No. 23-2842

In the

United States Court of Appeals

for the Seventh Circuit

PAULA WALLRICH, et al.,

Plaintiffs-Appellees,

v.

SAMSUNG ELECTRONICS AMERICA, INCORPORATED;
SAMSUNG ELECTRONICS COMPANY, LIMITED,

Defendants-Appellants.

On appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:22-cv-05506

BRIEF OF RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE SUPPORTING APPELLANTS AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2842

Short Caption: Paula Wallrich, et al. v. Samsung Electronics America, Incorporated, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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INTEREST OF AMICUS[1]

The Retail Litigation Center, Inc. ("RLC") represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 amicus briefs on issues of importance to the retail industry. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (citing the RLC's brief); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013) (citing the RLC's brief).

The RLC has a particular interest in this case because many of its retail members use arbitration programs to efficiently resolve individual disputes with their customers. "Mass arbitrations," in which plaintiffs' counsel purport to represent thousands of individual claimants in identical matters, are being brought against companies with arbitration agreements, including RLC members, at an increasing rate. Ethical issues in mass arbitration abound and

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

impact RLC member retailers, their employees, and their customers. The RLC has consulted counsel for both parties and both have consented to the filing of this amicus brief.

INTRODUCTION

The hallmark of mass arbitration is that thousands of individual claimants appear against one defendant ostensibly represented by a single firm that submits identical claims on behalf of each claimant.[2] These claimants are solicited by a law firm generally through social media advertising promising the potential for easy compensation. The "client engagement" process is typically an online questionnaire, some advertised as taking less than two minutes. Once complete, the initiating law firm claims thousands, or tens of thousands, of clients despite little to no screening to determine whether the online viewer who completed the engagement survey provided accurate information, fully understood the nature of the claim, or realized the type of representation for which they signed up. The resulting "client" population creates immense leverage against the mass arbitration target. That target company must then contend with a system based on unanswered questions about the rapid intake

[2] Amicus is not suggesting that a single counsel or firm could never represent multiple (even many) claimants with similar claims in arbitration if counsel had capacity to fully perform all obligations to their clients. However, such an arrangement is far afield from what seems to occur.

and virtually simultaneous case administration of thousands of alleged claimants *en masse*.

In cases like this one where 50,000 claimants have been amassed, each of whom purportedly wishes to bring a claim against Samsung for an alleged BIPA violation, questions include: Has claimants' counsel performed its due diligence to correspond meaningfully with each of 50,000 people to verify the identity and claims of each before triggering non-refundable fees for defendants? Has counsel verified that each claimant actually exists, possesses a Samsung phone, and believes they have been wronged by Samsung as alleged? Does each claimant really want to arbitrate individually against Samsung under BIPA, understand they have hired claimants' counsel for that purpose, and grasp that they are owed all the same ethical duties by counsel as if they were the sole client?

Realistically, there is no practical way to address these questions with the number of claimants and timeline involved in a typical mass arbitration. As illustrated here, problems quickly arise: claimants supposedly named "Bluff Master," "Vain Exp," and "Full Chck," and three claimants all named Deonta Daniels from Chicago Heights filed arbitration demands triggering nonrefundable fees. Op. Br. 23. These are not just glitches. Nonexistent and redundant claimants are falsehoods that counsel have an ethical duty to avoid.

Similar issues have popped up in mass arbitrations across the country, against retailers and corporations in various industries.

As a result, the business model that underlies mass arbitration campaigns presents professional ethical concerns. Lawyers are required to abide by their ethical obligations no matter if they represent one client or 50,000 clients. This brief aims to explain some of these concerns, which show why a defendant like Samsung might choose to rely on a AAA provision allowing the company to give claimants the option to pay the fees rather than paying millions in up-front, nonrefundable arbitration fees itself. Dist. Ct. Doc. 1-15.

Indeed, Samsung was not "hoist with its own petard," as the district court mused. RSA34. Even a company that contractually agrees to arbitrate individual claims does not agree to pay non-refundable filing fees greatly inflated by unvetted claimants who do not exist, who have no contestable claim, or who have no idea they are even participating in an arbitration.

ARGUMENT

I. Today's mass arbitration model inherently creates ethical challenges for claimants' counsel.

Mass arbitration presents noteworthy ethical challenges for claimants' counsel, for at least two reasons.

First, the mass arbitration model depends on a "mass"—a collection of thousands or tens of thousands of simultaneous claimants—to achieve its goal of

leverage for settlement. Yet unlike class actions, *these are individual clients with individual claims*. "Each plaintiff's claim is distinct, and each plaintiff is individually represented, not 'merely' a class member." Decl. of Richard Zitrin ¶ 4, *Abernathy v. DoorDash, Inc.*, No. 19-7545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1; *see also* J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1350 (2022) ("The second distinctive feature of the mass-arbitration model is that its claims proceed individually rather than being merged into something like a single class action or MDL consolidation.").[3]

Accordingly, "despite multiple parties with similar complaints, these cases are *individual* representations … and the same ethical rules that apply to lawyers who represent two clients will apply equally to lawyers representing hundreds." Richard Zitrin, *Regulating the Behavior of Lawyers in Mass Individual Representations: A Call for Reform*, 3 St. Mary's J. on Legal Malpractice & Ethics 86, 88-89 (2013) ("While plaintiffs' lawyers sometimes litigate these cases as if they are class actions, those who treat individual plaintiffs like passive class members are violating their duties to their clients."); *see also In re Valsartan N-Nitrosodimethylamine (NDMA), Losartan, & Irbesartan Prod. Liab. Litig.*, 2020 WL

[3] Class actions are different. As the Model Rules recognize, "[l]awyers representing a class of plaintiffs or defendants . . . may not have a full client-lawyer relationship with each member of the class." Rule 1.8, cmt. 16. The rules make no similar distinction for mass arbitrations, which are all separate representations.

955059, at *3 (D.N.J. Feb. 27, 2020) (stating that "[n]o matter how many different clients a lawyer represents, the lawyer owes a duty of zealous representation to each individual," that the "obligation is not mitigated because a lawyer represents multiple plaintiffs").

