion for preliminary approval addressing Plaintiffs' request that the Court's Preliminary Approval Order contain a temporary injunction of all parallel proceedings, including arbitrations, by putative class members. [Docket No. 508] CenturyLink specifically addressed the individual consumer arbitrations brought against CenturyLink by clients of the law firms of Keller and Troxel. It represented that it would serve Keller and the AAA with a copy of its brief on January 10, 2020. (Id. at 3 n.3.)

On January 22, 2020, the Court held a hearing regarding the motion for preliminary approval of the settlement. [Docket No. 524] None of Keller's clients appeared at the hearing; nor did they file any document in the MDL.

On January 24, 2020, the Court issued the Preliminary Approval Order, which included language temporarily enjoining class members from participating in any lawsuit or arbitration relating to the claims being released in the class settlement. ([Docket No. 528] Preliminary Approval Order ¶ 10.) The Preliminary Approval Order also included requirements for class members submitting requests to opt out of the settlement class, including that each opt-out request include the individual's signature. (Id. ¶ 6.)

E. Keller's Actions Post-Preliminary Approval Order

In a February 2020 email, Keller wrote to its clients:

> On November 21, 2019, we filed 1,000 arbitration demands on behalf of our clients. We were preparing thousands more demands, including yours. We hoped that CenturyLink would honor its customer contracts and approach the arbitration process in good faith. But CenturyLink refused to go forward with the arbitrations at all, claiming they did not have to proceed with arbitrations because they were going to settle your claims in a class action settlement.
>
> ... CenturyLink decided to settle the class action after all, paying $15 million to release the claims of approximately 15 million people. While the amount each class member receives will vary, that averages out to $1 per class member. If you'd like to know more about the settlement, you will soon be able to review them at the settlement website. In the meantime, you may view a copy of the proposed class notice here, and the settlement documents are available here.
>
> ...
>
> We think the settlement violates your contract with CenturyLink, and we don't think an average of $1 per class member is nearly enough money. Although we cannot promise any particular result, we believe we can do better than $1 per person if we bring individual arbitrations for our clients.

(Sun Decl., Ex. F.)

Also in February 2020, Keller sent another similar email to its clients. (Sun Decl., Ex. E.) This communication included an identical first paragraph. It also stated:

CenturyLink has described the amount of the settlement as follows:

> If you are a member of the Class and claim you were overcharged and not reimbursed by CenturyLink, you are eligible to make a claim for $30 from the Settlement (subject to a pro rata adjustment up or down depending on how many valid claims are filed), or more (depending on whether you choose to provide additional explanation and documentation with your claim).
>
> If you'd like to know more about the settlement, you may view a copy of the proposed class notice here, and the settlement documents are available here.
>
> ...
>
> We think the settlement violates your contract with CenturyLink, and we don't think an average of $30 per class member is nearly enough money. Although we cannot

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promise any particular result, we believe we can do better than $30 per person if we bring individual arbitrations for our clients. And under our agreement with you, you will never owe us any attorneys' fees out-of-pocket. You will only ever pay us attorneys' fees as part of any award or settlement you receive from CenturyLink.

***5** Please also keep an eye on your inbox and your phone. We'll be sending instructions for opting out of the settlement in the near future.

As much as we think the class settlement is a bad deal, we want to make clear that you are completely free to participate in the class settlement if you wish. If you submit a claim in the settlement, you will not owe us any money. If you would like to withdraw your claim for arbitration or would like assistance participating in the class settlement, please contact us ....

(Id.) Keller avers that the claim that it can obtain a recovery of more than $30 per client is true and based on its substantial recoveries for other clients in other actions. (Postman Decl. ¶ 35.)

Keller avers that "a substantial number" of its clients have decided to participate in the class settlement, and when that has occurred, Keller has terminated its engagement and charged the client no fee. (Postman Decl. ¶ 42.)

On April 7, 2020, Keller filed a letter in this MDL that stated that the approximately 2,000 clients in the list attached to the letter were opting out of the class settlement. [Docket Nos. 631-30] No individual client signatures were included. On June 23, after oral argument on the current motion, Keller filed a new letter attaching a list of approximately 14,500 "additional clients ... who informed us that they would like to opt-out of the class-action settlement." [Docket Nos. 746, 747] The attached list identifies each client by name, email address, telephone number, and mailing address. [Docket No. 747] The list does not include individual signatures. CenturyLink's preliminary analysis of the list found that more than 250 of those individuals have also made a claim for payment from the settlement fund. [Docket No. 753]

F. Current Motion

CenturyLink has now filed the current motion requesting that the Court disqualify Keller from representing clients with respect to this class action and the proposed settlement and order that corrective notice be sent to Keller's clients. Keller and Plaintiffs' Lead Counsel oppose CenturyLink's motion.

III. DISCUSSION

A. Standard for Disqualification

"The grant of a motion to disqualify an attorney as trial counsel is reviewed for an abuse of discretion." Macheca Transp. Co. v. Philadelphia Indem. Co., 463 F.3d 827, 833 (8th Cir. 2006). "Because of the potential for abuse by opposing counsel, disqualification motions should be subjected to particularly strict scrutiny." Id. (citation omitted). "A party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." Id. (citation omitted).

"Naturally, a district court's inherent powers extend to managing its bar and disciplining attorneys that appear before it." Zerger & Mauer LLP v. City of Greenwood, 751 F.3d 928, 931 (8th Cir. 2014). "In cases where counsel is in violation of professional ethics, the court may act on motion of an aggrieved party or may act sua sponte to disqualify." O'Connor v. Jones, 946 F.2d 1395, 1399 (8th Cir. 1991) (citation and footnote omitted).

B. Standing

1. Standard for Standing

***6** "To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." S.D. v. U.S. Dept. of Interior, 665 F.3d 986, 989 (8th Cir. 2012) (citations omitted). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations and footnote omitted).

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2. Standing Standard with Regard to Attorney Disqualification

A party moving to disqualify counsel must first show that it "has standing to raise the issues in [its] disqualification motion." O'Connor v. Jones, 946 F.2d 1395, 1400 (8th Cir. 1991). "[C]ase law gives an opposing party standing to challenge where the interests of the public are so greatly implicated that an apparent conflict of interest may tend to undermine the validity of the proceedings." Abbott v. Kidder Peabody & Co., 42 F. Supp. 2d 1046, 1050 (D. Colo. 1999) (citations omitted). See also DT Boring, Inc. v. Chicago Pub. Bldg. Comm'n, No. 15 C 11222, 2016 WL 3580756, at *6 (N.D. Ill. June 28, 2016) ("[W]here the conflict is such as to clearly call in question the fair or efficient administration of justice, opposing counsel may properly raise the question.") (citation omitted).

3. Injury to CenturyLink

The Court concludes that, overall, CenturyLink does not have standing to seek to disqualify Keller. CenturyLink does not assert that it is a current or former client of Keller. Nor does it claim that Keller has obtained its confidential information. Generally, CenturyLink asserts that Keller has conflicts that harm its clients, not CenturyLink, and that Keller gave its clients incompetent, misleading, and non-individualized advice, which harms Keller's clients rather than CenturyLink. See, e.g., Simonca v. Mukasey, No. CIVS081453FCDGGH, 2008 WL 5113757, at *4 (E.D. Cal. Nov. 25, 2008) ("It is not sufficient that the party moving for disqualification shows that the lawyer's client may be injured by his counsel's continued involvement in the case. The moving party must show how the diminished quality of the representation of an opposing party causes the movant injury.") (citations omitted). Even if CenturyLink does have an interest in class members fairly considering its settlement offer, that interest is protected by the Court-approved notice that was already sent to all class members and by enforcement of the Court's Preliminary Approval Order requirement that opt-out requests be individually signed by the class member. CenturyLink cannot show "the invasion of a legally protected interest" from Keller's representation of its clients, and certainly not one that is "not conjectural or hypothetical." Corn Plus Coop. v. Cont'l Cas. Co., No. 04-CV-4270 (DSD/SRN), 2006 WL 8443196, at *3 (D. Minn. Oct. 5, 2006), aff'd, No. 04CIV4270 (DSD/SRN), 2006 WL 8444456 (D. Minn. Nov. 3, 2006).

C. Alleged Ethical Violations

1. Applicable Ethical Rules

Under the District of Minnesota's Local Rules,

> [a]n attorney who is admitted to the court's bar or who otherwise practices before the court must comply with the Minnesota Rules of Professional Conduct, which are adopted as the rules of this court. An attorney commits misconduct by failing to comply with the Minnesota Rules of Professional Conduct.

***7** Minn. L.R. 83.6(a). Thus, the Court looks to the Minnesota Rules of Professional Conduct and, in some instances, to the professional rules in the jurisdiction in which the attorney is located and licensed. See In re Potash Antitrust Litig., No. CIV. 3-93-197, 1993 WL 543013, at *8 (D. Minn. Dec. 8, 1993), opinion amended on reconsideration, No. CIV. 3-93-197, 1994 WL 2255 (D. Minn. Jan. 4, 1994). Here, the Keller firm is located in Illinois. Both Minnesota and Illinois have adopted the Model Rules of Professional Conduct, and their ethical rules are identical for purposes at issue in this motion.

2. Lack of Individualized Representation and Tailored Advice

CenturyLink asserts that Keller breached Rules 1.1, 1.2, 1.3, and 1.4, and its ethical duty to zealously represent each client's interest by refusing to spend 15 minutes to evaluate and discuss its clients' individual claims pre-arbitration and by giving a blanket recommendation that all of its 22,000 clients opt out of the settlement without regard to their individual situations. CenturyLink also asserts that Keller's enrollment process requires a client to provide minimal information and no supporting materials before Keller signs up the client to pursue arbitration. (Unthank Decl., Ex. E; Unthank Decl. ¶¶

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23-25.) Before retention, Keller does not advise each client on the risks of pursuing arbitration. (See Unthank Decl. ¶¶ 22-26; Unthank Decl., Ex. E; Sun Decl., Ex. H.)

