UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AVI KOSCHITZKI, on Behalf of Himself and all Others Similarly Situated,

Plaintiff,

v.

Case No. 1:08-cv-04451-JBW-VVP

APPLE INC. and AT&T MOBILITY LLC,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION OF AT&T MOBILITY LLC FOR A PROTECTIVE ORDER

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Pursuant to Federal Rule of Civil Procedure 26(c), defendant AT&T Mobility LLC ("ATTM") respectfully moves this Court for a protective order barring plaintiff Avi Koschitzki from taking the depositions of ATTM employees Caroline Mahone-Gonzalez and Adam Gill, Vanderbilt law professor Richard Nagareda, and Apple Inc. ("Apple") employee TJ Terry. Koschitzki noticed the depositions in response to Judge Weinstein's original order of February 11, 2009, which set an evidentiary hearing for March 13, 2009 on ATTM's pending motion to compel arbitration and Koschitzki's motion to strike Professor Nagareda's supporting declaration. Yet Judge Weinstein has since ruled—and on Friday reconfirmed—that full briefing and oral argument on the motions must take place before he makes a determination as to whether an evidentiary hearing is even appropriate. Particularly in light of that determination, a protective order should be granted for the following reasons:

First, the plaintiff should not be permitted to impose the burden and expense of discovery on ATTM, its employees, and other individuals before Judge Weinstein decides whether the motions may be resolved as a matter of law, making further factual development unnecessary. Indeed, conducting a fishing expedition that may be unnecessary contravenes the Supreme Court's instruction that arbitrable disputes should be moved "out of court and into arbitration ***as quickly and easily as possible***." *Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) (emphasis added; internal quotation marks omitted).

Second, the noticed depositions are unnecessary because they could not turn up facts that would prevent ATTM's motion to compel arbitration from being granted as a matter of law. In our motion, we pointed to two arbitration agreements that Koschitzki entered into with ATTM. Since we filed our motion, Koschitzki entered into a third such agreement. Each agreement is identically worded—covering "all disputes and claims between" the parties—and thus independ-

ently covers this dispute. Yet in his opposition, Koschitzki makes no effort to challenge the formation of the first of those agreements.[1] Thus, the dispositive issue is a legal one: whether Koschitzki's dispute falls within the scope of that arbitration agreement. It does. Time and again, the Supreme Court and the Second Circuit have confirmed that an agreement to arbitrate "all disputes" means precisely that—all disputes. Accordingly, there is no need for the Court to consider Koschitzki's arguments about the second agreement. But even as to that second agreement, discovery is unnecessary because Koschitzki himself alleges that he signed that agreement (and we are submitting a copy of that signature with this motion). Although he says in his affidavit that he does not recall whether he had a chance to read the agreement first, New York law is emphatic that he is bound by an agreement he signed regardless of whether he read it or had an opportunity to do so.

Third, the noticed depositions would impose an entirely unnecessary burden. The ATTM and Apple employees provided documents with their declarations that speak for themselves. Koschitzki does not need a deposition to learn what is obvious from those documents. He also does not need a deposition to explore facts described in the employees' declarations that he does not dispute. In addition, Professor Nagareda's deposition is not needed to resolve Koschitzki's motion to strike. Because Professor Nagareda's testimony is non-technical and solely for the Court's benefit, the Court can decide for itself whether that testimony is useful. In addition, the basis for Professor Nagareda's opinions may be found in a law review article he identified in his declaration as the source for his analysis. Moreover, because Professor Nagareda's testimony relates to Koschitzki's unconscionability challenge—a challenge that fails on its face under New York law—delaying the resolution of ATTM's arbitration motion for discovery on the issues

[1] He also says nothing about the third agreement even though he entered into it before he filed his opposition.

raised by Professor Nagareda's declaration would permit the tail to wag the dog.

Fourth, the law is clear that Koschitzki may not require ATTM's witnesses to travel hundreds (or thousands) of miles for a deposition, absent exceptional circumstances justifying the burden. No such circumstances exist here. Moreover, because many of the witnesses are not parties or officers, directors, or managing agents of parties, Koschitzki would be required to serve valid subpoenas on them in order to compel their attendance at a deposition. And any effort to issue subpoenas would violate Rule 45(c)(3)(A)(ii), which does not permit Koschitzki to require such witnesses to travel from their homes in California, Atlanta, and Nashville to be deposed in his counsel's offices on Long Island. Moreover, Koschitzki failed to seek leave of court before noticing depositions in advance of the Rule 26(f) conference.

BACKGROUND

Koschitzki alleges that he is a New York resident who "purchased an iPhone [3G]" from an Apple store "and signed an agreement for monthly service provided by [ATTM]." Am. Compl., Dkt. No. 7, ¶ 5. Koschitzki originally filed his putative class-action lawsuit against Apple. After he amended his complaint to add ATTM as a defendant, ATTM responded by moving to compel arbitration in November 2008.

A. ATTM Confirms Koschitzki's Allegation That He Executed A Signature For An ATTM Service Agreement When He Bought His iPhone 3G And Provides A Similar Agreement For Koschitzki's Other Cell Phone.

In its motion to compel arbitration, ATTM explained that it agreed that Koschitzki had, as he alleged, "signed an agreement for monthly service provided by [ATTM]" when he purchased an iPhone 3G from an Apple store. Am. Compl. ¶ 5; *see also* Mem. in Supp. of Mot. to Compel Arb. ("Arb. Mem."), Dkt. No. 17, at 1–2. ATTM also explained that, two days before buying the iPhone 3G, Koschitzki had entered into another service agreement when he activated a Sony Ericsson cellular phone on another line of service. Arb. Mem. 1–2. ATTM demonstrated

that each of Koschitzki's service agreements requires both parties to pursue all disputes—including this one—in arbitration or small claims court. *Id.* at 5–8.