Such individual representation on a mass scale results in inherent tension with multiple ethical guardrails. Zitrin, *supra,* at 88 ("Even for honest lawyers who are simply trying to fit the round peg of multiple representations into the square rigid hole of the applicable ethics rules … the task proves virtually impossible."). For example, how can a lawyer with thousands of clients possibly keep in touch with each of them, or "possibly do their best job for each, fulfill their fiduciary duties to each, and advise each on what is best for that particular person . . . ? The answer is, 'with great difficulty.'" *Id.* at 91. *See also id.* at 102 ("[T]here is a disconnect, even for the most ethical lawyers, between strictly adhering to the current [ethical] rules and managing a case with huge numbers of plaintiffs.").

Second, the purpose of mass arbitration is to leverage the large number of claimants and attendant fees to force early settlement. The point of bringing thousands of identical, simultaneous demands in arbitration is "leveraging arbitration fees and fee-shifting provisions in arbitration agreements" and

"arbitrating individual claims—or credibly threatening to do so—to impose asymmetric costs on the defendants." Glover, *supra*, at 1340.

In class actions, the number and identity of class members is subject to dual party review, class certification requirements, and the oversight of a judge on both class certification and the merits of the claims. In mass arbitrations, however, where the leverage is often the *initial* arbitration fees, the sole gatekeeper is the claimants' counsel.

So, in a mass arbitration, the settlement pressure is based on the threshold fees involved with *starting* to arbitrate the claims – not actual damages or anything to do with the relationship between the company and the individual. If the claimants actually file their claims, the plan goes, the defendant immediately loses millions of dollars in nonrefundable fees. *See id.* at 1340-50; *see al*so U.S. Chamber of Commerce Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, 28-30 (Feb. 2023) (hereinafter Mass Arbitration Shakedown).[4] Counsel filing the mass arbitrations rely on the fact that these fees are imposed no matter the merits, or even the existence, of their clients' claims.

At that key pre-filing negotiation stage, there is no supervision by any arbitrator or court. The larger the mass of claimants, the more leverage their

[4] Available at: https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf

counsel has. This imposes unsupervised "*in terrorem*" settlement pressure on businesses. *See* Glover, *supra*, at 1348-49 ("[T]he fee-leveraging mechanism of the mass-arbitration model could impose settlement pressure for more dubious claims—that is to say, it could impose illegitimate, *in terrorem* settlement pressure."); *see also* Mass Arbitration Shakedown at 24-25 ("It therefore is not surprising that defendants have characterized the fees imposed by a mass arbitration as a 'ransom' and a 'shakedown.'"). This, in turn, encourages claimants' counsel to amass the greatest possible number of individual claimants, rather than performing diligence on the facts underlying each claim and zealously representing the interests of each individual claimant.

II. In practice, mass arbitration cases have seen numerous procedural abuses that raise ethical concerns.

Ethical concerns in mass arbitration are not theoretical. These concerns have played out in many ways in mass arbitration disputes, from the intake and solicitation stage through the end of the case.[5] Courts and state bar associations

[5] Given the early stage of the underlying dispute in this case, this brief focuses on pre-filing ethical concerns, including solicitations, vetting of clients and claims, and communicating with clients. There are other significant ethical concerns with mass arbitration, including concerns about the unauthorized practice of law, conflicts of interest, and aggregate settlements. Although not discussed here, these other ethical concerns with mass arbitration have been discussed elsewhere. *See, e.g.*, Zitrin, *supra*, at 95-96 (discussing ethical issues with aggregate settlements); Mass Arbitration Shakedown at 30-32 (discussing ethical issues related to the unauthorized practice of law), 38-39 (discussing ethical

have yet to address these concerns, so the burden of responding to demands and triggered fees resulting from these questionable practices falls on companies targeted in mass arbitration campaigns.

A. Misleading or oversimplified solicitations and advertisements are designed to recruit as many individuals as quickly as possible.

ABA model rules provide that a "lawyer shall not make a false or misleading communication about the … lawyer's services." *See* ABA Model R. Prof. Conduct 7.1; *see also* Ill. R. Prof. Conduct 7.1.[6] False or misleading communications include those that omit necessary facts or advertise success on behalf of other clients in a way that would lead a reasonable person to form unjustified expectations. *Id.* at cmt. 3. Rule 7.1 applies to communications with potential clients. *Id.* at cmt. 1.

Any online process designed to rapidly attract thousands of people to electronically retain an attorney to represent each in an individual action risks running afoul of Rule 7.1. Yet that is exactly the predicament presented in the mass arbitration context.

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issues related to the client's role in settlement decisions), 39-40 (discussing ethical issues related to conflicts of interest).

[6] This brief cites the ABA's Model Rules of Professional Conduct, which are nationwide and provide a model for many states' codes of professional conduct. Illinois has adopted each of the ABA rules discussed in this brief.

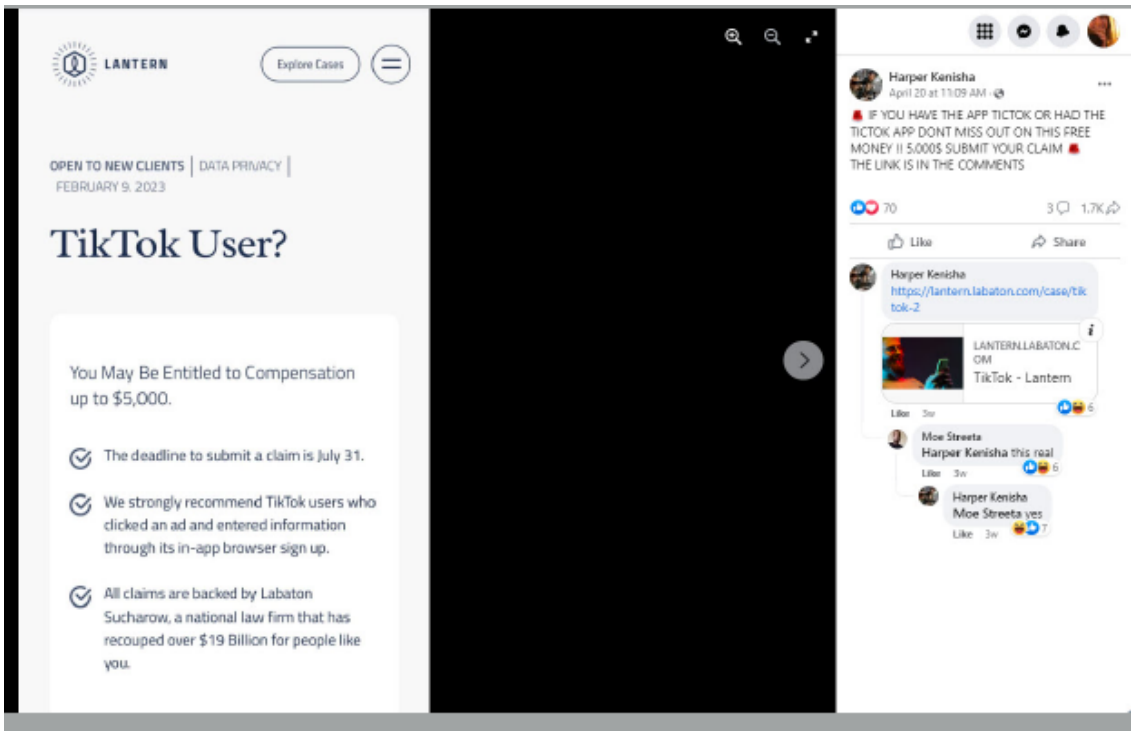
To create the "mass" of claimants needed for any mass arbitration campaign, claimants' counsel in these campaigns use streamlined online advertising programs.[7] *See* Glover, *supra*, at 1330 ("Creating the 'mass' requires firms to develop (internally) or hire (externally) an advertising and marketing team capable of designing and implementing an expansive, but also targeted, multimedia campaign."). These advertising campaigns are designed to "persuade" individuals to electronically sign up with the firm. *Id.* "Robo-powered and potentially misleading client solicitations are the first seeds of