CenturyLink argues that this lack of individualized consultation served Keller's interest in opting out as many class members as possible, but it violated Keller's ethical obligations under Rules 1.1 through 1.4. Thus, the Court cannot be confident that the opt-out decisions of Keller's clients were fully informed.

CenturyLink does not have standing to assert disqualification based on the foregoing allegations. If Keller failed to inform, consult with, and provide competent representation to its clients, those actions harmed Keller's clients, not CenturyLink. Keller's clients, not CenturyLink, have standing to raise these allegations. Nor do these allegations sufficiently implicate the fair or efficient administration of justice in this class action lawsuit. The Court has a strong interest in ensuring that each class member makes an informed and voluntary decision regarding whether to object, opt out, or file a claim. The Court has put safeguards in place to guard that interest, regardless of whether Keller fulfilled its duty to provide competent, individualized representation; namely, the Court has ensured that each class member received clear, informative notice and has required that each opt-out request be individually signed by the class member seeking to opt out. Thus, the threat to the administration of justice from the alleged actions taken or not taken by Keller is speculative.

3. Conflicts

Model Rule 1.7(b) requires that attorneys with a concurrent conflict of interest obtain informed written consent from each client. However, a client cannot consent to a conflict, "if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation." Rule 1.7, Comment 15.

CenturyLink asserts that two types of non-waivable conflicts exist: Keller has a conflict with its clients based on its fee structure, and there is a conflict among Keller's clients because opting out and pursuing individual arbitrations and mass settlement benefits clients with strong claims at the expense of clients with weak or small claims.

a) Keller's Alleged Financial Conflict

***8** CenturyLink argues that Keller faces a monetary incentive to encourage its clients to opt out – it recovers no fees or costs whatsoever if its clients fail to opt out, but it does recover attorney's fees if its clients opt out and settle outside of the class action or succeed in arbitration. (See Moore Supp. Decl. ¶ 13; Sun Decl., Exs. E-G; Postman Decl. ¶¶ 84, 88.) CenturyLink claims that Keller violated its duty of loyalty to its individual clients by providing advice tainted by its undisclosed financial interest and that this violation harms CenturyLink by causing Keller clients to make uninformed decisions to opt out of the class action settlement.

Even if Keller's fee arrangement does constitute a conflict that should have been revealed to its clients, Keller's clients, not CenturyLink, have standing to raise this issue. Given the provision of Court-approved notice to all of Keller's clients, Keller's own provision of the settlement terms and class notice to its clients, and the Court's requirement that each opt-out request contain the individual's signature, CenturyLink's claim that this alleged conflict harms CenturyLink or the administration of justice is speculative. CenturyLink does not have standing to raise this claim.

b) Alleged Conflict Among Keller's Clients

CenturyLink argues that Keller cannot represent 22,000 clients in this class action lawsuit without conflict. (See Moore Supp. Decl. ¶ 12.) It asserts that Keller's goal is to to use the threat of large arbitration fees to force an aggregate settlement outside of the class settlement. CenturyLink reasons that, to ensure as large an aggregate settlement as possible, it benefits Keller and its clients with stronger claims to encourage opt outs from as many class members as possible, while harming the interest of clients with weaker claims who would benefit from remaining in the settlement class. (Moore Supp. Decl. ¶¶ 11-12.) CenturyLink concludes that these conflicts bar Keller's continued representation of class members with respect to their decisions regarding the class settlement.

Whether each of Keller's clients chooses to pursue individual arbitration, settle individually, or participate in this class settlement will have no material effect on any other client. CenturyLink's allegation of a potential conflict among Keller's clients arises only if Keller seeks a mass settlement

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outside of this class action, in which case clients with weaker claims might benefit from obtaining a settlement in this MDL, while clients with stronger claims might benefit from all clients opting out en masse to potentially leverage a larger mass settlement. (Although, it is also possible that clients with weaker claims could still benefit if a larger mass settlement is achieved.) The possibility of this type of conflict was raised in Keller's retainer agreement. (See Sun Decl., Ex. H (noting that a conflict might arise if "[a] defendant offers to settle, but only if a certain percentage, or even all, of our clients accept the proposed settlement").)

Even if Keller's representation of 22,000 clients with regard to the decision of whether to remain in the class action or opt out constitutes a conflict, Keller's clients, not CenturyLink, have standing to raise this issue. Given the provision of Court-approved notice to all of Keller's clients, Keller's own provision of the settlement terms and class notice to its clients, and the Court's requirement that each opt-out request contain the individual's signature, CenturyLink's claim that this alleged conflict harms CenturyLink or the administration of justice is speculative. CenturyLink does not have standing to raise this claim.

4. Misrepresentations

a) Applicable Standard

***9** Model Rule 7.1 prohibits a lawyer from providing "false or misleading communications." Likewise, Model Rule 8.4(c) states that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." CenturyLink asserts that Keller violated Rules 7.1 and 8.4(c) by providing misleading information to its clients to attempt to sway them to Keller's preferred outcome of opting out. (Moore Supp. Decl. ¶¶ 6-8.)

b) Disclosure of Class Action Settlement

CenturyLink asserts that Keller violated the ethical rules by failing to inform its clients of the material fact of this MDL and the potential class settlement until after they had signed retainer agreements and after this Court granted preliminary approval on January 24, 2020.

The available evidence indicates that Keller did not inform potential clients or clients about the MDL and potential class settlement until the class and settlement were preliminarily approved. Soon after the class and settlement were preliminarily approved, Keller did inform all of its clients of that fact and provided a link to the Court-approved notice. Keller also informed its clients that they could remain in the settlement class and terminate Keller's representation with no financial consequence. Many of its clients have, in fact, chosen to terminate Keller's representation and remain in the settlement class. In light of these facts and the provision of Court-approved notice to all of Keller's clients, whether or not Keller violated ethical rules by failing to inform its clients of the potential settlement, any harm to CenturyLink or the fairness and integrity of this litigation is speculative. CenturyLink does not have standing to assert this claim.

c) Characterization of the Class Action Settlement

CenturyLink asserts that Keller misrepresented the class action settlement to its clients by suggesting that each class member will only receive $1, by claiming that class members would receive an average of $30, and by advising all clients, regardless of their individual circumstances, that the class settlement is a "bad deal." (Sun Decl., Exs. E-F.)

CenturyLink can point to no blatant misrepresentations by Keller. Keller stated: "CenturyLink decided to settle the class action after all, paying $15 million to release the claims of approximately 15 million people. While the amount each class member receives will vary, that averages out to $1 per class member." (Sun Decl., Ex. F.) Keller's statement that the settlement averages out to approximately $1 per class member is technically true. In the same email, Keller also noted that recovery amounts will vary and linked to the Court-approved class notice in the same communication. Additionally, CenturyLink has not shown that Keller does not "believe [it] can do better than $1 per person." (Id.)

Keller's statement that it doesn't "think an average of $30 per class member is nearly enough money" and that it can do better than $30 per person is contained in an email that also explained that a $30 claim could be made, "subject to a pro rata adjustment up or down depending on how many valid claims are filed" or a claim for more money could be made with documentation. (Sun Decl., Ex. E.) And the email contained a link to the Court-approved notice.

Thus, in context, the "average of $30" characterization is not misleading.

Keller's opinion that the class settlement is a "bad deal" (Sun Decl., Ex. E) is not objectively false – it is Keller's subjective opinion, which it is entitled to provide to its clients.

d) Breach of Arbitration Contracts

***10** CenturyLink asserts that Keller erred by failing to inform its clients that it had materially breached their arbitration contracts and, as a result, CenturyLink revoked and terminated those contracts. CenturyLink further argues that Keller misleadingly stated: "CenturyLink refused to go forward with the arbitrations at all, claiming they did not have to proceed with arbitrations because they were going to settle your claims in a class action settlement." (Sun Decl., Ex. E.)

Keller's statement that "CenturyLink refused to go forward with the arbitrations at all, claiming they did not have to proceed with arbitrations because they were going to settle your claims in a class action settlement" is not blatantly untrue, because, initially, CenturyLink claimed that Keller's clients' arbitrations were stayed by this Court's injunction contained within the Preliminary Approval Order.

Whether Keller's alleged failure to inform its clients that CenturyLink terminated their arbitration agreements because they were in material breach violated ethical rules depends upon balancing a lawyer's duty to keep their clients reasonably informed with the fact that the ethical rules do not require a lawyer to describe litigation strategy in detail. See Model Rule 1.4, cmt. 5 (Although a lawyer must "keep the client reasonably informed about the status of the matter, "a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail."). Whether Keller violated the ethical rules and miscalculated regarding whether CenturyLink's claim to have terminated the arbitration agreements was material to its clients is an issue that belongs to Keller's clients, not CenturyLink.

Overall, the Court finds that the alleged misrepresentations by Keller do not reach the magnitude of the type of misrepresentations that go to the heart of this case, and they neither give CenturyLink standing nor justify sua sponte disqualification by the Court. Cf. In re Lutheran Brotherhood Variable Insurance Products Co. Sales Practices Litigation, No. 99-MD-1309, 2002 WL 1205695, at *1-3 (D. Minn. May 31, 2002) (disqualifying attorney for "blatantly false" advertisement to non-client class members that contained "no fewer than three egregious misrepresentations" regarding the court's rulings and the litigation). The misrepresentations alleged by CenturyLink are part of legal advice contained in communications from lawyers to their clients – not in solicitations to class members by unaffiliated lawyers. Many are found within communications that provide a link to the Court-approved class notice. Together, all of these facts diminish the chance of confusion by Keller's clients. CenturyLink cannot show that it has been harmed by these actions sufficient to give it standing to assert this motion. Nor do the allegations implicate the fair administration of this case.

D. Remedy

1. Disqualification

Overall, the Court finds that CenturyLink lacks standing to assert its motion for disqualification. Additionally, for the reasons explained with regard to each asserted ground for disqualification, the Court concludes that, overall, any harm to the administration of justice in this case is speculative and does not support the Court acting sua sponte to disqualify Keller and deny its clients' their choice of counsel, particularly when considered in context with Keller's other statements and provision of the link to the Court-approved notice from this case.