The evidence ATTM submitted was straightforward. First, ATTM submitted a declaration from Caroline Mahone-Gonzalez, an ATTM employee based in Sacramento, California who is an area manager in one of the company's customer service offices. Mahone-Gonzalez reviewed ATTM's "records for [Koschitzki's] account" and stated that those records indicated that, on August 27, 2008, Koschitzki "placed a telephone order with an ATTM customer care representative for a Sony Ericsson W580i cellular phone." Decl. of Caroline Mahone-Gonzalez, Dkt. No. 20, ¶¶ 3–4. ATTM also submitted a declaration from Adam Gill, an ATTM employee in Atlanta, Georgia who, among other things, manages the team that creates the documents given to customers who place such orders. Gill testified that a customer who has ordered a cellular phone from an ATTM customer care representative by telephone "is sent a Customer Guide enclosed within a Quick Start Guide along with the shipment containing the cellular phone." Decl. of Adam Gill, Dkt. No. 18, ¶ 3. Gill attached those documents to his declaration. *See id.* Exs. 1–2. Those documents contain a copy of ATTM's terms of service. *Id.* Ex. 2 at 9–16. They also contain the instructions for activating the phone by accepting the terms of service either online or by telephone "using ATTM's Interactive Voice Response ('IVR') system." *Id.* Ex. 1 at 1; *id.* Ex. 2 at 2. To do so, the customer must identify himself or herself by providing his or her "SSN or tax ID number" and "zip code" and then affirm that he or she "accept[s]" ATTM's "service terms and conditions." *Id.* Ex. 1 at 1; *id.* Ex. 2 at 2. In her declaration, Mahone-Gonzalez indicates that ATTM's records reflect that Koschitzki used ATTM's IVR system on August 29, 2008 to activate his Sony Ericsson cell phone. Mahone-Gonzalez Decl. ¶ 4.

ATTM's records also reflect that—just as Koschitzki alleges (Am. Compl. ¶ 5)—

Koschitzki "obtained an iPhone 3G from an Apple retail store" on August 31, 2008 (Mahone-Gonzalez Decl. ¶ 5). ATTM submitted a declaration from TJ Terry, Apple's Senior Manager of Store Operations, who confirmed Koschitzki's allegation that he "signed an agreement for monthly service provided by [ATTM]." Am. Compl. ¶ 5. Terry stated that "[a]ny customer who purchases an iPhone 3G from an Apple retail store must confirm that he or she accepts the terms of [ATTM] service as a condition of completing the transaction." Decl. of TJ Terry, Dkt. No. 18, ¶ 3. To do so, "a customer must mark a box labeled 'AT&T Terms and Conditions'" on a screen that says "Ask Customer to read Agreement and sign" on an "EZ Pay handheld device." *Id.* ¶ 4 & Ex. 1. The customer then must "write his or her signature" on the device." *Id.* ¶ 4 & Ex. 5. Terry testified that "Apple's policy" is to "offer to show customers a copy of [ATTM's] Wireless Service Agreement, including its Terms of Service" on a computer in the store and to "print out copies for the customer upon request." *Id.* ¶ 5. Terry attached a printout of that agreement to his declaration. *Id.* Ex. 3. Terry also verified that, as Koschitzki had alleged (Am. Compl. ¶ 5), "Apple's records regarding plaintiff Avi Koschitzki's purchase of an iPhone 3G at an Apple retail store" confirm that he "marked the boxes and executed his signature indicating that he agreed to [ATTM's] Wireless Service Agreement * * *." Terry Decl. ¶ 7. In addition, in a supplemental declaration filed with this motion, Terry attaches that electronic record of Koschitzki's signature. Supp. Decl. of TJ Terry ¶ 3 & Ex. 1.

B. Each Of Koschitzki's Service Agreements Requires That All Disputes Be Pursued In Individual Arbitration Or Small Claims Court.

The terms of service for each of Koschitzki's ATTM service agreements include an arbitration provision. *See* Gill Decl. Ex. 2 at 14–16; Terry Decl. Ex. 3 at 7–9. Those provisions are worded identically. They provide: "[ATTM] and you agree to arbitrate ***all disputes and claims between us***. This agreement to arbitrate is intended to be broadly interpreted." Gill Decl. Ex. 2

at 14 (emphasis added); Terry Decl. Ex. 3 at 8. They specify that arbitration must be conducted on an individual rather than class-wide basis, and that either party may instead opt to bring a claim in small claims court. Gill Decl. Ex. 2 at 14; Terry Decl. Ex. 3 at 8.

Anticipating Koschitzki's argument that this latter requirement is unconscionable, ATTM demonstrated that under its arbitration provision individual arbitration is a realistic and fair means of resolving disputes like Koschitzki's. Under ATTM's provision, customers arbitrate for free and may recover statutory attorneys' fees to the same extent as they could in court. Arb. Mem. 2–3. In addition, customers can recover much greater relief than a court could award: If the customer bests ATTM's last written settlement offer in arbitration, the customer receives $5,000 and double attorneys' fees in lieu of any smaller arbitral award. *Id.* at 3.

In further support, ATTM submitted a declaration from Professor Richard Nagareda, a law professor at Vanderbilt University Law School who is an expert in the field of aggregate dispute resolution in general and class action litigation in particular. *See* Decl. of Richard A. Nagareda, Dkt. No. 22, ¶¶ 1–4. Professor Nagareda explains that he reviewed a draft version of ATTM's provision and that he "ha[s] never seen an arbitration provision that has gone as far as this one to ensure that consumers and their attorneys have adequate incentives to bring claims." *Id.* ¶¶ 10–11. He indicates that he analyzed the provision using the framework he had laid out in a law review article he had recently published. *Id.* ¶¶ 5–10 (citing Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006)). Applying this analysis, he concluded that the provision "reduces dramatically the cost barriers to the bringing of individual consumer claims, is likely to facilitate the development of a market for fair settlements of such claims, and provides financial incentives for consumers (and their attorneys, if any) to pursue arbitration in the event that they are dissatis-

fied with whatever offer ATTM has made to settle their dispute." *Id.* ¶ 11.