[7] Some firms have been accused of gathering claimants by using information gleaned from confidential class member information provided in unrelated class actions. Courts have sanctioned firms for violating protective orders by using such information. Mass Arbitration Shakedown at 33, n. 154 (citing, *e.g.*, *O'Connor v. Uber Techs., Inc.*, 2017 WL 3782101, at *5 (N.D. Cal. Aug. 31, 2017) (finding that counsel violated protective order by "attempt[ing] to solicit Class Members as clients in separate arbitration proceedings that would be initiated outside of this litigation")). Samsung submitted evidence that Labaton used class list data provided purely for settlement purposes from *In re Facebook Biometric Information Privacy Litigation*, No. 3:15-cv-03747 (N.D. Cal. Aug 17, 2015) to send targeted advertising to potential claimants for its mass arbitration against Samsung. *See* Dist. Ct. Doc. 27-5, 27-6. The Amended Stipulation of Class Settlement in that case directed the Settlement Administrator to keep the class list "strictly confidential," including "the identity, mailing, and e-mail addresses of all persons" and barred the use of the list for any purpose other than administering the settlement of that case. *In re Facebook Biometric Information Privacy Litigation*, No. 3:15-cv-03747 (N.D. Cal. Aug 17, 2015), Doc. 468 at 20; Doc. 537 (Order Re Final Approval, Attorneys' Fees and Costs, and Incentive Awards). Despite this, solicitations were directly sent out to members of the class list stating counsel "recently represented you in a class action against **Facebook**" and urging recipients to see "if you qualify" for this action. *See* Dist. Ct. Doc. 27-5, 27-6.

many mass arbitration harvests." Ann Marie Mortimer, *Emerging Mass Arbitrations May Be Ideal Proving Ground for AI*, Bloomberg (Nov. 9, 2023) (attached as Ex. 1).

Typically, the advertising is done on social media. For unsophisticated consumers of legal services, these advertisements often appear to promote a means of collection from an approved class settlement – a more commonly understood method of obtaining compensation for a broad claim. As the below example makes clear, the advertisements are confusing (is this a class settlement notice or a client solicitation?) and potentially misleading (is the statute of limitations July 31 or just an arbitrary deadline to join the Lantern/Labaton mass arbitration demand?).[8]

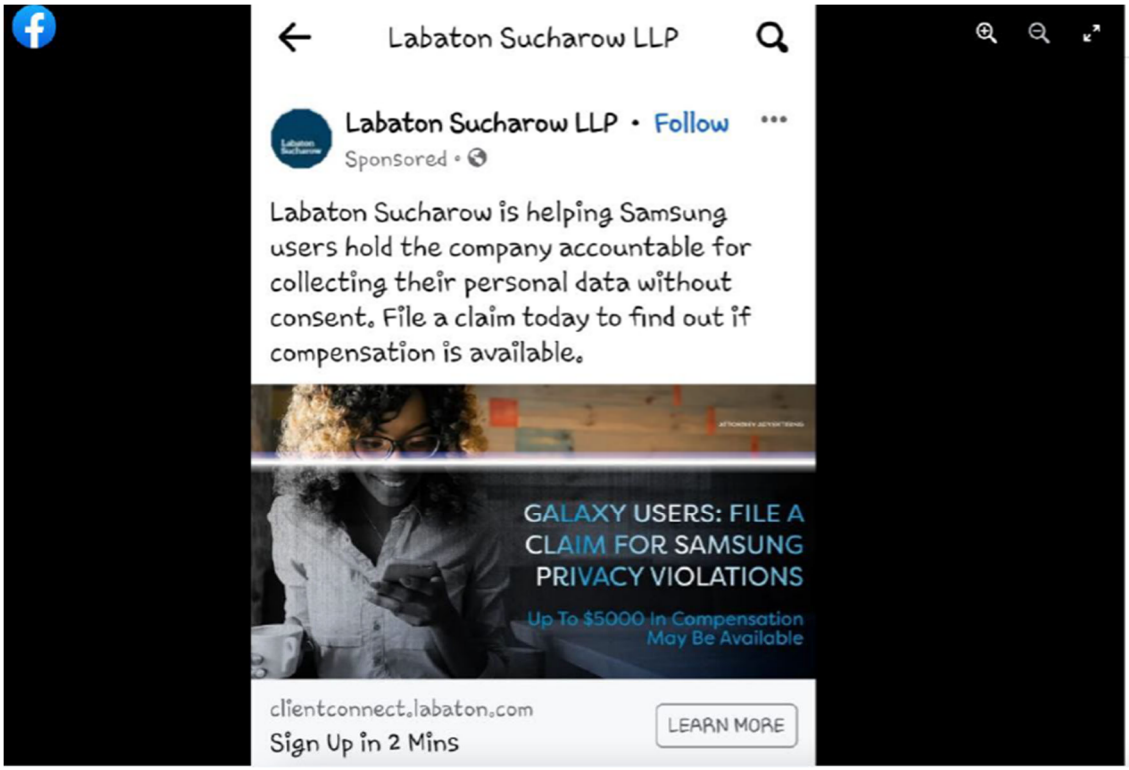
[8] Available at: https://www.facebook.com/icanmake.stormharper/posts/pfbid0JcGDL9psA6o6gVsEKzUACUpKyuMryCackWGC8aSPq2DLzM3J5oFNHAdFS67W87mul.