The Court acknowledges that Keller faces a strong financial incentive to uniformly advise its clients to opt out, regardless of their individual circumstances. This does not rise to the level of a conflict requiring sua sponte disqualification. It does raise a concern about the validity of the mass opt-out requests it filed on behalf of more than 16,000 of its clients. However, this concern is adequately addressed by enforcing this Court's Preliminary Approval Order requiring that opt-out requests be individually signed.

***11** The Court emphasizes that it is making no finding regarding whether or not Keller has violated ethical rules with regard to its representation of its clients. The Court merely holds that, in this action and on this record, CenturyLink has not established standing to seek disqualification of Keller and to disrupt Keller's clients' chosen attorney-client relationship. Nor has CenturyLink raised allegations that support this

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Court interfering with the attorney-client relationship and sua sponte disqualifying Keller.

2. Corrective Notice

Because the Court denies CenturyLink's request to disqualify Keller and because Keller's alleged misrepresentations regarding the class settlement are not blatantly misleading when viewed in the context of the other language in Keller's communications and its provision of a link to the Court-approved notice, the Court concludes that corrective notice is not warranted.

Accordingly, based upon the files, records, and proceedings herein**, IT IS HEREBY ORDERED**:

CenturyLink, Inc. and Its Operating Companies' Motion to Disqualify Counsel and Require Corrective Notice [Docket No. 634] is **DENIED**.

All Citations

Slip Copy, 2020 WL 3513547

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2007 WL 1791258
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

In re: METHYL TERTIARY BUTYL ETHER ("MTBE") PRODUCTS Liability Litigation
This document relates to: County of Suffolk and Suffolk County Water Authority v. Amerada Hess Corp. et al., 04 Civ. 5424

No. 1:00-1898, MDL 1358(SAS), M21-88.
|
June 15, 2007.

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OPINION AND ORDER

SCHEINDLIN, J.

***1** In 2002, two plaintiffs, the County of Suffolk and the Suffolk County Water Authority, sued various corporations for their use and handling of the gasoline additive methyl tertiary butyl ether ("MTBE").[1] After defendants removed the action from state to federal court, the Judicial Panel on Multidistrict Litigation transferred it to this Court pursuant to section 1407 of title 28 of the United States Code as part of a large multi-district litigation ("MDL") involving MTBE.

On March 12, 2007, plaintiffs moved to "Set Bellwether Trial of Ten Wells" in this action, which had been previously selected as one of several focus actions for early discovery and trial. After full briefing on the Motion, an oral argument was held on April 27, 2007.[2] Following oral argument, and at the Court's request, both plaintiffs and defendants submitted supplemental briefs on three issues. Finally, by stipulation dated June 13, 2007, the parties have resolved one of the issues raised by this Motion-namely, the order in which the proof will be presented to a jury.[3] With respect to the remaining issues, plaintiffs' Motion to Set Bellwether Trial of Ten Wells is granted in part and denied in part.

I. Brief Background on Bellwether Trials

Rule 42(b) provides, in pertinent part, that a court "may order a separate trial of any claim ... or any separate issue ... always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution...."[4] Pursuant to this rule, federal courts have the authority to conduct a "bellwether trial." In *In re Chevron* (*"Chevron"*),[5] the Fifth Circuit explained the function of such a trial in the context of a mass tort action:

> The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context.
>
>> The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one.... The reason for acceptance [of bellwether trials] by the bench and bar are apparent. If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts. Common issues or even general liability may also be resolved in a bellwether context in appropriate cases.[6]

Over the last decade, bellwether trials have become more common in large actions, and, in particular, mass tort actions. For example, courts have held bellwether trials in actions

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involving the outbreak of Legionnaires' Disease on board a cruise ship, uranium contamination of a community, and the adverse effects of a prescription drug. [7]

***2** The obvious justification for a bellwether trial is that "a consolidation or a multi-district transfer has the potential of overwhelming the resources of a particular court." [8] "It is a fundamental principle of American law that every person is entitled to his or her day in court." [9] However, if plaintiffs file hundreds or thousands of individual actions, the sheer volume of the proceeding may overwhelm a court's ability to provide *any* plaintiff with relief in a timely and efficient manner.

A bellwether trial also allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action. It must be remembered that a defendant is not liable merely because it has been sued by a large group of plaintiffs. And every experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns. A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact. Moreover, resolution of these issues often facilitates settlement of the remaining claims. [10]

Of course, bellwether trials cannot exceed the limits imposed by the Constitution, but they do not necessarily pose an uncommonly high risk of doing so. Judges are often called upon to protect litigants' rights in unusual circumstances. Indeed, at least two Courts of Appeal have found that a bellwether trial may be superior to other forms of adjudication without violating any party's substantive or procedural due process rights. [11]

II. A Trial on All Issues with Respect to a Limited Group of Representative Wells Shall Be Held, Commencing on March 3, 2008

A. The Court's Order

The action before this Court, which is part of a larger MDL, involves 182 wells located in Suffolk County, New York. Plaintiffs have proposed a trial of a subset (approximately five percent) of their wells that have been allegedly impacted by MTBE. [12] The parties estimate that it will take at least three months to try ten to twelve wells. In contrast, if all 182 wells were tried before a single jury, this estimate might grow to two years or more. Such a trial would be untenable because, at the very least, it would be unreasonable to expect a jury to sit for this length of time, as well as strain limited judicial resources.

Thus, pursuant to Rule 42(b), this Court finds that a trial on all issues with respect to a limited group of representative wells shall be held, commencing on March 3, 2008. Such a trial is warranted by the sheer size of this action, the need for expeditious resolution, judicial economy, and the convenience of the Court, the jury, and the parties. Trying a subset of the wells in this two-plaintiff action renders a massive, complex trial manageable.

B. Defendants' Objections to the Bellwether Trial Are Meritless

Defendants oppose plaintiffs' Motion to try a group of representative wells by asserting that such trials are a disfavored procedure rife with dangers and pitfalls. While defendants may be correct that a bellwether trial raises certain problems, these problems are not so serious as to overcome the obvious advantages.

***3** In arguing against plaintiffs' proposal, defendants rely heavily on the Fifth Circuit's decision in *Chevron.* In doing so, however, defendants fail to give sufficient weight to the fact that the *Chevron* court explicitly approved of bellwether trials. As the *Chevron* court explained, "[t]he notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar." [13]

The question in *Chevron* was not whether a court could use a bellwether trial, but rather what preclusive effects would attach to findings resulting from that trial. The *Chevron* court concluded that unless the representative plaintiffs are selected by a statistically-valid, random method, the results of a trial of representative plaintiffs could not form the basis for a judgment affecting any action other than those brought by the representative plaintiffs. [14] Applying that conclusion, the Fifth Circuit found that the district court's selection method was not statistically valid and thus the first trial verdict would have no binding effect with respect to any other plaintiff. [15]

The *Suffolk County* action does not raise the same concerns as those discussed in *Chevron. Chevron* involved approximately three thousand plaintiffs suing a single defendant for harm arising from its acts and omissions. Here, by contrast, only two plaintiffs-Suffolk County and the Suffolk County Water

Authority-are suing more than fifty defendants for harm to approximately 182 wells owned or managed by these two plaintiffs. The extrapolation question in this action is thus quite different than the one addressed in *Chevron*-in this action, there is no other plaintiff who will benefit from the trial, to the detriment of the defendants, from any verdict reached in the proposed trial of representative wells. [16]

Moreover, even if a jury finds one or more of the defendants liable with respect to any of the representative wells, that finding would not establish that the particular defendant is responsible for the alleged harm to other wells. As explained below, the only preclusive effect would be with respect to common issues of tort liability. And such preclusion would attach only *if and when it is proven to a different jury that other wells in fact sustained any harm,* and even then, would only bind those defendants who were found to have caused harm to the two plaintiffs by virtue of their tortious conduct.

In short, because the results of the proposed trial of representative wells will *not* be extrapolated into a finding of liability with respect to any other well involved in this action, the proposed trial does not raise the same problems that the *Chevron* court faced. [17]

C. Selection of Representative Wells

Plaintiffs propose a trial that includes a mix of wells from three categories, with each category defined by the causation evidence that is available for the wells in that category: (1) a "known-source" category of wells for which the evidence can likely identify a single defendant whose conduct allegedly caused the MTBE contamination of a particular well; (2) a "multiple-source" category of wells for which the evidence will likely show that more than one defendant contributed to the MTBE contamination of a well; and (3) an "unknown-source" category of wells for which no expert can identify the source of the MTBE contamination of a well. [18] Plaintiffs' plan for selecting representative wells from the three causation categories is tentatively approved because it is likely to provide useful guidance to the parties with respect to subsequent trials or the settlement of claims regarding the remaining wells. [19] As to the particular wells that will represent each category at trial, the final selection must be approved by the Court after hearing from all counsel. [20]

D. Preclusion and Subsequent Trials for Remaining Wells

***4** The verdict reached in this trial will only bind the parties who participate in the trial and then only if a verdict is reached as to that party. Because all issues will be tried as to the representative wells, issue preclusion will attach only as to those defendants against whom there is an adverse verdict and who will then have the opportunity for appellate review. [21] The Court envisions that the representative-well trial jury will be asked, for each well, to answer certain interrogatories on a special verdict form with respect to general liability, damages, and causation. For example, with respect to general liability, the jury might decide the following:

> whether defendants could have provided feasible alternatives to MTBE;
>
> whether defendants knew of the dangers of MTBE at various points in time;
>
> whether defendants provided adequate warnings regarding the dangers of MTBE; and
>
> whether water contamination was a foreseeable result of the use of MTBE-containing gasoline.
>
> If general liability is established, the jury will likely be asked to decide, with respect to damages, whether a particular well suffered a compensable injury, and, if so, which defendants, if any, were specifically responsible for that injury.