C. Koschitzki Agrees A Third Time To ATTM's Arbitration Provision.

On December 31, 2008, after ATTM had moved to compel arbitration, Koschitzki used ATTM's web site to purchase yet another cellular device—a Blackberry Curve—for use with ATTM's network. As ATTM will demonstrate in connection with its reply brief in support of its arbitration motion, during that transaction Koschitzki clicked a box next to the statement "I have read and agree to the service agreement." Immediately above that statement, a copy of that service agreement, including ATTM's terms of service, appeared in a scrollable text box. The terms of service of that agreement contained the same arbitration provision as the other service agreements Koschitzki accepted.

D. Koschitzki Opposes ATTM's Motion To Compel Arbitration But Does Not Deny That He Agreed To Arbitrate His Disputes.

On January 8, 2009, Koschitzki filed an opposition to ATTM's motion to compel arbitration, along with an affidavit he executed. In those documents Koschitzki ***never*** affirmatively denies that he agreed to arbitrate his disputes with ATTM. In particular, he does not deny that he accepted ATTM's terms of service—and its arbitration provision—when he activated his Sony Ericsson cell phone. Instead, he contends that his first service agreement is "irrelevant" because his claims relate to his iPhone 3G. Pl. Mem. of Law in Opp. to ATTM's Mot. to Compel Arb. ("Arb. Opp."), Dkt. No. 38, at 4–5. (As we explain below, that contention is legally erroneous.)

In addition, Koschitzki does not deny that he accepted ATTM's terms of service—and the same arbitration provision—when he purchased his iPhone 3G two days later. In particular, he does not retract his earlier allegation that he "signed an agreement for monthly service provided by [ATTM]" at the Apple store. Am. Compl. ¶ 5. Rather than denying that contract, he says in his affidavit merely that he "do[es] not recall being offered or being provided the terms

and conditions of any AT&T service agreement * * *." Aff. of Avi Koschitzki, Dkt. No. 41, ¶ 3. And in his opposition, he argues that ATTM failed to prove that he "read, reviewed or even had access to [ATTM]'s service agreement before purchasing and/or activating" it. Arb. Opp. 6. Koschitzki also argues that the arbitration provision in the contract for his iPhone 3G is procedurally and substantively unconscionable under New York law. *Id.* at 8–20. (Again, as we discuss below, these arguments fail as a matter of law.)

Last, Koschitzki failed to mention that he had recently entered into a new ATTM service agreement when he purchased a Blackberry Curve from ATTM's web site.

E. Koschitzki Moves To Strike Professor Nagareda's Declaration.

Koschitzki also moved to strike Professor Nagareda's declaration. First, Koschitzki argued that expert testimony is "inappropriate" "at the current stage of this litigation"—*i.e.*, at the motion-to-compel-arbitration stage. Arb. Opp. 12–13. Second, Koschitzki asserted that the testimony is inadmissible under Federal Rule of Evidence 702 because (he claims) Professor Nagareda "expresses opinion based solely" upon "subjective belief" that (in Koschitzki's view) does not comply with the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Mot. to Strike Decl. of Richard Nagareda ("Mot. to Strike"), Dkt. No. 40-2, at 4. Third, Koschitzki contended that Professor Nagareda's testimony consists of impermissible "legal opinion." *Id.* at 5.

F. Koschitzki Notices Depositions To Prepare For A Now-Vacated Evidentiary Hearing.

On February 11, 2009—while the parties were preparing reply briefs in support of their respective motions—the Court (Judge Weinstein) *sua sponte* calendared an evidentiary hearing on both motions for March 13, 2009. Order, Dkt. No. 44, at 1. On the following day, counsel for ATTM electronically filed a letter and sent by overnight delivery a courtesy copy to the

Court. *See* Letter, Dkt. No. 46, at 1. In the letter, ATTM requested that the Court take the evidentiary hearing off calendar and instead hear oral argument on both motions and on whether (in light of that argument) an evidentiary hearing on either motion would be necessary. *Id.* The letter explained that "an evidentiary hearing would be an unnecessary burden to the Court, the parties, and the witnesses, who would need to travel from" hundreds (or thousands) of miles away, because full briefing and oral argument "may eliminate the need to have any evidentiary hearing at all, or at a minimum would simplify the issues to be covered at such a hearing." *Id.*

The following Tuesday, on February 17, 2009, counsel for Koschitzki emailed to counsel for ATTM and Apple notices of depositions for Caroline Mahone-Gonzalez, Adam Gill, TJ Terry, and Richard Nagareda. The notices called for depositions to take place between February 26 and March 2 and for the witnesses to travel to the offices of plaintiff's counsel on Long Island. The notices also demanded that the witnesses produce "[a]ll documents you reviewed, relied on, or used in connection with the preparation of your affidavits."

On Wednesday, February 18, 2009, ATTM's counsel at Mayer Brown LLP's Washington, DC office, who are principally responsible for the proceedings relating to arbitration, learned that the Court had, the previous day, granted ATTM's request to convert the evidentiary hearing to an oral argument. *See* Order, Dkt. No. 56, at 1. Counsel for ATTM forwarded the faxed order to all the parties. The order provided that "[o]ral argument, without witnesses, will be heard on [the] date scheduled, with evidentiary [hearing] to take place shortly thereafter if required." *Id.*

G. At Plaintiff's Request, Judge Weinstein Holds A Brief Status Conference In Which Defendants' Counsel Participate By Telephone.