Once a person clicks on the solicitation, they are directed to a website where they answer a few questions on a questionnaire before officially becoming a mass arbitration claimant and "client" of the claimants' counsel. *See, e.g.*, *In re CenturyLink Sales Pracs. & Sec. Litig.*, 2020 WL 3513547, at *2 (D. Minn. June 29, 2020) (claimants' counsel engaged in online advertising and "decided whether to represent potential clients based on their responses to questionnaires"); Labaton Sacharow, *Samsung Galaxy User In Illinois?*, https://lantern.labaton.com/case/samsung#accordItem3 [hereinafter Labaton Intake Website] (example online form for claimant sign up stating "[i]t's free to start a claim and takes less than 2 minutes"); Declaratory Judgment Complaint at 26, *Uber Techs., Inc. v. Am. Arb. Ass'n*, No. 21-03782 (N.Y. App. Div., 1st Dept. Jan.

6, 2022) (showing advertisement for mass arbitration against Uber stating that it "Only Takes a Minute" to see if you qualify as a claimant).

The advertisements often use language to entice consumers to sign up or the ads make unjustifiable, conclusory statements about the likelihood of success on novel claims. This includes advertising the amount of money claimants "may be eligible for" but not mentioning anything about the claims, litigation risk, the process required to vindicate claims, or the law firm behind the advertisements. *See* Mass Arbitration Shakedown at 21. As the below example recruiting claimants in this case illustrates, advertisements may promise viewers that they can "sign up in 2 mins" to "find out if compensation is available" without any indication the person "signing up" is retaining a lawyer to individually represent them to pursue the beginning of a claim in arbitration.



Dist. Ct. Doc. 27-4.

Other advertisements seek claimants on the premise of simply striking back against corporate America. *See* Decl. of Alicia A. Baiardo ¶ 10, Exs. N, P, *Mosley v. Wells Fargo & Co.*, No. 22-CV-01976-DMS-AGS (S.D. Cal. Feb. 3, 2023), ECF No. 22 (attached as Ex. 2) (advertisement stated that "bringing hundreds of thousands of arbitrations, each resulting in thousands paid by [the bank], means consumers can finally hit one of the world's largest corporations where it hurts.").

When firms do include information about the mass arbitration, it is sometimes false or misleading. For instance, in *In re CenturyLink Sales Prac. & Secs. Litig.*, a legal ethics professor found that the solicitations for mass

arbitration claimants were "actively misleading," including stating that arbitration was the sole or primary method to pursue claims when claimants' counsel knew of a class action encompassing the same claims. Decl. of Professor Nancy J. Moore ¶¶ 8-28, No. 0:17-md-02795 (D. Minn. Jan. 10, 2020), ECF No. 511 (attached as Ex. 3) (adding that in Professor Moore's view the claimants' counsel had "engaged in numerous violations of their professional responsibilities" including of Rules 7.1 and 8.4 of the Illinois Rules of Professional Conduct). *Id.* ¶ 10.

Misleading solicitations, including oversimplified solicitations, may even be *necessary* to attract thousands of claimants to sign up as clients so quickly. *See* Glover, *supra*, at 1330 (discussing the need for mass arbitration advertising campaigns that must "persuade" individuals to sign up); *see also* Baiardo Decl. ¶ 10 (stating that firm's solicitation of claimants to join mass arbitration contained false factual statements).

When solicitations do not adequately or accurately explain key facts like the nature of the claim, the firm, and terms of the proposed representation, consumers may join a mass arbitration without knowing what they are signing up for. One claimant in a mass arbitration recently filed a letter in a related Wisconsin court action stating that the counsel who had claimed to represent him and filed a claim initiating an arbitration on his behalf was "not my legal

representative" and "falsely represented me in this *class action* lawsuit." (emphasis added). *See* Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14 (attached as Ex. 4). A week later, the same claimant filed a letter retracting his earlier letter, confirming that he *is* represented by four different law firms and now stating that none of them had "falsely represented" him. *See* Lang Letter II, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 20, 2023), ECF No. 20 (attached as Ex. 5). While that claimant withdrew his allegations against counsel, his confusion is obvious.

The Civil Justice Association of California ("CJAC") recently raised the issue of misleading solicitations in a letter to the State Bar of California. *See* CJAC Letter from Jaime Huff, Vice President and Counsel, Public Policy, Civil Justice Association of California, to Enrique Zuniga, Public Trust Liaison, The State Bar of California, *Hoeg v. Samsung*, No. 1:23-cv-01951 (N.D. Ill. Aug. 28, 2023), ECF No. 44-4 (attached as Ex. 6). CJAC asserted that some mass arbitration advertisements "make it appear that individuals are merely signing up to participate in an investigation or a class action, rather than an individual arbitration proceeding in which the claimant must engage personally." *Id.* at 3. CJAC also criticized overbroad advertisements that cause individuals without claims to believe they may have a claim. *Id.* at 4. *See also* Mortimer, *supra*

("Indiscriminate solicitations yield dubious client/lawyer relationships and a bumper crop of names of people who may or may not be within the scope of the purported mass arbitration—and may or may not understand that by 'clicking yes' they were consenting to initiate any type of legal action").

B. Today's mass arbitration client engagement model all but precludes counsel from sufficiently investigating each claimant and claim before asserting demands.

The Model Rules of Professional Conduct require lawyers to vet their clients' claims before asserting them. ABA Model R. Prof. Conduct 3.1; Ill. R. Prof. Conduct 3.1. A lawyer shall not assert a claim "unless there is a basis in law and fact for doing so that is not frivolous." *Id.* Comment 2 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." *Id.* at cmt. 2.