The jury's findings on general liability will only have preclusive effect in subsequent trials as to those defendants who are found liable to plaintiffs. If a jury finds that certain defendants were not liable, there is no adverse verdict as to that defendant, who therefore has no right to appeal. In the absence of a right to appeal, there can be no preclusive effect. [22] In short, there can be no liability without proof of injury. [23]

If there are subsequent trials regarding the remaining wells in the *Suffolk County* action, there will be issue preclusion with respect to those defendants who suffered an adverse verdict in the first trial. Thus, a subsequent jury will not reexamine the findings of the first jury. However, with respect to a defendant as to whom there was no prior adverse verdict, the subsequent jury will be asked to make findings similar to those asked of a prior jury with respect to the liability of those defendants.

This procedure does not violate the Seventh Amendment's reexamination clause which forbids a subsequent jury from

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re-examining a matter already decided by a prior jury.[24] As defendants argued, if a defendant is not found liable for damages to a particular well, there can no "finding" of general liability as to that defendant. Thus, *a fortiori,* a subsequent jury would not be re-examining any matter that has already been decided as to that defendant since *no matter* has been decided as to that defendant.

E. Punitive Damages

The final question is whether the Court will permit plaintiffs to seek an award of punitive damages during the trial of the representative wells. Plaintiffs argue, *inter alia,* that the same jury that considers defendants' alleged misconduct for the purpose of assessing liability and damages *must* consider the question of whether that conduct warrants an award of punitive damages. If a different jury was asked to make that assessment, then a subsequent jury might, in effect, be re-examining the conclusions of a prior jury, which is forbidden by the Seventh Amendment.[25] Plaintiffs also argue that the failure to present the request for punitive damages to the first jury would jeopardize the parties' ability to seek appellate review[26] because certification under Rule 54(b) requires that a judgment be final-*i.e.,* that it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[27]

***5** Defendants, in turn, argue that if each successive jury is permitted to award punitive damages, there is a real risk that these successive awards would unduly increase the amount of the total award of punitive damages.[28] Defendants make the related argument that a jury must know the total amount of compensatory damages before making a punitive damages award because such an award must bear a reasonable relationship to the total harm suffered by the plaintiff.[29]

Finally, in yet another related argument, defendants contend that a punitive damages award must be "proportionate to the amount of harm to the plaintiff and to the general damages recovered."[30] Because the economic harm for a five-percent subset of wells (the number of wells proposed for the first trial), is far less than the possible total damages based on all of the wells, defendants fear that the jury will award a higher multiple of the compensatory damages than they might otherwise award if the total damages figure was significantly higher.[31] Thus, for example, if a jury believed that the total harm to plaintiffs was $200 million, it might award a punitive damages multiplier of 2:1. But if the same jury had realized that the total harm was twenty times that figure ($4 billion), it might only have awarded a punitive damages multiplier of 1:1.

Both sides make compelling arguments: there is no final judgment unless a punitive damages verdict is taken; yet if punitive damages are awarded, there is a risk that the award will not be proportionate to the total harm caused by defendants' alleged egregious conduct. After weighing all of the arguments, I conclude, for the following reasons, that plaintiffs must be allowed to seek, and possibly obtain, a punitive damages award at the close of the first trial.

First, it is axiomatic that punitive damages are based on a defendant's overall conduct as well as the harm to plaintiff.[32] Plaintiffs intend to present *all* of the evidence regarding defendants' alleged egregious conduct in the liability phase of the first trial. Such evidence is *not* well specific. Thus, the first jury will have a complete presentation as to the conduct allegedly engaged in by those defendants it finds liable for compensatory damages.

Second, each jury will be instructed that it is only hearing evidence as to a subset of the wells that plaintiffs allege have suffered damage as a result of MTBE contamination. Each jury will be further instructed that it cannot consider *damage* to wells other than those currently on trial because there will be no proof at that trial as to whether those other wells sustained any damage, nor proof of who is responsible for damage, if any, to the other wells. Nonetheless, the jury will know that it is trying only a subset of the potential claims.

Such a jury instruction is not unusual. For instance, it is no different from an action in which a plaintiff sues the manufacturer of Vioxx: the jury knows that there are other, similar actions pending. Indeed, the Supreme Court has made it clear "a plaintiff may show harm to others in order to demonstrate reprehensibility[,]" a "part of the punitive damages constitutional equation."[33] At the same time "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."[34]

***6** Thus, a court must properly instruct a jury because "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one."[35] Yet, once the jury is properly instructed, plaintiffs are allowed to show alleged harm to others in order to

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demonstrate reprehensibility of defendants' conduct (which conduct plaintiffs will have already proved directly harmed them). As the Supreme Court recently stated:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible-although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse.[36]

While there are no nonparties here, there are other wells that will not be considered at the first trial. By analogy, each jury may consider the alleged harms to other wells as evidence of reprehensibility, but may not directly punish defendants for such alleged harms.

Moreover, plaintiffs could have brought 182 separate lawsuits, each alleging damage to a single well.[37] While this would have created an administrative nightmare for the courts, it is unlikely that defendants would have (or could have) argued that each of these 182 actions would need to be tried before a jury could consider punitive damages. In the end, it makes little sense to reach a different result based on plaintiffs' pleading choices at the outset of this complex litigation-choices that benefitted both the parties and the courts.

Finally, each jury will only be permitted to award a ratio or multiplier, rather than any dollar figure.[38] If, at the end of the trials of all of the wells in the *Suffolk County* action, the Court concludes that the later punitive damages awards, if any, are disproportionate to the total harm, it can strike any later punitive damages award, leaving only the first, or the earliest, award(s).[39] For these reasons, plaintiffs may seek a punitive damages award at the trial of the representative wells against any defendant that is determined to be liable for compensatory damages.

For the foregoing reasons, plaintiffs' Motion to Set Bellwether Trial of Ten Wells is granted in part and denied in part. The Clerk of the Court is directed to close this Motion (document # 1359).

SO ORDERED:

All Citations

Not Reported in F.Supp.2d, 2007 WL 1791258

Footnotes

1 The parties have engaged in extensive motion practice. This Opinion assumes the reader's familiarity with this Court's previous opinions, in which the facts underlying this and other related actions are more comprehensively discussed. For a thorough recitation of plaintiffs' fact allegations see, for example, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig. ("In re MTBE")*, 379 F.Supp.2d 348, 364-67 (S.D.N.Y.2005).

2 *See* April 27, 2007 Hearing Transcript ("4/27/07 Tr.") at 32-86. At oral argument, Samuel Issacharoff argued for plaintiffs and Sheila L. Birnbaum argued for defendants.

3 In the parties' Joint Proposal, defendants specifically preserved their objection to a trial of less than all of plaintiffs' claims and to a trial pertaining only to a subset of wells. *See* June 13, 2007 Joint Proposal Regarding Trial Plan at 1. Nonetheless, anticipating that the Court might overrule defendants' objection, the parties reached an agreement with respect to the phasing issue. The essence of their agreement is that "[t]he parties shall be allowed to present all admissible evidence on all issues regarding the claims for liability and compensatory damages ... before the jury renders any findings, decision or verdict. The parties shall be allowed to present evidence on these issues in the order they deem appropriate." *Id.* at 2.

4 Fed.R.Civ.P. 42(b)

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5 109 F.3d 1016 (5th Cir.1997).

6 *Id.* at 1019.

7 *See* *Silivanch v. Celebrity Cruises, Inc.,* 333 F.3d 355, 359 (2d Cir.2003); *Dodge v. Cotter Corp.,* 203 F.3d 1190, 1194 (10th Cir.2000); *In re Vioxx Prods. Liab. Litig.,* 478 F.Supp.2d 897, 906 (E.D.La.2007).

8 R. Joseph Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What do the Constitution and Federal Rules of Civil Procedure Permit?,* 8 Wm. & Mary Bill Rts. J. 199, 202 (1999).

9 *Tice v. American Airlines, Inc.,* 162 F.3d 966, 968 (7th Cir.1998).

10 As the *Manual for Complex Litigation* explains: “Prior to recommending remand, the transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2) *may otherwise promote settlement in the remaining actions.”* *Manual for Complex Litigation (Fourth)* § 20.132 (2004) (emphasis added).

11 *See* *Hilao v. Estate of Marcos,* 103 F.3d 767, 771 (9th Cir.1996); *In re Chevron,* 109 F.3d at 1017.

12 Because of this, much of the precedent cited by the parties in their submissions is irrelevant. There is no effort here to extrapolate the judgments with respect to these representative wells to the remaining wells in this action. *See* Plaintiffs' Motion to Set Bellwether Trial of Ten Wells (“Pl.Mem.”) at 8.

13 109 F.3d at 1019.

14 *See id.* at 1020.

15 *See id.* at 1021.

16 As plaintiffs have argued, “[t]here is no suggestion that the Trial Wells be the basis for any extrapolated judgments to any parties or even to any wells that have not been submitted for trial.” Pl. Mem. at 4. *See also* 4/27/07 Tr. at 35 (Mr. Issacharoff stating: “I think we should be absolutely clear, we do not intend to extrapolate....”).

17 The proposal also avoids Seventh Amendment problems because all issues regarding the limited group of wells will be tried before a single jury. Finally, the Court should be able to direct the entry of a final judgment with respect to the jury's verdicts on claims relating to these wells, pursuant to Rule 54(b), that can be reviewed by an appellate court. *See* Fed.R.Civ.P. 54(b) (“[T]he court may direct the entry of a final judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”).

18 *See* Pl. Mem. at 8-9 and Appendix.

19 *See* *Manual for Complex Litigation (Fourth)* § 22.315 (2004).

20 Plaintiffs have already selected eleven wells for trial. *See* June 1, 2007 Letter from Robin L. Greenwald, plaintiffs' liaison counsel and counsel for plaintiffs, to the Court, at 2. These wells are mostly from the group of wells that were designated as “focus wells” for discovery purposes, because the focus wells are the only wells for which the parties have had full discovery. *See id.* at 2-3.