On Friday, February 20, 2009, at the behest of Koschitzki's counsel, the parties appeared before the Court for a status conference. Judge Weinstein reiterated that full briefing and oral argument should take place on the pending motions in lieu of an evidentiary hearing: "All right.

So everybody agrees and we will go forward in accordance with my order." Tr. of Proceedings, Feb. 20, 2009, Dkt. No. 58, at 7:10–11. Counsel for Koschitzki indicated that they had propounded discovery. Judge Weinstein instructed them to "[t]ake that up with the magistrate judge." *Id.* at 8:15.

ARGUMENT

Federal Rule of Civil Procedure 26(c) authorizes this Court to issue a protective order to relieve ATTM of the "undue burden" of submitting to discovery that, at a minimum, is premature, and that almost certainly is unnecessary. Because Koschitzki's discovery requests flout the limitations on discovery imposed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, this Court should issue a protective order. Moreover, the notices of deposition are improper under the Federal Rules of Civil Procedure: The witnesses Koschitzki seeks to depose cannot be compelled to travel across the country for depositions in New York.

I. The Noticed Depositions Are Premature Because The Court Has Postponed Inquiry Into Any Factual Issues That The Pending Motions May Present.

The depositions that Koschitzki has noticed are premature. Koschitzki noticed them in response to Judge Weinstein's *sua sponte* order setting an evidentiary hearing on ATTM's pending motion to compel arbitration and Koschitzki's pending motion to strike Professor Nagareda's declaration. But that evidentiary hearing has now been vacated because Judge Weinstein concluded that full briefing and "oral argument, without witnesses" may eliminate the need to have any evidentiary hearing at all. Order, Dkt. No. 56, at 1. At the status conference on Friday, February 20, 2009, Judge Weinstein reiterated his ruling to proceed "in accordance with [his] order" (Tr. of Proceedings, Feb. 20, 2009, at 7:10–11) and to try to resolve both pending motions as a matter of law, thus sparing the Court, the parties, and the witnesses the burdens and expense of unnecessary factual development. If, following oral argument, Judge Weinstein believes that it

is necessary to conduct an evidentiary hearing, that would be the appropriate time for the parties to meet and confer about discovery.

By contrast, Koschitzki's demand that depositions take place now—before oral argument on the dispositive legal issues—is wholly inconsistent with the FAA. As the Supreme Court has said time and time again, Section 2 of the FAA, "'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner." *Preston*, 128 S. Ct. at 983 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)); *see also, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Accordingly, the Court recently reiterated that "Congress' intent" in enacting the FAA is "'to move the parties to an arbitrable dispute out of court and into arbitration ***as quickly and easily as possible***.'" *Preston*, 128 S. Ct. at 986 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)) (emphasis added). When, as here, a motion to compel arbitration is pending, the FAA "call[s] for an expeditious and summary hearing, with only ***restricted inquiry*** into factual issues." *Moses H. Cone*, 460 U.S. at 22 (emphasis added); *see also, e.g.*, *Booth v. Hume Publ'g, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) (same). Koschitzki's insistence that the declarants in support of ATTM's motion—who are scattered across the country—travel to the offices of plaintiff's counsel on Long Island for depositions that may be entirely unnecessary would impose enormous burdens on those potential witnesses. That directly contravenes the Supreme Court's directive in *Moses H. Cone*. Forcing a party seeking to enforce an arbitration agreement to submit to burdensome discovery into tangential factual matters—especially when there is no factual dispute about the formation of a binding arbitration agreement—is inappropriate. The imposition of such burdens threatens to eliminate the very benefits that arbitration is designed to provide.

II. The Depositions Constitute An Unnecessary Burden Because A Number Of Threshold Legal Issues Dispose Of Koschitzki's Objections To Arbitration.

The depositions Koschitzki seeks should be barred because they are part of an unnecessary fishing expedition into supposed factual issues that are unnecessary to consider in resolving ATTM's arbitration motion. Because that motion must be granted as a matter of law, discovery into tangential issues is entirely inappropriate.

By the time it files its reply brief, ATTM will have proffered evidence that Koschitzki agreed to arbitrate his disputes with ATTM on at least three occasions. To avoid arbitration, Koschitzki would be required to show that ***none*** of these three agreements is valid. That burden is insuperable. To begin with, ATTM's motion to compel arbitration identified two ATTM service agreements containing arbitration provisions, each of which Koschitzki accepted. *See* pages 3–5, *supra*. The first is the service agreement he accepted when he activated his Sony Ericsson cell phone by following the instructions in the Quick Start Guide: (1) to dial into ATTM's IVR system, (2) to identify himself with his social security number and zip code, and (3) to affirm that he accepts the terms in the Guide. *See* pages 3–4, *supra*. The second is the "agreement for monthly service provided by [ATTM]" that Koschitzki himself alleges that he "signed" when he purchased his iPhone 3G. Am. Compl. ¶ 5; *see* pages 4–5, *supra*. The agreements contain identical provisions requiring both parties "to arbitrate ***all disputes and claims*** between us" or pursue them in small claims court. Gill Decl. Ex. 2 at 14 (emphasis added); *see also* Terry Decl. Ex. 3 at 8.

Moreover, since ATTM filed its motion to compel arbitration—which made abundantly clear to Koschitzki that ATTM's terms of service require arbitration—Koschitzki entered into a third service agreement when he used ATTM's web site to purchase a Blackberry Curve for use with ATTM's network. *See* page 7, *supra*. During that transaction, Koschitzki clicked a box

next to the statement, "I have read and agree to the service agreement," which appeared immediately above in a scrollable text box. That agreement also contained the same all-encompassing arbitration provision as Koschitzki's previous service agreements. Each of these arbitration agreements independently covers this dispute.

