UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AVI KOSCHITZKI, On Behalf of Himself and all Others Similarly Situated, Plaintiff, vs. APPLE INC. and AT&T MOBILITY LLC, Defendants.	Civil Action No. 1:08-CV-04451-JBW-VVP

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO STRIKE THE DECLARATION OF RICHARD NAGAREDA

Plaintiff Avi Koschitzki ("Plaintiff" or "Koschitzki") submits this memorandum of law in support of his motion to strike the declaration of Richard Nagareda (the "Motion to Strike"), which Defendant AT&T Mobility LLC ("AT&T" or "Defendant") submitted in support of its motion to compel arbitration and dismiss claims (the "Motion to Compel").

I. PRELIMINARY STATEMENT[1]

In support of its Motion to Compel, AT&T submitted the declaration of Richard Nagareda ("Nagareda"), a law professor at Vanderbilt University Law School. In his declaration, Nagareda attempts to underscore the benefits that he perceives are provided to consumers by the arbitration provision contained in AT&T's purported service agreement. He goes so far as to maintain that the language of the arbitration provision at issue would actually incentivize and facilitate the filing of consumer filings on an individual basis. He bases his opinion on works he authored, including a law review article entitled "Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration and CAFA," which was published in the Columbia Law Review in 2006. *See* 106 Colum. L. Rev. 1872.

Plaintiff moves to strike Nagareda's declaration because it is intended to influence how this Court should reach its ultimate conclusion as to the enforceability of the arbitration provision, including, for example, whether its terms are unconscionable. Indeed, even a cursory review of his declaration indicates that it is not intended to "assist the trier of fact to understand the evidence or to determine a fact in issue" and, as such, is

[1] The statement of facts set forth in Plaintiff's combined oppositions to Defendants' Motion to Dismiss and Plaintiff's opposition to defendant AT&T's Motion to Compel are incorporated herein by reference.

inadmissible under Rule 702 of Federal Rules of Evidence ("FRE"). The opinion declared by Nagareda, and as submitted by AT&T, is therefore inadmissible.

For the reasons set forth herein, Plaintiff's Motion to Strike should be granted.

II. LEGAL ARGUMENT

A. The Nagareda Declaration is Based on Inadmissible Opinions

Nagareda's declaration is comprised entirely of his opinions regarding terms of the ostensible service agreement, including his belief that certain terms are favorable to consumers. As such, the subjective nature of his declaration cannot be construed as reliable and is, therefore, impermissible.

FRE 702 states the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge[2], skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 requires that the Court determine whether the offered expert evidence is reliable. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993); *see also General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997) (stating that the courts are gatekeepers for vetting the introduction of expert testimony). A court's "gatekeeping" function in intended to ensure that testimony based on "technical" or "specialized" knowledge or information is not only relevant, but reliable as well. *Kumho Tire Co., Ltd. v. Carmichael*,

[2] The term "knowledge," as used in Rule 702, embodies more than subjective belief or unsupported theory or conjecture. *See Daubert*, 509 U.S. at 590 (noting that the testimony must be reliable and based on industry practice, methods and procedures, rather than on subjective belief or unsupported speculation").

526 U.S. 137, 141 (1999); *see also Discover Fin. Servs. v. Visa U.S.A., Inc.*, 04-CV-7844 (BSJ) (DFE), 2008 U.S. Dist. LEXIS 82441 (S.D.N.Y. Oct. 11, 2008).

An expert should explain, with more than subjection belief or conjenture, how or why a conclusion was reached. *See, e.g., Barban v. Rheem Textile Sys.*, 147 Fed. Appx. 222 (2d Cir. N.Y. 2005) (reasoning that regardless of whether the proffered expert was qualified to render his expert opinions, the district judge maintains discretion to preclude unreliable and speculative opinions); *Colon v. Abbott Labs.*, 397 F. Supp. 2d 405, 413-14 (S.D.N.Y. 2005) (explaining that if expert testimony is mere opinion based on speculation, it should be excluded).

Indeed, when an expert opinion is based on information or sources that are insufficient to support the opinions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony. *Emig v. Electrolux Home Prods.*, Case No. 06-CV-4791 (KMK), 2008 U.S. Dist. LEXIS 68811, at *23 (S.D.N.Y. Sept. 10, 2008). An expert must have good grounds for his or her opinions and, ultimately, the goal is to ensure that the expert's testimony is reliable and relevant. *Kumho*, 526 U.S. at 150.

Here, Nagareda's declaration expresses opinion based solely upon his own subjective belief. Pursuant to FRE 702, as well as *Daubert* and its progeny, his opinion that AT&T's purported arbitration agreement contains terms that are favorable to consumers is inadmissible. Consequently, even if Nagareda is shown to have the requisite qualifications to be deemed an expert witness under Rule 702, his stated opinion is unequivocally based upon his own subjective belief and, thereby, inadmissible.

The opinions articulated by Nagareda in his declaration are rooted in his own personal supposition and his own writings. He opines, for example, that AT&T's

arbitration provision favors consumers and that the terms of the arbitration provision would encourage consumers to file individual arbitration claims. He does not, however, substantiate those opinions or beliefs. The declaration likewise fails to offer objective information to support his theories or speculative opinions. According, Nagareda's declaration must be stricken.

B. The Nagareda Expert Declaration Improperly Draws Legal Conclusions

Nagareda's declaration, which appears factually-based in nature, is actually submitting a legal opinion for this court to consider. By stating that several terms in AT&T's arbitration provision are consumer-friendly, Nagareda is essentially arguing that the arbitration provision is not substantively unconscionable. In an action pending in the District of New Jersey – *Larson v. AT&T Mobility LLC f/k/a Cingular Wireless LLC*, Civil Case No. 07-CV-5325 (JLL-ES) – Nagareda submitted a declaration in support of AT&T Mobility LLC's motion to compel arbitration. *See* Reich Aff., Ex. D. There, he openly stated his opinion as to whether the applicable arbitration clause was unconscionable. In response, plaintiff there moved to strike his declaration on several bases – including an argument stating that Nagareda's inappropriate legal conclusions were inadmissable. (The court has not ruled on plaintiff's motion.)

Here, Nagareda tries to avoid blatantly stating that he believes the arbitration provision purportedly at issue is or is not unconscionable. However, by stating that (1) he believes the terms and conditions are favorable to consumers; and (2) that the language of the arbitration provision will encourage individual arbitration claims, Nagareda is openly asking this Court to draw legal conclusions regarding substantive unconscionability of the arbitration clause. *United States v. Bilzerian*, 926 F.2d 1285,

1294 (2d Cir. 1991) (noting that the use of expert testimony "must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge as to the applicable law or the role of the jury in applying that law to the facts before it"); *see also United States v. Scop*, 846 F.2d 135 (2d Cir. 1988). As such, Nagareda's expert testimony on the legal standard for substantive unconscionability must be stricken as inadmissible. *See Pereira v. Cogan*, 281 B.R. 194, 198 (S.D.N.Y. 2002) ("an expert's testimony on issues of law is inadmissible").

III. CONCLUSION

For the reasons set forth herein, Plaintiff's Motion to Strike should be granted.

RIGRODSKY & LONG, P.A.

DATED: January 8, 2008

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