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21 Collateral estoppel as to those defendants is appropriate. Subsequent trials regarding the remaining wells will involve issues identical to those actually litigated and decided in the first trial, those defendants will have had a full and fair opportunity to litigate those issues, and the jury's findings on those issues will have been necessary to support a valid and final judgment on the merits. *See* *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Liona Corp., Inc. v. PCH Assoc. (In re PCH Assoc.),* 949 F.2d 585, 593 (2d Cir.1991).

22 *See* *Concerned Citizens of Cohocton valley, Inc., v. New York State Dep't of Envtl. Conservation,* 127 F.3d 201, 205 (2d Cir.1997); *Ashley v. Boehringer Ingelheim Pharms. (In re DES Litig.),* 7 F.3d 20, 23 (2d Cir.1993). *See also* *Warner/Elektra/Atl. Corp. v. County of Dupage,* 991 F.2d 1280, 1282-83 (7th Cir.1993) ("an unappealable finding does not collaterally estop.... If an appellant is complaining not about a judgment but about a finding (here that the [appellant] was negligent and also an inverse condemnor)-on the bottom line it prevailed-the appeal does not present a real case or controversy. So it must be dismissed for want of jurisdiction, and the finding will thus have no collateral estoppel effect.").

23 *See* Defendants' Memorandum of Law Concerning the Three Issues Raised by the Court at the April 27, 2007 Oral Argument ("Def.Supp.Mem.") at 7-12.

24 *See* *Blyden v. Mancusi,* 186 F.3d 252, 268 (2d Cir.1999).

25 *See* Plaintiffs' Supplemental Submission Regarding Trial Plan at 8.

26 *See id.* at 10.

27 *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). *Accord* *International Controls Corp. v. Vesco,* 535 F.2d 742, 748 (2d Cir.1976) (holding that a judgment "cannot be considered final as long as it leaves open the question of additional damages").

28 *See* Def. Supp. Mem. at 3 (citing *King v. Macri,* 993 F.2d 294 (2d Cir.1993)).

29 *See id.* (citing *Philip Morris U.S.A. v. Williams,* 549U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)).

30 *Campbell,* 538 U.S. at 426.

31 *See* Def. Supp. Mem. at 4-5.

32 *See* *Campbell,* 538 U.S. at 425. *See also* *Philip Morris,* 127 S.Ct. at 1062-63 (explaining that whether a punitive damages decision is excessive depends upon (1) the reprehensibility of the defendant's conduct, (2) whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to plaintiff or plaintiffs, and (3) the difference between the award and sanctions imposed in comparable cases) (citing *BMW,* 517 U.S. at 575-85).

33 *Philip Morris,* 127 S.Ct. at 1063-64.

34 *Id.* at 1064.

35 *Id.*

36 *Id.*

37 *See* 4/27/07 Tr. at 38.

38 *See id.* at 69-74.

39 *See* *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. 415, 434-35, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994) (holding that the Constitution requires meaningful post-verdict judicial review in which the court has the power to reduce an excessive punitive damages award); *see also* *id.* at 421 ("Judicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.").

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2008 WL 4876577
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Nicholas PANACCIONE and Cindy Panaccione, Plaintiffs-Appellants,
v.
Piotr HOLOWIAK and Northeast Stucco Systems, Inc., Defendants-Respondents,
and
Township of Old Bridge and Planning Board of Old Bridge, Defendants.

Argued Oct. 8, 2008.
|
Decided Nov. 12, 2008.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-10236-06.

Attorneys and Law Firms

Richard D. Schibell argued the cause for appellants (Schibell, Mennie & Kentos, LLC, attorneys; Mr. Schibell, of counsel; Lisa C. Krenkel, on the brief).

Willard C. Shih argued the cause for respondents (Wilentz, Goldman & Spitzer, P.A., attorneys; Mr. Shih and Michael J. Weisslitz, of counsel and on the brief).

Before Judges PARRILLO, LIHOTZ and MESSANO.

Opinion

PER CURIAM.

***1** Plaintiffs Nicholas and Cindy Panaccione appeal from the May 11, 2007 summary judgment dismissal of their Law Division complaint in favor of defendants Piotr Holowiak (defendant), Northeast Stucco Systems, Inc. (NSS), the Township of Old Bridge (Old Bridge) and the Planning Board of Old Bridge (Board). We affirm.

By way of background, defendant owned a 6.835-acre tract of residentially-zoned property on East Greystone Road in Old Bridge, and lived in a home situated in the middle of the property. The property was protected by the New Jersey Freshwater Wetlands Protection Act (FWPA), *N.J.S.A.* 13:9B-1 to -30. In 1997, the New Jersey Department of Environmental Protection (DEP) cited defendant for violations of the FWPA, which defendant claims were the result of tree removal and clearing activities on his undivided lot. Defendant submitted a restoration plan in response to the violations, and on December 19, 1997, the DEP approved a revised version of the plan. Six months later, on June 30, 1998, the DEP issued a letter advising defendant that it had "inspected the freshwater wetland restoration area and found it to be acceptable and reasonably in accordance with the approved restoration plan."

In November 1999, defendant submitted a land development application to Old Bridge seeking subdivision of the undivided property into three separate lots. The application specifically sought approval to create two additional building lots (Lots 60.11 and 60.13) on each side of defendant's current house (Lot 60.12). On August 6, 2002, the Board adopted a resolution specifically recognizing defendant's intent to develop the two new lots and approving his plan subject to several conditions. On October 3, 2002, the DEP approved defendant's application and issued a Statewide General Permit and Transition Area Waiver Averaging Plan Authorization.

After obtaining subdivision approval in 2002, defendant decided to sell his residence. Plaintiffs agreed to purchase Lot 60.12 from defendant for $935,000, and on August 3, 2005, the parties entered into a contract for sale. The contract contained an "as is" provision and an integration clause, specifically reciting that plaintiffs were not relying upon any representation of defendant or NSS outside those within the four corners of the contract. On August 11, 2005, plaintiffs' counsel confirmed that the contract was acceptable without modifications and the parties proceeded to closing.

Prior to closing, defendant, who was in Poland at the time, transferred the property in question (Lot 60.12) to NSS, of which he was the president and sole owner. At the October 28, 2005 closing, NSS conveyed the property to plaintiffs via a bargain and sale deed. The deed expressly refers to the subdivision plan, reciting: "[d]eed description refers to map entitled 'Proposed Minor Subdivision prepared for Piotr Holowiak of Lot 60...." Also at closing, the parties executed a release in which they waived "any and all claims" and rights against the other.

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***2** This much appears undisputed. The parties differ, however, over what if anything had been represented orally prior to the contract's closing. According to Nicholas Panaccione, defendant told him that the bookend lots were undevelopable and that he had no plans to develop them. Defendant denies making any such representation and in fact insists that he never met plaintiffs prior to signing the contract. Moreover, Grzegorz Kochan, vice president of NSS, certified that after closing, plaintiffs advised him that if defendant decided not to build on Lots 60.11 or 60.13, they would be interested in purchasing them.

In any event, based on their version, on December 22, 2006, plaintiffs filed a multi-count complaint against defendant, NSS, the Township and the Board, alleging common law and statutory consumer fraud, nuisance, and tortious interference with their enjoyment of the property. [1] In addition, or as an alternative to damages, plaintiffs' sought to void the Board's July 2, 2002 subdivision approval, which they contended was without knowledge of defendant's wetlands violations, and ultimately to enjoin defendant from developing the two parcels he still owned adjacent to their property. To that end, on January 29, 2007, plaintiffs moved for a preliminary injunction and leave to file a lis pendens. In response, on February 14, 2007, defendant filed a motion to dismiss plaintiffs' complaint with prejudice. In their opposition, plaintiffs, contending that defendant was still in violation of the FWPA, for the first time sought enforcement through the Environmental Rights Act (ERA), *N.J.S.A.* 2A:35A-1 to -14.

Treating the dismissal motion as one for summary judgment because materials beyond the complaint were presented, [2] the judge granted defendants the relief requested and denied plaintiffs' motions for a preliminary injunction and lis pendens. In so ruling, the judge specifically found that: plaintiffs failed to properly plead the ERA claim; both the contract and the general release barred plaintiffs' fraud-related claims; evidence supporting their fraud claims was barred by the parol evidence rule; the Consumer Fraud Act [3] was inapplicable; their nuisance claim was meritless; their challenge to the subdivision plan was time-barred; and they were not entitled to injunctive relief under the circumstances.

On appeal, plaintiffs raise the following issues for our consideration:

I. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT PERMITTING AMENDMENT OF PLAINTIFFS' PLEADINGS TO INCLUDE THE ENVIRONMENTAL RIGHTS ACT (“ERA”) AND IN NOT FINDING THAT PLAINTIFFS' PLEADINGS HAD ALLEGED THE ERA.

II. THE ENVIRONMENTAL RIGHTS ACT VESTS IN YOUR PLAINTIFFS AND THE TRIAL COURT THE RIGHT TO PROSECUTE TO CONCLUSION THE AVERRED VIOLATION OF *N.J.A.C.* § 7:7A-14.5 AND ITS DEFERENCE TO THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION WAS NOT STATUTORILY REQUIRED UNDER THE WITHIN CICRUMSTANCES.

III. PLAINTIFFS HAVE THE INDEPENDENT RIGHT TO PURSUE THEIR CLAIMS REGARDLESS OF THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL'S INACTION, REMEDIES FOR ENVIRONMENTAL DESECRATION UNDER THE ERA UNDER THE WITHIN CIRCUMSTANCES.

***3** IV. UNDER THE WITHIN CIRCUMSTANCES, THE PAROL EVIDENCE RULE DID NOT BAR EVIDENCE OF FRAUDULENT CONDUCT BY DEFENDANTS, NOR DID THE RELEASE EXECUTED BY PLAINTIFFS ANCILLARY TO CLOSING PRECLUDE THE RELIEF SOUGHT.

V. PLAINTIFFS' EXECUTION OF A RELEASE AT TIME OF CLOSING BY VIRTURE OF DEFENDANTS' FRAUDULENT CONDUCT DOES NOT BAR PLAINTIFF'S CLAIMS DIRECTLY OR COLLATERALLY AS IT RELATES TO THE CONTIGUOUS PARCELS NOT ENCOMPASSED THEREIN.