In his opposition to ATTM's motion to compel arbitration, Koschitzki ***does not challenge the formation of his first arbitration agreement***. Instead, he argues that the arbitration provision in his service contract for his Sony Ericsson cell phone is "irrelevant" because his lawsuit pertains to his iPhone 3G. Arb. Opp. 4–5. This contention is a purely ***legal*** one that is potentially dispositive of the contract formation issue. If Judge Weinstein were to agree with ATTM that the all-encompassing language of the first agreement covers Koschitzki's claim, there would be no need to consider the factual smoke that Koschitzki seeks to throw up around the second agreement. Moreover, given the case law, it is highly likely that he will agree with ATTM. The Supreme Court and the Second Circuit have held time and again that an agreement to arbitrate "all disputes and claims between" the parties means precisely that—***all*** disputes, including ones unrelated to the contract. Indeed, three decades ago, the Second Circuit recognized that, "[i]f a court finds that the parties have agreed to submit to arbitration disputes 'of any nature or character,' or simply 'any and all disputes,' all questions * * * will be properly consigned to the arbitrator." *Rochdale Vill., Inc. v. Pub. Serv. Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979). The same rule applies here.[2]

[2] *See also, e.g.*, *Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 488, 491 (1972) ("There is nothing to limit the sweep of" an agreement to arbitrate "'any difference * * * between the parties'" or "to except any dispute or class of disputes from arbitration," and so "'any difference' * * * should be referred to the arbitrator for decision."); *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 282, 285 (2d Cir. 2005) (dispute over contract that did not contain an arbitration provision "plainly falls within the scope" of the parties' earlier agreement to arbitrate any dispute "'arising out of or relating to *any business relationship* between'" them)

Moreover, even if the scope of Koschitzki's agreement to arbitrate were debatable, the Supreme Court has reiterated that "any doubts concerning the scope of arbitrable issues should be resolved ***in favor of arbitration*** [when] the problem at hand is the construction of the contract language." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (emphasis added; internal quotation marks omitted).[3] Because the case law so powerfully supports ATTM's position that the first agreement covers Koschitzki's claim, there is good reason to believe that Judge Weinstein will conclude that Koschitzki's failure to dispute that he entered into the first arbitration agreement moots his arguments about the second agreement.

The same is true of Koschitzki's most recent arbitration agreement, which Koschitzki accepted when he purchased a Blackberry Curve from ATTM's web site. (As noted above (at 7), we will submit evidence of this agreement with our reply brief in support of the motion to compel arbitration.) During that online transaction, Koschitzki accepted AT&T's service agreement—and the arbitration provision it contains—by clicking the box next to the statement, "I have read and agree to the service agreement." That box and statement appear directly below the text of the service agreement. ATTM's records of Koschitzki's arbitration agreement constitute

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(emphasis by court); *Bell v. Cendant Corp.*, 293 F.3d 563, 568 & n.3 (2d Cir. 2002) (agreement to arbitrate "'[a]ny controversy arising in connection with or relating to this Agreement * * * or *any other matter or thing*'" is "as broad an arbitration provision as one can imagine" and applies to disputes arising out of a "distinct" contract) (emphasis by court); *Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machs.*, 167 F.3d 764, 767–68 (2d Cir. 1999) (agreement to arbitrate "'any act or conduct or relation between the parties'" extends to "matters that go beyond the application and interpretation of the [a]greement" itself).

[3] *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995) ("ambiguity about * * * 'whether a * * * dispute is arbitrable because it is within the scope of a valid arbitration agreement'" is "resolved in favor of arbitration") (emphasis and internal quotation marks omitted); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) ("ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration") (internal quotation marks omitted); *accord McMahan Sec. Co. v. Forum Capital Mkts. L.P.*, 35 F.3d 82, 88 (2d Cir. 1994) (arbitration must be compelled "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute") (internal quotation marks omitted).

incontrovertible proof that Koschitzki agreed yet again to arbitration.[4] Although Koschitzki may protest that his most recent arbitration agreement should not apply to his preexisting dispute relating to his iPhone, that is a purely legal question—and indeed, one to which there is a clear answer: ATTM's arbitration provision does encompass preexisting disputes, as many courts have held. For example, Judge Cote of the Southern District of New York recently analyzed the same ATTM arbitration provision and held that, because "the plain language of the arbitration clause requires both parties to submit any disputes between them, regardless of when they occur, to arbitration," under Second Circuit precedent, "the agreement to arbitrate applies to the entirety of [plaintiff's] dispute with ATTM, even though the dispute pre-dates the agreement to arbitrate." *Douce v. Origin ID TMAA 1404-236-5547*, 2009 WL 382708, at *4 (S.D.N.Y. Feb. 17, 2009).[5]

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[4] Contracts that are accepted electronically online are fully enforceable. *See* 15 U.S.C. §§ 7001 *et seq*. (The Electronic Signatures in Global and National Commerce Act); N.Y. State Tech. Law. §§ 301 *et seq*. (The Electronic Signatures and Records Act). Courts routinely enforce online contracts accepted by clicking on a box, which indicates that doing so constitutes acceptance of a contract on the web site. *See, e.g.*, *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 451–52 (E.D.N.Y. 2004) (clicking acceptance "button" on web page with a "window" displaying the terms and conditions binds the user to the terms); *accord, e.g.*, *Eslworldwide.com, Inc. v. Interland, Inc.*, 2006 WL 1716881, at *2 (S.D.N.Y. June 21, 2006) (enforcing clickwrap agreement); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237–38 (E.D. Pa. 2007) ("By clicking on" acceptance "button, Plaintiff indicated assent to the terms" in "scrollable text box"); *Siebert v. Amateur Athletic Union of the United States, Inc.*, 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006) ("The Court finds that the 'click' represents assent to the contract, including the arbitration clause."); *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010–11 (D.C. 2002) ("clicking an 'Accept' button below the scroll box" containing the contract "provide[s] adequate notice of the [contract's] forum selection clause").