The nature of today's mass arbitration business model makes it nearly impossible for claimant's counsel to vet their clients' claims properly. Mass arbitration generally relies on extremely simplified online questionnaires (at best). But "[b]lindly trusting the word of a stranger who types a name into an online form and claims to be a customer or employee of a defendant company likely is not sufficient" to meet a lawyer's obligation under Rule 3.1. *See* Mass Arbitration Shakedown at 35 (citing *Nieves v. City of Cleveland*, 153 F. App'x 349,

353 (6th Cir. 2005) (affirming Rule 11 sanctions imposed on lawyer who "did not do any reasonable investigation to establish the truth of [his client's] claims, but only blindly relied on his client's accusations") and *S. Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir. 1986) ("Blind reliance on the client is seldom a sufficient inquiry" under Rule 11), *overruled in part on other grounds by Thomas v. Cap. Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc)).[9] Indeed, some claimants may not even be "strangers," but bots—roaming software programmed to emulate human activity by filling out online forms.

Because of broad solicitations, quick client onboarding, and the incentive to gather as many claimants as possible, it strains credulity to assert that counsel in any mass arbitration campaign has adequately investigated the claimants and their claims before asserting demands. In fact, evidence shows that some claimants' counsel firms do not directly communicate with people at all before signing them on as clients. *See* Respondents' Opp. to Petitioners' Mot. to Compel Arbitration at 12-15, *Hoeg v. Samsung*, No. 1:23-cv-01951 (N.D. Ill. June 14, 2023), ECF No. 38 (describing how a marketing firm signed up hundreds of people in a

[9] Similar to ethical obligations applying no matter how many claimants a lawyer represents at one time, courts have held that "Rule 11 imposes the same obligations on a lawyer regardless of whether he files one complaint or 10,000 complaints." *In re Engle Cases*, 283 F. Supp. 3d 1174, 1221 (M.D. Fla. 2017) ("[T]his Court rejects the notion that the volume of claims somehow lessens an attorney's obligations under Rule 11.").

single week in a "process [that] is done 100% online, there is no involvement from the law firm at any point.").

One recent mass arbitration filed in AAA began with nearly 4,000 claimants against a national bank, alleging they were accountholders whom the bank had charged improper fees and provided improper disclosures. But the bank quickly discovered that some claimants had stated their bank account numbers as "i don't have one"; "Idk"; "xxxxxxxxxx"; "XXX…"; "Not giving my account"; "None"; "999999999"; "N/A"; "[claimant's last name]"; "Not sure"; "Blank"; "000000000." Ex. 2, Baiardo Decl. ¶¶ 8-9, Ex. N.

When the arbitrator required claimants' counsel to identify their clients' bank account numbers and other basic qualifying information, the mass of claimants fell apart. Given a year in which to gather the information, fewer than 450 of almost 4000 claimants—one in nine—managed to show that they had the alleged contestable claims against the bank. Rule 28(j) Letter, *Mosley v. Wells Fargo & Co.*, No. 23-55478 (9th Cir. Nov. 15, 2023), ECF No. 25 (attached as Ex. 7). Meanwhile, more than 1,600 confirmed the contrary—that they were "not qualified" to bring the original claim they had filed against the bank. *Id.* Ultimately, nearly 90% of the arbitration claims were dismissed when their claimants' counsel could not provide information establishing baseline eligibility

for the claim asserted – after the bank had already paid half a million dollars in filing fees. *Id.*

There is no reason to think that occurrence is unique. *See, e.g.*, *In re Centurylink Sales Pracs. & Sec. Litig.*, 2020 WL 3513547, at *3 ("Centurylink could not identify any potential customer account that could be connected with some of [claimants' counsel's] clients; some clients claimed to receive services at addresses in states in which Centurylink does not provide services"); *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1065 (N.D. Cal. 2020) (claimants' counsel failed to produce sufficient evidence to establish that 869 claimants had an arbitration agreement with Doordash); *See also* Doordash Opp. To Mot. To Compel Arbitration at 20-23, *Abernathy v. DoorDash, Inc.*, No. 3:19-cv-07545 (N.D. Cal. Jan. 16, 2020), ECF No. 157 (attached as Ex. 8) (arguing that claimants' counsel had failed to vet claims when it withdrew 361 claimants who had no record of ever working for Doordash, when 448 other claimants appeared on other firms' client lists asserting the same legal issues, and when 869 claimants failed to submit declarations complying with court's order to submit a personally signed document containing identifying information); Kohl's Complaint at ¶ 7, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Oct. 16, 2023), ECF No. 6 (attached as Ex. 9) ("Kohl's review of the [mass arbitration] claimants identified numerous individuals who could not assert any claims

against Kohl's, including people who were deceased, people who had not made any recent purchase at Kohl's . . . , and people in active bankruptcy proceedings").

In the reported experience of defense counsel, "the number of obviously groundless claims in mass arbitrations often exceeds 30 percent of claims—and on a number of occasions has exceeded 90 percent." Mass Arbitration Shakedown at 37.

What actually occurs is that claimants' counsel withdraw claims *en masse* after the defendant company assumes the responsibility of sifting through the claimant list. When defendants—at great cost and effort—point out the problems, claimants' counsel "typically just voluntarily cross the bogus claimants off their list of clients once the defendant identifies them." CJAC Letter at 3.

Essentially, defendants are forced to perform the due diligence required to bring a claim in the first place. But this "outsourcing" of ethical obligations to respondents does not meet the requirements that Rule 3.1 places on claimants' counsel. *Id.* *See* Complaint ¶¶ 1-2, 10-12, *Fam. Dollar, Inc. v. Am. Arb. Ass'n*, No. 20-cv-00248 (E.D. Va. May 15, 2020), ECF No. 1 (attached as Ex. 10) (withdrawing hundreds of mass arbitration claims after Family Dollar informed claimants' counsel that claimants had never been employed by Family Dollar despite asserting employment claims, had never agreed to arbitrate or agreed to arbitrate

in a different forum, or had already released their claims through prior settlements or bankruptcies); *see also* Decl. of Rodger Cole ¶ 21, *In re Intuit Free File Litig.*, No. 3:19-cv-2546-CRB (N.D. Cal. Dec. 7, 2020), ECF No. 192 (claimants' counsel withdrew 8,320 demands in mass arbitration after Intuit demonstrated the demands were baseless because the claimants were not customers, did not use Intuit's services, had no basis for a legal claim against Intuit, or were duplicate demands).