VI. THE CORPORATE DEFENDANT NORTHEAST STUCCO SYSTEMS, INC. IS SUBJECT TO THE NEW JERSEY CONSUMER FRAUD ACT AS A COMMERCIAL SELLER OF REAL ESTATE.

VII. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT PREMATURELY BY MAKING FACTUAL AND LEGAL CONCLUSIONS WITHOUT GIVING APPROPRIATE DEFERENCE TO THE REQUISITE INFERENCES AT THE TIME OF HEARING.

VIII. THE CONDUCT AVERRED BY THE PLAINTIFFS IN THE DESTRUCTION OF WETLANDS

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CONSTITUTES A PUBLIC AND PRIVATE NUISANCE.

IX. PLAINTIFFS, IN THEIR CHALLENGE TO THE WITHIN SUBDIVISION GRANT, ARE NOT BARRED BY THE FORTY-FIVE (45) DAY RULE.

X. THE COURT ERRED IN FINDING THAT THE AWARD OF MONETARY DAMAGES WOULD SUFFICE SHOULD PLAINTIFFS HAVE PREVAILED; A LIS PENDENS AND PRELIMINARY INJUNCTION SHOULD HAVE BEEN ISSUED.

We address these issues in the order raised.

(A)

During oral argument, plaintiffs raised an ERA claim not specifically or expressly pled in their complaint. The trial court noted at the time:

> I don't see in your pleadings an assertion of the [ERA]. I see that that was first raised in your papers filed on April 19th .... but you didn't assert the [ERA]. It's not asserted anywhere in the pleading ... [and] you are supposed to assert that in the complaint so the D.E.P. is on notice and the State ... is made a party. That's one of the statutory requirements for invocation.... So while I note you raise it, it's really not before the Court .... Certainly to use such a statutory remedy you would have had to comply with the entirety of this statute....

Consequently, the motion judge dismissed plaintiffs' so-called ERA claim because it was not pled in their complaint, failed to comply with the ERA's mandatory pre-suit notice requirement, and was, in any event, substantively deficient.

On appeal, plaintiffs contend that a "fair reading of the complaint," including its "verbiage" about wetlands destruction/alteration [4] was sufficient to invoke the ERA and that the requisite notice to the DEP was provided by Dr. Walker's correspondence. We disagree.

The ERA enables private citizens to pursue their own enforcement proceedings in circumstances where the DEP fails to do so, providing in pertinent part:

> Any person may commence a civil action ... against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment. The action may be for injunctive or other equitable relief to compel compliance with a statute, regulation or ordinance.... The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.

***4** [*N.J.S.A.* 2A:35A-4a.]

The ERA, however, does not confer any substantive rights directly. *Mayor & Council of Rockaway v. Klockner & Klockner,* 811 *F.Supp.* 1039, 1054 (D.N.J.1993) (citing *Superior Air Prods. v. NI Indus.,* 216 *N.J.Super.* 46, 58, 522 A.2d 1025 (1987), *appeal dismissed,* 126 *N.J.* 308 (1991)). Rather, it grants private plaintiffs standing to enforce other New Jersey environmental statutes "as an alternative to inaction by the government which retains primary prosecutorial responsibility." *Superior Air Prods., supra,* 216 *N.J.Super.* at 58, 522 A.2d 1025.

There are two significant limitations to this statutory "procedural" remedy. First, it does not enable a citizen to compel performance of a discretionary function. *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chem. Co.,* 216 *N.J.Super.* 166, 174, 523 A.2d 250 (App.Div.1987). The government is "entrusted initially with the right to determine the primary course of action to be taken." *Rockaway, supra,* 811 *F.Supp.* at 1054 (quoting *Twp. of Howell v. Waste Disposal, Inc.,* 207 *N.J.Super.* 80, 95, 504 A.2d 19 (App.Div.1986)). Private citizens only have the right of enforcement under the ERA when "the state agency has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted [.]" *Morris County Transfer Station, Inc. v. Frank's Sanitation Serv., Inc.,* 260 *N.J.Super.* 570, 577-78, 617 A.2d 291 (1992) (quoting *Twp. of Howell, supra,* 207 *N.J.Super.* at

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96, 504 A.2d 19) (finding a three-year delay in addressing an ongoing Solid Waste Management Act violation constituted inaction that enabled a private citizen to bring an ERA claim). Second, the ERA is only available to prevent future violations; it cannot be used to seek redress for past ones. *N.J.S .A.* 2A:35A-4 ("The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.").

Here, the particular environmental statute plaintiffs seek to enforce through the ERA is the FWPA. The FWPA, in turn, vests the DEP with the authority to enforce its provisions and terminate any permits issued. *N.J.S.A.* 13:9B-20, -21; *N.J.A.C.* 7:7A-14.5. In fact, courts have routinely deferred to the DEP in FWPA cases. *See* *East Cape May Assocs. v. State, Dept. of Envtl. Prot.,* 343 *N.J.Super.* 110, 131-32, 777 A.2d 1015 (App.Div.), *certif. denied and appeal dismissed,* 170 *N.J.* 211, 785 A.2d 439 (2001).

Because private enforcement of environmental laws through the ERA hinges on agency inaction, the ERA contains mandatory pre-suit notice requirements:

> No action may be commenced pursuant to this act unless the person seeking to commence such suit shall, at least 30 days prior to the commencement thereof, direct a written notice of such intention by certified mail, to the Attorney General, the Department of Environmental Protection, ... and to the intended defendant; provided, however, that if the plaintiff in an action brought in accordance with the "N.J. Court Rules, 1969," can show that immediate and irreparable damage will probably result, the court may waive the foregoing requirement of notice.
>
> ***5** [*N.J.S.A.* 2A:35A-11.]

Summary judgment is appropriate when a plaintiff fails to comply with this mandatory condition precedent. *See* *Player v. Motiva Enters., LLC,* 240 *Fed. Appx.* 513, 524 (3d Cir.2007); *See also* *Twp. of Howell, supra,* 207 *N.J.Super.* at 95, 504 A.2d 19 (recognizing Legislature designed notice requirement to allow agencies to exercise value judgments such as whether to join the case, whether its expertise will assist the court, and whether state interests would be sacrificed to personal interests by the instigators of the suit).

Indisputably here, plaintiffs have failed to comply with this requirement. They did not mail notice to the DEP or the Attorney General of New Jersey announcing their intent to bring suit under the ERA. Nor did Dr. Walker's post-filing correspondence to the DEP suffice. Not only was it untimely, but it failed as well to notify the DEP that plaintiffs intended to pursue an enforcement action. Nor have plaintiffs demonstrated any immediate irreparable damage resulting from failure to waive the notice requirement.

Besides failing to provide the requisite notice, plaintiffs' complaint does not suggest-much less plead-an ERA claim. The complaint refers neither to the ERA nor the environmental statute-the FWPA-plaintiffs seek to enforce through the ERA. At best, plaintiffs allude to non-specified violations of state and local statutes in Count Three, which they voluntarily dismissed in any event. Indeed, a "fair reading" of the complaint's fraud, misrepresentation, nuisance, tortious interference and property delineation dispute counts fails to suggest, or even hint at, plaintiffs' interest to enforce another environmental statute against defendant. And finally, nowhere do plaintiffs assert governmental inaction, a necessary prerequisite to an ERA claim. [5]

Significantly, as to the latter, the motion judge found that the DEP in this instance retained exclusive jurisdiction to investigate defendant's alleged FWPA violations and to enforce the Act:

> [A]s I understand it, plaintiffs are arguing that because there was purported fraud on the [DEP] that this Court is vested with jurisdiction to address what may have been a misrepresentation by defendants at the time the wetlands restoration was approved.
>
> Plaintiffs are relying on the New Jersey Administrative Code 7:7A-14.5. And as the Court reads that section ... it is the [DEP] who must make the determination that the issuance of the permit was based upon false or inaccurate information. I note that the department, while being provided with copies of various reports of Dr. Walker and various copies of things, is not a party to this action.... [T]he case law that says the Court should defer to agencies where by legislative authority-in this case the Administrative Code-the agency is vested as the place of first review.... [T]his court is not going to usurp what the Administrative Code says which it should be the

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province of the department who is the overall regulator of the [FWPA] to make that determination.

***6** Indeed, plaintiffs acknowledge a pending DEP investigation of the alleged FWPA violations at the time the dismissal motion was heard. As such, plaintiffs' ERA claim is substantively defective for failure to show agency inaction. This critical defect, together with the procedural deficiencies already noted, defeats plaintiffs' so-called ERA claim.

(B)

Plaintiffs' challenge to the dismissal of their fraud-related claims is multi-faceted. They argue that the general release signed by the parties at closing did not preclude their claims; that the trial court misapplied the parol evidence rule; and that the Consumer Fraud Act applies. We disagree with these contentions.

(i)

At closing, the parties executed a release stating:

> I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:
>
> Any and all claims arising out of the transfer of title of premises known as 317 East Greystone Road, Old Bridge, New Jersey between the parties.

Because the parties disputed the property boundaries of Lot 60.12 at time of closing, plaintiffs argued below that the release should be limited to claims involving that dispute and that they could not have waived claims of which they were unaware. The motion judge rejected this argument, stating:

> The release that is provided to this Court is a very broad release and it releases any and all claims arising out of the transfer of title of premises known as 317 East Greystone Road [(Lot 60.12)], Old Bridge, New Jersey, between the parties.
>
> ....
>
> It is a very broad release and it releases any and all claims. And to the extent there was any dispute ... as to acreage, that could have been put in there if, as plaintiffs say, it was only because there was a dispute in the listing agreement.... This is about as broad a release as you can get releasing any and all claims. I can't read in what plaintiffs' counsel wants me to read into the release.

Consequently, the judge dismissed plaintiffs' fraud-related claims in part because the broad language of the release prohibited them from seeking any relief from a lawsuit based on their contract. We find no fault with this reasoning.