[5] Other federal district courts also have held that the exact same ATTM arbitration provision applies to preexisting disputes. *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *6-7 (S.D. Cal. Aug. 11, 2008), *appeal pending*, No. 08-56394 (9th Cir.); *Davidson v. Cingular Wireless LLC*, 2007 WL 896349, at *4 (E.D. Ark. Mar. 23, 2007). Courts around the country have likewise concluded that parties can validly agree to arbitrate preexisting claims, so long as the language of the arbitration provision evinces an intent to do so. *See, e.g.*, *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646, 649–52 (6th Cir. 2008); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir. 1993); *Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL 830262, at *7 (E.D. Ark. Mar. 25, 2008); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577-79 (W.D.N.C. 2000); *see also* 9 U.S.C. § 2 ("an agreement in writing to submit to arbitration

In short, because Koschitzki's December 2008 service agreement contains an arbitration provision that covers his dispute, there is no need to consider arguments related to Koschitzki's iPhone 3G service agreement.

But even if the Court were to put aside both of Koschitzki's other service agreements, there still would be no need to conduct discovery relating to Koschitzki's iPhone 3G service agreement, because no additional facts are needed to resolve ATTM's motion to compel arbitration. Although Koschitzki asserts that ATTM failed to prove that he signed his iPhone 3G service agreement, he has already alleged in his complaint that, when he "purchased an iPhone," he "***signed an agreement for monthly service provided by AT&T***." Am. Compl. ¶ 5 (emphasis added). That allegation constitutes a judicial admission that binds Koschitzki. As the Second Circuit just reiterated: "Admissions by parties are not subject to judicial scrutiny to ensure that the admissions are fully supported by the underlying record." *Hoodho v. Holder*, 2009 WL 279654, at *5 (2d Cir. Feb. 6, 2009); *see also, e.g.*, *Bellefonte Reinsurance. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528–29 (2d Cir. 1985) (plaintiff bound by "assertion of fact" in complaint). Accordingly, the fact of his signature cannot be in dispute. And in any event, ATTM is submitting Apple's electronic record of Koschitzki's signature with this motion. *See* Supp. Terry Decl. ¶ 3 & Ex. 1.

Nor can Koschitzki justify discovery simply by saying in his affidavit that he "do[es] not recall being offered or being provided" ATTM's terms of service before he executed his signature. Koschitzki Aff. ¶ 3. Because Koschitzki concedes that he signed the contract, long-standing Second Circuit law requires him to produce "***an unequivocal denial*** that the agreement ha[s] been made" and "some evidence * * * to substantiate the denial." *Almacenes Fernandez,*

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an ***existing controversy*** arising out of * * * a contract [or] transaction * * * shall be valid, irrevocable, and enforceable") (emphasis added).

S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945); *see also*, *e.g.*, *Doctor's Assocs., Inc. v. Jabush*, 89 F.3d 109, 114 (2d Cir. 1996); *Canada Life Assur. Co. v. Guardian Life Ins. Co.*, 242 F. Supp. 2d 344, 354 (S.D.N.Y. 2003); *Scone Invs., L.P. v. Am. Third Mkt. Corp.*, 992 F. Supp. 378, 381 (S.D.N.Y. 1998). Whether Koschitzki's lack of recollection constitutes an "unequivocal denial," to say nothing of a denial accompanied by substantiating evidence, is a ***legal*** question, not a ***factual*** one.

Moreover, the outcome of that legal question is clear. As a matter of New York law, "'a party who signs or accepts a written contract is ***conclusively presumed*** to know its contents and to assent to them,'" "'[i]n the absence of fraud or other wrongful acts on the part of another contracting party'"—none of which is alleged here. *Nichols v. Wash. Mut. Bank*, 2007 WL 4198252, at *7 (E.D.N.Y. Nov. 21, 2007) (quoting *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004) (emphasis added; brackets omitted)); *accord*, *e.g.*, *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (App. Div. 2004) ("Plaintiff is bound by the arbitration provision even if she did not read it."). This conclusive presumption applies even when the signed document "incorporate[s] by reference" an arbitration provision "that may be found" in another document, "***irrespective of whether [the plaintiff] received a copy*** of the" document containing the arbitration clause. *Steelmasters, Inc. v. Local Union 580 of the Int'l Ass'n of Bridge, Structural Ornamental & Reinforcing Iron Workers*, 2008 WL 312096, at *4 (E.D.N.Y. Feb. 1, 2008) (emphasis added; citing cases); *Debono v. Wash. Mut. Bank*, 2006 WL 3538938, at *2 (S.D.N.Y. Dec. 8, 2006) ("[E]ven if he only received the last page, plaintiff is bound by the conditions of the Agreement once he signed it" because "[u]nder New York law * * *, it was his

responsibility to raise [any questions] prior to placing his signature on that document.").[6] Accordingly, the undisputed facts that Koschitzki (i) checked a box marked "AT&T Terms and Conditions" on a handheld device screen stating "Ask Customer to read Agreement and sign" (Terry Decl. Ex. 1), and (ii) signed his name on a succeeding screen conclusively establish that he had accepted and is bound by AT&T's terms of service.