The withdrawal or dismissal of claims, however, is still a loss for target companies, because it occurs *after* the company has paid nonrefundable fees to the arbitral body. On top of the fees, companies have also invested resources in identifying improper claimants—resources that the claimants' counsel were obligated to invest in developing their representation and that the companies should have been able to deploy elsewhere in their business. *See* Cole Decl. ¶¶ 20-21 (Intuit paid "roughly $13 million in AAA fees" before firm's withdrawal of claims); Ex. 2, Baiardo Decl. ¶ 7 (defendant paid $501,075 in nonrefundable arbitration fees before dismissal of most of the claimants); *see also* Doordash Opp. at 23 (citing concern that "AAA has been unwilling to demand or investigate anything before extracting nonrefundable fees"); Ex. 10, Family Dollar Compl. ¶ 15 (disputing AAA's attempt to seek payment of nonrefundable fees after the demands were resolved without arbitration).

As a result, the targets of mass arbitration face significant monetary loss (or, at minimum, settlement pressure) for demands filed on behalf of claimants who do not have contestable disputes. This pattern illustrates that a company's coerced payment of many millions of dollars in initial filing fees following a mass arbitration campaign is not a matter of being "hoist[ed] with its petard." RSA34. Instead, mass arbitration abuses agreements made with actual consumers by substituting a myriad of unverified internet users (or bots) who have taken two minutes to respond to a social media advertisement.

CJAC specifically addressed this issue in its letter to the state bar. *See* CJAC Letter at 3-4. CJAC called out claimants' counsel's failures to vet claims prior to asserting demands in mass arbitration, alleging that firms had filed demands on behalf of: fake or fictitious claimants; deceased claimants; claimants who asserted employment claims but never worked for the respondent; claimants in bankruptcy; duplicative claimants; claimants who never authorized the filing; and claimants already represented by other firms. CJAC Letter at 3. These counsel, however, have faced "little to no consequence." *Id.* at 4.

C. Claimants' counsel in mass arbitration campaigns cannot feasibly inform and explain material issues promptly to each client and abide by each client's decisions.

Lawyers are required to inform their clients regarding any decision requiring a client's informed consent. ABA Model R. Prof. Conduct 1.4 (a lawyer

shall "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required"); *see also* Ill. R. Prof. Conduct 1.4. "Informed consent" is the agreement by the client "to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Model R. Prof. Conduct 1.0(e).

In obtaining informed consent, the lawyer must make reasonable efforts to ensure that the client "possesses information reasonably adequate to make an informed decision." *Id.* at cmt. 6. This requires a "communication" with the client that includes "a disclosure of facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." *Id.* A lawyer who fails to "personally inform" the client assumes the risk that the client "is inadequately informed and the consent is invalid." *Id.* Obtaining informed consent "usually require[s] an affirmative response by the client." *Id.* at cmt. 7. A lawyer must abide by the client's decisions about the objectives of representation, and cannot do so until the lawyer has consulted with the client under Rule 1.4. *See* ABA Model R. Prof. Conduct 1.2(a), cmt. 1.

Mass arbitration always involves a "mass" of clients. Indeed, some claimants' counsel apparently represent more than 250,000 individual clients. Mass Arbitration Shakedown 30, n.134. Counsel for each client have ethical duties to obtain affirmative consent on material decisions, answer questions in a responsive manner, and abide by client choices even if that decision differs from clients bringing similar claims.

Given the large number of claimants that firms purport to represent in mass arbitration, it is nearly impossible to communicate with each claimant individually to provide the information necessary to obtain informed consent on material matters. *See* Zitrin, *supra*, 91. This failure presents serious concerns related to a lawyers' ethical duty to communicate adequately with and to follow the client's decisions.

III. Circumstances in this case support Samsung's concerns that led it to decline to pay AAA's fees.

Samsung has identified several issues that stem from ethical dilemmas that arise in the mass arbitration context. Samsung raised these concerns with petitioners' counsel. Dist. Ct. Doc. 1-15 at 2.

First, Samsung identified claimants within the mass arbitration who do not have contestable claims. Dist. Ct. Doc. 26 at 6-7, n.9. AAA acknowledged the deficiencies. *See* Dist. Ct. Doc. 27 at 17; Dist. Ct. Doc. 27-3 ("There are numerous additional cases with the same or similar inaccurate/incomplete information. As

such, we request that the claimants review the entire Spreadsheet and update, correct or if you are unable to do so, withdraw the filing and refile the matter at such time as you can provide updated and/or accurate information for the claimant(s).").

Deficiencies included demands filed on behalf of claimants who are deceased; have fictitious personal information; are not Illinois residents (as required by the claims asserted); are in bankruptcy; were never Samsung customers; submitted duplicate demands; submitted multiple demands; or are represented by different counsel on the same threatened claim. *Id.* If any attorney filed a claim in court on behalf of a plaintiff named "Bluff Master," "Full Chck," or "Vain Exp," they would immediately run into Rule 11 territory.

Second, Labaton may be pursuing arbitrations on behalf of claimants who are represented by other counsel and who do not know that Labaton is asserting claims on their behalf. This issue surfaced when other law firms petitioned to compel arbitration on behalf of over 1,000 petitioners alleging the same claims against Samsung as those alleged here. *See Hoeg v. Samsung Electronics Am.*, 1:23-cv-1951 (N.D. Ill.). Samsung informed the district court that many petitioners in *Hoeg* were already petitioners here. *See* Dist. Ct. Doc. 48 at 2. Counsel representing the *Hoeg* petitioners acknowledged the problem and stated that "[o]nce it is determined which law firm(s) will be representing which

overlapping Petitioner, the Court and Respondents will be promptly advised." Dist. Ct. Doc. 41, at 2. To date, no withdrawal motion or other notice has been filed with the court. Meanwhile, Petitioners insist Samsung pay duplicate nonrefundable fees for the same claimants while the two law firms sort out representation questions that could have been addressed at the outset of a client engagement. That cannot be the proper outcome.