"The scope of a release is determined by the intention of the parties as expressed in the terms of the particular instrument, considered in the light of all the facts and circumstances." *Bilotti v. Accurate Forming Corp.,* 39 *N.J.* 184, 203, 188 A.2d 24 (1963). "A general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." *Id.* at 204, 188 A.2d 24. Moreover, when a release's language refers to "any and all" claims, as here, courts generally do not permit exceptions. *Isetts v. Borough of Roseland,* 364 *N.J.Super.* 247, 255-56, 835 A.2d 330 (App.Div.2003). Thus, the fact that plaintiffs may have been unaware of defendant's intentions as to Lots 60.11 and 60.13, in and of itself, does not entitle them to avoid the effect of the broad provisions of the general release.

(ii)

***7** Even if the release were not dispositive of the fate of plaintiffs' fraud-related claims, the contract of sale, in our view, is. Such claims are based on alleged oral representations by defendant that Lots 60.11 and 60.13 were undevelopable and that he would not develop them. The parties' contract, however, does not contain such representations and in fact provides just the opposite, namely that plaintiffs were not relying upon any representations made by defendant not expressly in the contract:

> NO RELIANCE ON OTHERS: This Agreement is entered into based on the knowledge of the parties as to the value of the land and whatever buildings are upon the Property and

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> not on any representation made by the SELLER, the named Broker(s) or their agents as to character or quality. THIS MEANS THAT THE PROPERTY IS BEING SOLD "AS IS", EXCEPT AS OTHERWISE MENTIONED IN THIS AGREEMENT.

The contract also contained an integration clause further buttressing the fact that plaintiffs were not relying on any representations of defendant in agreeing to purchase Lot 60.12:

> BINDING AGREEMENT: This Agreement binds the SELLER and BUYER and also their heirs and personal representative in the case of death. It also is the entire and only Agreement between the parties and neither has made any promise or guaranty not contained in this Agreement.

Consequently, the judge found the contract dispositive of the issue:

> [One of Defendant's arguments is] that parol evidence bars the change of the contract, specifically the real estate contract, Paragraph ... 19 and 20 of the contract of sale.... [W]hich are that we are making no other representations not contained in this agreement and that this is the entirety of the agreement, cannot under case law be altered by the parol evidence rule; that this Court's function is not to make a better agreement than that which was assigned by the parties. As I understand [the Plaintiffs'] argument, they are trying to say that somehow there were misrepresentations in connection with that.
>
> However, ... by way of the briefs and the certifications that the misrepresentations really relate to what the defendant entity did vis-à-vis the wetland issue as opposed to the representations in the contract....
>
> So the Court is-is inclined to agree ... that the parol evidence should not be used to alter that contract....

Where a contract demonstrates that the parties have merged all prior negotiations and agreements in writing, the parol evidence rule bars evidence of prior negotiations and agreements tending to add or vary the terms of the writing being considered. *Filmlife, Inc. v. Mal "Z" Ena, Inc.,* 251 *N.J.Super.* 570, 573, 598 A.2d 1234 (App.Div.1991). This tenet is especially true when the contract itself contains an integration clause. *Harker v. McKissock,* 12 *N.J.* 310, 321-22, 96 A.2d 660 (1953) ("The essence of voluntary integration is the intentional reduction of the act to a single memorial; and where such is the case the law deems the writing to be the sole and indisputable repository of the intention of the parties.") (citations omitted).

***8** To be sure, "[i]ntroduction of extrinsic evidence to prove fraud in the inducement ... is a well-recognized exception to the parol evidence rule." *Filmlife, supra,* 251 *N.J.Super.* at 573, 598 A.2d 1234. However, "[e]xtrinsic evidence to prove fraud is admitted because it is not offered to alter or vary express terms of a contract, but rather, to avoid the contract or to prosecute a separate action predicated upon the fraud[,]" *id.* at 573-74, 598 A.2d 1234, and provided that the alleged fraud concern a matter not addressed in the agreement. *Id.* at 575, 598 A.2d 1234.

Our decision in *Filmlife* is illustrative. In *Filmlife, supra,* the plaintiff entered into a lease for a 1989 Lincoln Town Car. 251 *N.J.Super.* at 572, 598 A.2d 1234. At the signing of the lease, plaintiff traded in a 1984 Cadillac for a $6,000 allowance. *Ibid.* The lease provided that the $6,000 trade-in value was a capitalized cost reduction applied as a down payment. *Ibid.* The lease also stated that its four corners "contains the entire agreement" between the parties. *Ibid.* The plaintiff claimed that an employee of defendant automobile lessor made representations to him that the $6,000 would be paid in cash. *Ibid.* When the defendant refused to do so, the plaintiff filed suit alleging fraud and misrepresentation. *Ibid.* The trial court dismissed his claim and we upheld the dismissal on the basis that the parol evidence rule precluded plaintiff from introducing extrinsic evidence to vary or contradict the express terms of the lease. *Id.* at 573-75, 598 A.2d 1234.

Here, plaintiffs do not really seek to void the contract by alleging fraud. On the contrary, the gist of the relief they seek is to void the 2002 subdivision approval and to enjoin defendant from building on Lots 60.11 and 60.13.

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Moreover, plaintiffs seek to enforce an alleged representation not specified in a contract, which otherwise expressly states that its four corners contain the entire agreement and specifically precludes representations not documented in it. Even more pertinent, the deed conveyed by the contract refers to the Subdivision Plan approved by the Board for new developments; it makes no representation on behalf of defendant that the two new lots (60.11 and 60.13) would not be developed. Thus, enforcement of the alleged oral assertion would alter the contract terms with respect to representations contrary to both the contract and deed. As noted, extrinsic evidence to prove fraud is not admitted to alter or vary the express terms of a contract. *Filmlife, supra,* 251 *N.J.Super.* at 573-74, 598 A.2d 1234.

(iii)

For these reasons, Plaintiffs' consumer fraud claim fares no better. In addition, the CFA applies only to professional sellers of real estate and not isolated one-time sales of residences by homeowners. *Strawn v. Canuso,* 140 *N.J.* 43, 60, 657 A.2d 420 (1995), superseded on other grounds by statute, *New Residential Construction Off-Site Conditions Disclosure Act, L.* 1995, *c.* 253, § 1-12 (codified at *N.J.S.A.* 46:3C-1 to -12), as recognized in *Nobrega v. Edison Glen Assocs.,* 167 *N.J.* 520, 533, 772 A.2d 368 (2001); *DiBernado v. Mosley,* 206 *N.J.Super.* 371, 376, 502 A.2d 1166 (App.Div.), *certif. denied,* 103 *N.J.* 503, 511 A.2d 673 (1986) (recognizing the CFA's purposes was to prevent the deception, misrepresentation, and unconscionable practices of professional sellers seeking mass distribution of many types of consumer goods, not isolated sellers of single residences).

***9** The transaction involved here is a sale of a single-family private residence by its owner. The contract of sale was executed by defendant who occupied the home being sold, and there is no competent evidence that defendant, in his individual capacity, is a commercial seller of real estate, or that the sale of the subject property is anything other than an isolated transactional event. The fact that, for purposes of convenience, defendant transferred title to NSS just prior to closing does not alter the fact that defendant personally executed the contract of sale and is the individual to whom plaintiffs attribute the fraudulent misrepresentations. In our view, the CFA does not apply and therefore the judge properly dismissed plaintiffs' consumer fraud claim.

(C)

In response to plaintiffs' argument that defendant's development of Lots 60.11 and 60.13 created a public and private nuisance, the trial court found:

> This is three lots. It is not a public nuisance as the case law would define to be a public nuisance. There is no widespread impact to this case to invoke the doctrine of public nuisance. Nor does the Court find that there is any private nuisance as the case law says it should be unreasonable interference with the use and enjoyment of land. While I understand that plaintiffs ... may not be happy that they may have neighbors, that doesn't unreasonably interfere with their use and enjoyment of their land to qualify as a private nuisance as the Court understands the case law.

We agree.

A public nuisance involves a "course of conduct ... calculated to result in physical harm or economic loss to so many persons as to become a matter of serious concern." *James v. Arms Tech., Inc.,* 359 *N.J.Super.* 291, 329, 820 A.2d 27 (App.Div.2003) (citations omitted). It may consist of unreasonable interference with the general public's exercise of a common right. *Mayor & Council of Alpine v. Brewster,* 7 *N.J.* 42, 50, 80 A.2d 297 (1951). A private person proceeding with a public nuisance claim must demonstrate a special injury. *In re Lead Paint Litigation,* 191 *N.J.* 405, 428, 924 A.2d 484 (2007).

There is no competent evidence in the record that development of Lots 60.11 and 60.13 will have a widespread impact or interfere with the public's exercise of a right. Moreover, plaintiffs failed to allege any special harm that development of Lots 60.11 and 60.13 will cause them.

Plaintiffs' argument that development of these lots constitutes a private nuisance is equally unavailing. "The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land." *Sans v. Ramsey Golf & Country Club, Inc.,* 29 *N.J.* 438, 448, 149 A.2d 599 (1959). Plaintiffs utterly fail to show how development of lots neighboring their home unreasonably interferes with their enjoyment of that home.

(D)

Plaintiffs' complaint also challenged the Board's 2002 approval of defendant's subdivision plan. At the motion proceedings, they argued for enlargement of the *Rule* 4:69-6 forty-five day deadline, which had long since passed, based on their allegations that defendant provided misinformation when obtaining the Board's approval. The trial court declined to enlarge the deadline, finding none of *Rule* 4:69-6(b)(3)'s exceptions applied.

***10** *Rule* 4:69-6 sets forth the relevant deadline for challenging a township board's decision:

(a) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.

(b) Particular Actions. No action in lieu of prerogative writs shall be commenced

....

(3) to review a determination of a planning board or board of adjustment ... after 45 days from the publication of a notice....

[*R.* 4:69-6.]