All that remains of Koschitzki's objections to arbitration is his contention that arbitration on an individual basis would be unconscionable under New York law. But that issue is a legal one, making depositions of anyone (and certainly Terry, Mahone-Gonzalez, and Gill) unnecessary. Moreover, in case after case, New York courts have rejected identical unconscionability challenges to individual-arbitration agreements. *Harris v. Shearson Hayden Stone, Inc.*, 435 N.E.2d 1097, 1097 (N.Y. 1982), *aff'g*, 441 N.Y.S.2d 70, 75 (App. Div. 1981); *Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div.), *leave to appeal denied*, 857 N.E.2d 1137 (N.Y. 2006); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (App. Div. 2004), *leave to appeal denied*, 832 N.E.2d 1189 (N.Y. 2005); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div.), *leave to appeal denied*, 807 N.E.2d 290 (N.Y. 2003); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (App. Div. 1998); *accord, e.g.*, *Douglas v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 495 F.3d 1062, 1068 (9th Cir. 2007), *cert denied*, 128 S. Ct. 1472 (2008).

In sum, Koschitzki's proposed discovery should be barred, at minimum, until Judge Weinstein has had a chance to consider the potentially dispositive legal questions at oral argu-

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[6] *See also Gold*, 365 F.3d at 149–50 (employee was bound to NASD rules incorporated by arbitration agreement that he signed despite his "failure to fully read and [ask] questions" about "the forms"); *Baldeo v. Darden Rests., Inc.*, 2005 WL 44703, at *5 (E.D.N.Y. Jan. 11, 2005) ("[E]ven had [the employee] never received the handbook [containing the arbitration clause], her failure to review it would not allow her to avoid her [arbitration] agreement" because she had "signed the Acknowledgment form stating that" she agreed "to the terms and conditions" in the handbook).

ment on March 13. In light of the many independent legal grounds that would call for granting ATTM's motion without the need to consider asserted factual disputes, the depositions Koschitzki has requested constitute an unnecessary burden.

III. The Noticed Depositions Of Adam Gill, Caroline Mahone-Gonzalez, And TJ Terry Are Overly Burdensome Because The Documents About Which They Testify Speak For Themselves, And Koschitzki Does Not Dispute The Events They Describe.

Koschitzki's plan to depose Gill, Mahone-Gonzalez, and Terry is overly burdensome for an additional reason: Those witnesses' declarations primarily served to authenticate documents such as Koschitzki's service agreements. Those documents speak for themselves, making a deposition unnecessary. Indeed, Koschitzki does not dispute the statements made by Gill and Mahone-Gonzalez in their declarations, making it clear that what he has in mind is a fishing expedition.

Koschitzki does not need a deposition to determine whether he saw ATTM's Quick Start Guide before he activated his Sony Ericsson cell phone by accepting the terms of service in the Guide. The Guide itself contains the activation instructions, including the dial-in number for ATTM's Interactive Voice Response system. And ATTM's records show that Koschitzki used that system to activate his phone and accept the Terms of Service—facts that Koschitzki does not (and could not truthfully) deny.

Koschitzki also does not need a deposition to determine whether, as he himself alleges (Am. Compl. ¶ 5), he executed his signature at the Apple store to accept ATTM's terms of service. ATTM is submitting the electronic record of Koschitzki's signature on the signature-capture device in the Apple store with this motion. Supp. Terry Decl. ¶ 3 & Ex. 1.

Moreover, ATTM will be submitting additional documents with its reply brief—including the records that show that Koschitzki agreed to arbitrate a third time by accepting ATTM's terms of service online when he purchased a Blackberry Curve.

Because the information that Koschitzki seeks "can be gleaned from the documents themselves" or is not in dispute, depositions would be unnecessary and overly burdensome. *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 828 (S.D. Miss. 2001) (barring pre-arbitration discovery), *aff'd*, 34 F. App'x 964 (5th Cir. 2002); *Stephens v. Wachovia Corp.*, 2008 WL 686214, at *8 (W.D.N.C. Mar. 7, 2008) ("Plaintiff has failed to show how the evidence already presented to the Court is not adequate to determine these [arbitrability] issues.").

IV. The Noticed Deposition Of Professor Nagareda Is Not Needed To Resolve Koschitzki's Motion To Strike Professor Nagareda's Declaration.

To permit Koschitzki to depose Professor Nagareda at this point in the litigation would occasion needless and undue expense and delay.

First, for obvious reasons, discovery will not assist Koschitzki in resolving his law-based objections to Professor Nagareda's declaration. Koschitzki raises two, purely legal issues regarding the declaration: whether expert testimony may be submitted at the motion-to-compel-arbitration stage, and whether Professor Nagareda's testimony constitutes an impermissible legal opinion. The legal nature of these objections obviates any need for factfinding on these issues.

Second, Koschitzki's third and final objection to Professor Nagareda's testimony—that it fails the *Daubert* test for reliability—is so insubstantial that discovery is inappropriate. To begin with, this is not a case that implicates *Daubert* concerns—*i.e.*, one in which an expert witness is called upon to present a complex, technical opinion of unknown reliability to a jury. Professor Nagareda's testimony is purely for the Court's consideration, where discretion to dispense with *Daubert* briefing and hearings is at its zenith. *See, e.g., Chitayat v. Vanderbilt Assocs.*, 2007 WL 2890248, at *2 (E.D.N.Y. Sept. 27, 2007). For this very reason, a federal district court recently rejected a Rule 702 objection to Professor Nagareda's testimony in another ATTM case, explaining that because ATTM's motion to compel arbitration is "a matter to be decided by the court

and not a jury," the court can give his testimony the "appropriate weight," and so "[s]triking Nagareda's testimony and declarations in total, at this juncture, is unwarranted." *Francis v. AT&T Mobility LLC*, 2008 WL 5212171, at *1 (E.D. Mich. Dec. 12, 2008). Moreover, scrutinizing Professor Nagareda's testimony regarding consumers' incentives to pursue claims in arbitration is unnecessary, as his analysis is premised on basic economic concepts, such as the proposition that subsidizing an activity increases the incentive to engage in it. In any event, if Koschitzki desires to challenge Professor Nagareda's conclusions, Koschitzki need only read the article cited in Professor Nagareda's declaration, which contains his full analysis.