Samsung also pointed the district court to a letter to the AAA from two law firms (collectively Kind Law) not involved in this case or *Hoeg* that purported to represent 16 individuals in *other* arbitrations against Samsung, even though the individuals were also allegedly represented by Labaton. *See* Dist. Ct. Doc. 48 at 4; *see also* Dist. Ct. Doc. 48-6. The letter stated that 11 of the 16 individuals wanted Kind Law to continue representing them in arbitration asserting the same claims against Samsung that are being asserted in this case. Dist. Ct. Doc. 48-6. The letter also stated that several of the individuals "denied being represented by any other firm," despite being claimants and petitioners in this action. *Id.*

Third, evidence submitted by Samsung demonstrated Labaton's possible failure to communicate with its clients and obtain informed consent before making a material decision. Samsung provided its notice to petitioners' counsel on September 27, 2022 that it was not proceeding to pay the initial fees given

"serious concerns about the accuracy and integrity of the representations" related to the claims but that it would "participate and defend itself vigorously against these meritless claims" should individual claimants choose to pay the fee, in accordance with AAA Supplementary Rule 10(d). Dist. Ct. Doc. 1-15 at 2.

The *very next day* petitioners' counsel responded "on behalf of the 50,000 Claimants" that claimants "decline Samsung's invitation to pay Samsung's fees to arbitrate the cases." Dist. Ct. Doc. 1-16. It is unclear how petitioners' counsel could inform and obtain agreement from nearly 50,000 claimants on this issue in 24 hours.

Samsung's concerns about these 50,000 claimants—ranging from whether the claimants are real and have contestable claims at all, to whether the claimants understand what is happening in their cases—are substantial and arise in many mass arbitrations. These concerns frame Samsung's decision to rely on a AAA provision allowing the company to give claimants the option to pay initial fees following unresolved questions about the legitimacy of purported claimants and claims.

CONCLUSION

The district court's decision requiring Samsung to pay millions of dollars in arbitration fees should be reversed.

Dated: November 21, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Circuit Rule 29 because it contains 6,094 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirement of Rules 32(a)(4), 32(a)(5), and 32(a)(6) because the brief is double-spaced and has been prepared in a proportionally spaced typeface (13-point Book Antiqua).

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

CERTIFICATE OF SERVICE

I certify that on November 21, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

Exhibit 1

US Law Week
Nov. 9, 2023, 3:00 AM CST

Emerging Mass Arbitrations May Be Ideal Proving Ground for AI

Hunton Andrews Kurth's Ann Marie Mortimer explores how AI could soon be a helpful tool for defense of mass arbitrations, though there will still be plenty left for lawyers to do.

Based on news coverage, you might think artificial intelligence is coming for your legal job. AI so far has racked up impressively high 90% scores on the LSAT and the Uniform Bar Exam, and passed several law school exams from the University of Minnesota.

In time, AI is expected to slash the time attorneys spend on many tasks, including document review, legal research, drafting memos, briefs, correspondence, deposition preparation, and contract analysis and management.

Another specific deployment of AI is the role, if any, it might take in the emerging area of mass arbitrations.

The two areas seem to go together naturally. Mass arbitration is considered high-risk because of the potential multiplying power of large numbers of pattern claims. AI promises to help identify, capture, analyze, and "think" about large data sets. Accordingly, defense of mass claims seems a good place to road-test AI. Consider these possible uses.

Arbitrator Selection

Arbitrators hold your clients' fates in their hands, but who are they and how might they decide? AI seems tailor-made to answer these questions. Ferreting out arbitrator information sometimes requires serious investigative skills, and relying on your standard all-office "ISO" seems woefully inadequate for a complex mass arbitration.

Clause Review

Mass arbitration is still in its relative infancy, and smart companies have tried all kinds of strategies to craft legally sound arbitration clauses that meet the goals of the company. Consider harnessing AI to scour publicly facing consumer arbitration clauses to keep on top of best practices in arbitration clause drafting.

Solicitation Sleuthing

Robo-powered and potentially misleading client solicitations are the first seeds of many mass arbitration harvests. Indiscriminate solicitations yield dubious client/lawyer relationships and a bumper crop of names of people who may or may not be within the scope of the purported mass arbitration—and may or may not understand that by "clicking yes" they were consenting to initiate any type of legal action.

Knowing who and how many professional plaintiffs in your claimant pool spend their days clicking "sign me up" to a slew of sometimes overlapping actions is useful as part of an overall claims analysis. As with other big data roundups, AI can help.

Research Optimization

No more late nights sifting through head notes and case text? Not so fast. AI mimics the human voice, but sometimes it generates false results that are nothing but pure fabrication. Imagine citing *Smith v. Jones* only to find out it's a figment of the AI mind. No question, AI can—and already is—sharpening legal research by combing vast data sets for relevant precedent. And just as AI might cast its net too wide, it also may return too-narrow results because it may lack that human ability to reason by analogy, extension, or implication like the best litigators do. AI may help you find more faster, but you still must read it and apply that ineffably human touch of persuasion.

Pattern Responses

Legal-specific AI may help standardize and automate certain responsive pleadings once a master template is set. It also can be used to comb existing repositories of information internally and externally to identify useful exemplars. AI seems particularly useful for the mechanical adaptation task once the hard human thinking of setting the initial strategy and master response is set.

Document Dumps

At first blush, AI would seem an attractive replacement for hours spent in document review, but the learning feature of AI must not inadvertently result in unanticipated disclosures. AI is notoriously promiscuous when it comes to information. If you are tempted to harness AI for document review tasks, consider an AI tool tailored to the legal profession that doesn't "hallucinate" imaginary document results or spill your clients' secrets.

While an AI replacement won't likely replace flesh-and-blood arbitrators anytime soon, AI has its uses. AI seems primed to supercharge efficiency in data collection and review in certain hours-dense tasks, but quality control is key.

Don't just give over your practice to AI the way you might surrender the wheel to a self-driving car—your malpractice insurance carrier likely agrees.

And while you ponder how you might deploy AI to collect, sift through, and analyze large caches of data, ask yourself: Did a lawyer with decades of experience suggest these possible mass arbitration AI deployments or did an AI chatbot, trained by massive datasets, produce these snippets of wisdom?

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Ann Marie Mortimer is managing partner of the Los Angeles office of Hunton Andrews Kurth and leads the firm's commercial litigation practice. Her practice focuses on mass and class cases, including mass arbitration.

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Exhibit 2

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALEXANDRIA MOSELY, REJOYCE KEMP, BERENICE CISNEROS, BRUCE PARKER, individually,

Plaintiffs,

vs.