This time proscription should only be enlarged "where it is manifest that the interest of justice so requires." *R.* 4:69-6(c). The Supreme Court has established three general categories to the "interest of justice" exception: "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." *Borough of Princeton v. Bd. of Chosen Freeholders of Mercer,* 169 *N.J.* 135, 152, 777 A.2d 19 (2001) (quoting *Brunetti v. Borough of New Milford,* 68 *N.J.* 576, 586, 350 A.2d 19 (1975)).

None of these categories applies here. There are no novel constitutional issues, no informal or ex parte determinations by administrative officials, and no important public interests requiring adjudication or clarification. Indeed, it is difficult to conceive how plaintiffs could challenge the subdivision plan as an injustice when they voluntarily took advantage of the approval and purchased one of the subdivided lots. There being no reason to relax the time bar of *Rule* 4:69-6, the motion judge properly dismissed plaintiffs' challenge to the Board's 2002 subdivision approval.

(E)

We have considered plaintiffs' remaining arguments and deem them without merit. *R.* 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in A.2d, 2008 WL 4876577

Footnotes

1 One of the counts pled a Conscientious Employee Protection Act (CEPA) (*N.J.S.A.* 34:19-1 to -14) violation, which plaintiffs later acknowledged as inadvertent and voluntarily agreed to dismiss.

2 After filing their lawsuit, plaintiffs retained the services of Dr. Raymond Walker, a consultant specializing in environmental engineering, who then inspected defendant's property. On March 22, 2007, Walker reported

his findings to the DEP, namely that the agency did not detect the full extent of the unauthorized filling of wetlands on defendant's property when it issued the notice of violation to defendant in 1996; that additional violations occurred after the DEP instituted its enforcement action, which remain unaccounted for to date; and that defendant did not comply with his obligations under the December 1997 DEP-approved restoration plan.

3 *N.J.S.A.* 56:8-1 to -184.

4 Plaintiffs base their "verbiage" argument on a number of allegations raised in their complaint

[FIRST COUNT]

12. More particularly, ... the referenced subdivision application/purported grant contained inaccurate delineations of wetlands on the property, thus falsely inducing the Planning Board of the Township of Old Bridge to issue certain variances ancillary to grant of subdivision aforesaid.

13. Moreover, the wetlands/wetlands transition areas on the contiguous parcels aforesaid, upon information and belief, were disturbed without N.J.D.E.P. consent entailing, amongst other activities, the unauthorized clearing, filling and grading of the said premises.

14. Moreover, pursuant to obtaining state regulations/statute and the nominally named defendant Township's land use element of its Master Plan, the within defendants, Holowiak/Northeast Stucco Systems, Inc., did not continue to maintain an appropriate conservation easement following the location of fresh water wetlands and wetlands buffers as a condition precedent subsequent to the minor subdivision grant aforesaid.

....

[THIRD COUNT]

2. The activities of the within defendants, Holowiak and Northeast Stucco Systems, Inc .... in the aggregate were calculated to violate the regulations, statutes and ordinances obtaining in such instances made and provided on a municipal, county and state-wide level.

5 As for plaintiffs' alternative contention that the judge should have allowed them to amend their pleadings to include an ERA claim, suffice it to say, plaintiffs never made such a request below. Plaintiffs were free, of course, to amend their complaint before defendant's responsive pleading, *Rule* 4:9-1, but chose not to do so.

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SUPREME COURT OF NEW JERSEY

APP. DIV. # **A-003639-21**

SUPREME COURT # **088253**

Jeffrey Achey, Marilyn Achey, Justin Anderson, Deidre Asbjorn, Gregory Burlak, Carla Hiorazzo, Judith Chiorazzo, John Conway, Adam DeMarco, Dean Esposito, James Fisher, Allison Gillingham, Lorraine Gillingham, Doree Gordon, Donna Hartman, Patricia Justice, David Kelly, Christina Manfredo, Alexander Navarra, Judith Oelenschlager, Daniel Patino, James Prate, Michael Scheufele, Russell Sewekow, Deborah Stroyek, Linda Teer, Christine Trappe, and Brenda Tripicchio, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

Cellco Partnership, d/b/a Verizon Wireless, and Verizon Communications, Inc.,

Defendants-Petitioners.

NOTICE OF MOTION
MOTION FOR LEAVE TO APPEAR AMICUS CURIAE

PLEASE TAKE NOTICE THAT PURSUANT TO R. 1:13-9, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE (COLLECTIVELY, "PROPOSED AMICI"), BY AND THROUGH THEIR ATTORNEYS, LOWENSTEIN SANDLER LLP, HEREBY MOVE FOR LEAVE TO FILE THE ENCLOSED BRIEF AND PARTICIPATE AS AMICI CURIAE IN THE ABOVE-CAPTIONED ACTION CURRENTLY PENDING BEFORE THE SUPREME COURT OF NEW JERSEY.

PLEASE TAKE FURTHER NOTICE THAT PROPOSED AMICI RELY ON THE ENCLOSED BRIEF IN SUPPORT OF DEFENDANTS-RESPONDENTS CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS AND VERIZON COMMUNICATIONS, INC.'S PETITION FOR CERTIFICATION (WHICH WILL ALSO SERVE AS PROPOSED AMICI'S BRIEF IF THIS MOTION IS GRANTED), AS WELL AS THE CERTIFICATIONS OF JONATHAN URICK AND ALEX R. DANIEL.

Attorney for CHAMBER OF COMMERCE OF THE USA & NJ CJI

Dated: **06/26/2023**

S/ GAVIN J ROONEY

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JEFFREY ACHEY, et al., on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS AND VERIZON COMMUNICATIONS, INC., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY Docket No.: 088253 ON PETITION FOR CERTIFICATION FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-003639-21-T2 Civil Action SAT BELOW: Hon. Greta Gooden Brown, J.A.D. Hon. Patrick DeAlmeida, J.A.D. Hon. Stephanie Ann Mitterhoff, J.A.D.

CERTIFICATION OF ALEX R. DANIEL
IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

I, Alex R. Daniel, being of full age, hereby certify as follows:

1. I am licensed to practice law in the State of New Jersey. I am in-house counsel at the New Jersey Civil Justice Institute ("the Institute"), and counsel for the Institute in the above-captioned matter.

2. As counsel to the Institute, I am familiar with the facts set forth herein and am authorized to make this certification in support of the Institute's motion for leave to file a brief and participate as Amicus Curiae in this case.

3. The New Jersey Civil Justice Institute ("the Institute") is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations dedicated to improving New Jersey's civil justice system.

4. In that capacity, the Institute monitors New Jersey legislation to assess its impact on issues related to civil justice, offers comments on proposed amendments to New Jersey's Rules of Court and participates as amicus curiae in matters of interest to its membership.

5. The Institute's mission is to identify the broader civil justice implications that cases, such as this one, may have on the professionals, sole proprietors, businesses and employers within this State. As a representative of both the business and professional communities on matters of law and legal policy, the Institute offers the Court its insight into the impact of major departures from established and predictable applications of the law, including in the area of alternative dispute resolution.

6. The Institute believes that a balanced civil justice system and the enforcement of agreements to engage in alternative dispute resolution fosters

public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

7. Many of the Institute's members and affiliates regularly rely on arbitration agreements. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. The Institute's members and affiliates have structured millions of contractual relationships around the use of arbitration precisely to achieve those benefits. Accordingly, the Institute has a special interest and expertise in preserving the use of arbitration as a means to resolve disputes.

8. Thus, the Institute has a "special interest, involvement or expertise" to participate as Amici Curiae under Rule 1:13-9(a).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

/s/ Alex R. Daniel
Alex R. Daniel

Dated: June 26, 2023

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JEFFREY ACHEY, et al., on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS AND VERIZON COMMUNICATIONS, INC., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY Docket No.: 088253 ON PETITION FOR CERTIFICATION FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-003639-21-T2 Civil Action SAT BELOW: Hon. Greta Gooden Brown, J.A.D. Hon. Patrick DeAlmeida, J.A.D. Hon. Stephanie Ann Mitterhoff, J.A.D.

CERTIFICATION OF JONATHAN URICK IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

I, Jonathan Urick, being of full age, hereby certify as follows:

1. I am associate chief counsel at the United States Chamber Litigation Center, the litigation arm of proposed Amicus Curiae, the Chamber of Commerce of the United States of America ("the Chamber"), and counsel for the Chamber in the above-captioned matter.

2. As counsel to the Chamber, I am familiar with the facts set forth herein and am authorized to make this certification in support of the

Chamber's motion for leave to file a brief and participate as Amicus Curiae in this case.

3. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

4. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, such as the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

5. Many of the Chamber's members and affiliates regularly rely on arbitration agreements. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. The Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration precisely to achieve those benefits. Accordingly, the Chamber has a special interest and expertise in preserving the use of arbitration as a means to resolve disputes.

6. Thus, the Chamber has a "special interest, involvement or expertise" to participate as Amici Curiae under Rule 1:13-9(a).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

/s/ Jonathan Urick
Jonathan Urick

Dated: June 26, 2023

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SUPREME COURT OF NEW JERSEY
APP. DIV. # A-003639-21
SUPREME COURT # 088253

CRIMINAL ACTION

Jeffrey Achey, Marilyn Achey, Justin Anderson, Deidre Asbjorn, Gregory Burlak, Carla Hiorazzo, Judith Chiorazzo, John Conway, Adam DeMarco, Dean Esposito, James Fisher, Allison Gillingham, Lorraine Gillingham, Doree Gordon, Donna Hartman, Patricia Justice, David Kelly, Christina Manfredo, Alexander Navarra, Judith Oelenschlager, Daniel Patino, James Prate, Michael Scheufele, Russell Sewekow, Deborah Stroyek, Linda Teer, Christine Trappe, and Brenda Tripicchio, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

Cellco Partnership, d/b/a Verizon Wireless, and Verizon Communications, Inc.,

Defendants-Petitioners.

CERTIFICATION OF SERVICE

I hereby certify that the following documents, AMICUS CURIAE BRIEF WITH APPENDIX, MOTION FOR LEAVE TO APPEAR AMICUS CURIAE,

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