Third, to permit non-critical depositions and discovery on a motion to strike a declaration in support of an arbitration motion, as Koschitzki requests, contravenes the Supreme Court's command that arbitrable disputes be moved "out of court and into arbitration as quickly and easily as possible." *Preston*, 128 S. Ct. at 986 (internal quotation marks omitted). Professor Nagareda's declaration rebuts Koschitzki's argument that ATTM's arbitration provision is unconscionable—an argument that in any event is foreclosed by New York law. *See* page 18, *supra*. It would stand the FAA on its head to increase ATTM's expense of litigating its motion to compel arbitration by requiring it to submit to discovery on such a tangential issue.

V. The Deposition Notices Are Ineffective Because They Improperly Purport To Require Witnesses To Travel Hundreds (Or Thousands) Of Miles And Because Koschitzki Did Not Seek Leave To Conduct Discovery.

Even if discovery were appropriate, Koschitzki's deposition notices are defective because they fly in the face of the Federal Rules of Civil Procedure. Although Caroline Mahone-Gonzalez and TJ Terry are from California, Adam Gill is from Atlanta, and Professor Nagareda is from Nashville, Koschitzki seeks to compel them to travel hundreds (or thousands) of miles for depositions. He also failed to obtain leave of court before noticing depositions to occur prior

to the Rule 26(f) conference. Each defect warrants a protective order to spare the noticed witnesses the undue burden and expense of appearing for unauthorized depositions.

First, Koschitzki has improperly noticed depositions that would require the witnesses to travel hundreds (or thousands) of miles to be deposed at the offices of Koschitzki's counsel on Long Island. Even if the witnesses were parties to this action—and Professor Nagareda assuredly is not—"a plaintiff may overcome the presumption" that a "defendant's deposition will be held in the district of his residence" only "by showing 'peculiar' circumstances favoring deposition at a different location." *Six West Retail Acquisition v. Sony Theatre Mgmt. Corp*., 203 F.R.D. 98, 108 (S.D.N.Y. 2001) (internal citations omitted). "Courts have reasoned that since the plaintiff is free to choose the forum to litigate, and 'defendants are not before the court by choice, it is the plaintiff who should bear any reasonable burdens of inconvenience that the action presents.'" *Ward v. Leclaire*, 2008 WL 1787753, at *4 (N.D.N.Y. Apr. 17, 2008) (citation omitted). Koschitzki can point to no "peculiar circumstances" justifying the burdens he seeks to impose.

Moreover, the Rules affirmatively forbid requiring non-party witnesses such as Professor Nagareda and the ATTM employees to travel across the country for depositions.[7] As this Court has declared, "'[a] corporate employee or agent who does not qualify as an officer, director, or managing agent is ***not subject to deposition by notice***'" under Rule 37(d)(1). *Ruinsky v. Harrah's Entm't, Inc.*, 2006 WL 681200, at *1 (E.D.N.Y. Mar. 15, 2006) (Pohorelsky, M.J.) (emphasis added; quoting *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 220 F.R.D. 235, 237 (S.D.N.Y. 2004)); *see also* 8A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2103 (Supp. 2008). Caroline Mahone-Gonzalez and Adam Gill may be manag-

[7] We express no position as to Apple employee TJ Terry because we have no direct knowledge of Apple's management structure.

ers, but they are not "managing agent[s]": She is an area manager in ATTM's Office of the President (an executive-level customer-care department) and he is a senior area manager in ATTM's Customer Experience Team and Converged Services group. *See* Mahone-Gonzalez Decl. ¶ 2; Gill Decl. ¶ 2; *see also, e.g.*, *Rapoca Energy Co. v. Amci Export Corp.*, 199 F.R.D. 191, 194 (W.D. Va. 2001) (regional manager not a "managing agent"). And Professor Nagareda is a Vanderbilt law professor, not an employee of either party. Accordingly, their attendance at a deposition "must be procured by subpoena pursuant to Rule 45 * * *." *Ruinsky*, 2006 WL 681200, at *1 (citing *United States v. Afram Lines (USA), Ltd.*, 159 F.R.D. 408, 413 (S.D.N.Y. 1994)).[8] Yet Rule 45 forbids subpoenas that "require[] a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(3)(A)(ii). Accordingly, Koschitzki should not be permitted to impose the expense and burden of long-distance travel on these individuals and their employers by a deposition notice when he could not do so even with a subpoena.

Second, the deposition notices are invalid because Koschitzki failed to obtain leave "to take the deposition[s] before the time specified in Rule 26(d)." Fed. R. Civ. P. 30(a)(2)(iii). Rule 26(d) requires the parties to obtain leave of court before seeking "discovery from any source before the parties have conferred as required by Rule 26(f)." The Rule 26(f) conference has not yet occurred. Moreover, Koschitzki does not qualify for the exception to this requirement. He has not "certifie[d] in the notice, with supporting facts, that the deponent is expected to

[8] Moreover, a party cannot compel the production of documents from non-party witnesses by notice alone; rather, subpoenas are necessary. *See* Fed. R. Civ. P. 34(a) (party may "serve on any other ***party***" a request for documents "in the responding ***party's*** possession, custody, or control") (emphasis added); *id.* 30(b)(2) ("notice to a ***party deponent*** may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition") (emphasis added).

leave the United States and be unavailable for examination in this country after that time." Fed. R. Civ. P. 30(a)(2)(iii). Nor would it be appropriate for the Court to grant leave for a deposition before the Rule 26(f) conference takes place, as leave may be granted only if "consistent with Rule 26(b)(2)." *Id.* 30(a)(2). That Rule requires this Court to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* 26(b)(2)(C)(iii). For the reasons discussed earlier, that is exactly the situation here.

CONCLUSION

The Court should grant ATTM's motion for a protective order.

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Respectfully submitted,

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