WELLS FARGO & CO., WELLS FARGO BANK, N.A., and DOES 1 through 5,

Defendants.

CASE NO. 3:22-cv-01976-DMS-AGS

The Hon. Dana M. Sabraw

DECLARATION OF ALICIA A. BAIARDO IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION

Courtroom: 13A

Hearing Date: March 3, 2023

Complaint Filed: December 13, 2022

1. I am an attorney licensed to practice in the state of California and a member of the law firm of McGuireWoods LLP, counsel for Defendants Wells Fargo Bank, N.A. and Wells Fargo & Co. I have personal knowledge of the facts set forth herein and if called as a witness could and would testify competently to these facts under oath.

2. On November 25, 2020, McCune Law Group ("MLG") filed a class action complaint on behalf of Mosanthony Wilson ("Wilson") and all others similarly situated, alleging that Wells Fargo violated the requirements of the Federal Electronic Funds Act ("EFTA"), its implementing regulation at 12 C.F.R. ¶ 1005.1, *et seq.* ("Regulation E") and California Business & Professions Code § 17200, *et seq.* ("California UCL"). *See Wilson v. Wells Fargo & Co.*, Case No. 3:20-cv-02307-RBM-WVG, 2022 WL 4125220, at *1 (S.D. Cal. Sept. 9, 2022). Wells Fargo moved to compel Wilson's dispute to arbitration on an individual basis, as required by the arbitration agreement between Wilson and Wells Fargo (the "Wilson Motion to Compel"). A true and correct copy of the Wilson Motion to Compel is attached hereto as **Exhibit A**. The Court granted Wells Fargo's motion to compel, and in doing so concluded that the language of the Deposit Account Agreement stating that "any 'disagreement about this Arbitration Agreement's meaning, application or enforcement' must be decided by an arbitrator" showed that the "parties agreed to arbitrate gateway issues of arbitrability." *Wilson v. Wells Fargo & Co.*, No. 20-CV-2307-DMS-WVG, 2021 WL 1853587, at *2-3 (S.D. Cal. May 10, 2021). Thereafter, the case was resolved in arbitration, and the arbitrator found that Wilson did not prove his claims for violation of Regulation E and violation of the California UCL and held that Wells Fargo was the prevailing party in the matter (the "Wilson Final Award").[1]

[1] Notably, it took only 314 days from the date MLG filed Wilson's arbitration demand until the Wilson Final Award was entered.

A true and correct copy of the Wilson Final Award is attached hereto as **Exhibit B**. The Court confirmed the Wilson Final Award without objection.

3. As the *Wilson* arbitration was nearing completion, MLG filed arbitration demands against Wells Fargo on behalf of 13 individual claimants ("13 Demands"). Shortly thereafter, on April 13, 2022, MLG began its mass arbitration[2] campaign against Wells Fargo by filing 497 additional arbitration demands against the bank with AAA. The additional demands (including Plaintiffs' Arbitration Demands) were virtually identical, and included the following, identical statement in the portion of the demand form requiring the claimant to briefly explain the dispute: "Claimant seeks statutory damages and return of overdraft fees collected in violation of

[2] A number of law firms have implemented a new strategy in response to class action waivers called "mass arbitration." In "mass arbitrations," a law firm gathers the claims that would have been part of the class action through solicitation efforts and assert them individually in arbitration through usually identical demands on behalf of individuals. *See* 1 Alt. Disp. Resol. § 8:22 (4th ed.). Most arbitration agreements require that defendants pay the majority of the administrative fees—which can result in the defendant having to pay millions of dollars in initial administrative filing fees before any ruling on the merits of the dispute have been litigated, much less resolved. *See, e.g., Uber Tech., Inc., v. Am. Arbitration Ass'n, Inc.*, 2022 WL 1125962, at *31 (N.Y.A.D. 1 Dept.) (No. 655549/21) (discussing AAA's intent to invoice Uber more than $91 million in connection with mass arbitration campaign consisting of 31,560 boilerplate arbitration demands); *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020) (discussing AAA's invoice of nearly $12 million in administrative fees to DoorDash in connection with mass arbitration campaign); Mem. of Law in Supp. of Def. Chegg, Inc.'s Mot. for Clarification or Modification of the Court's April 27, 2020 Order at 16-18, *Lyles v. Chegg, Inc.*, No. 1:19-cv-03235-RDB (D. Md. Aug. 4, 2020), ECF No. 26 (discussing AAA's charging over $7 million in filing fees as part of mass arbitration campaign). As a result of this fee structure, there is the potential for abuse where the plaintiff-side law firm attempts to force high-dollar settlements from businesses that have nothing to do with the merits of the alleged claims, but instead are driven by the desire to avoid the costs the defendant must incur to pay for arbitration itself. *See* Br. of the Chamber of Com. of the U.S. as *Amicus Curiae* in Supp. of Defs.-Appellants and Reversal at 9-18, *MacClelland v. Cellco P'ship*, No. 22-16020 (9th Cir. Nov. 28, 2022).

Regulation E of the federal Electronic Funds Transfer Act, and for violation of state consumer fraud laws that have also been violated as a result of Respondent's violations of Regulation E." True and correct copies of Plaintiffs' Arbitration Demands are attached hereto as **Exhibits C-F**. (Plaintiff Berenice Cisneros' demand states that his name is "Bernice". The Complaint filed in this matter misspelled Plaintiff Alexandria Mosley's name as Mosely as acknowledged in Dkt. 13-1.) Filed with each demand was an identical "Statement of Claims,"[3] wherein MLG does not specify which state consumer fraud law or statutory section applies to the claimant's arbitration, but states that the "Claimant seeks actual damages, statutory damages, restitution, and all appropriate injunctive relief provided for by applicable state laws." *See id.*

4. On April 22, 2022, AAA informed MLG and counsel for Wells Fargo via letter (the "April 22nd AAA Letter") that the additional demands would be subject to AAA's Supplementary Rules for Multiple Case Filings (the multiple case filing dispute is referred to herein as the "MCF"). A true and correct copy of the April 22nd AAA Letter is attached hereto as **Exhibit G**. The parties and AAA agreed that the 13 Demands should be treated as part of the MCF as well. On April 25, 2022, MLG sent a letter to AAA wherein it stated that "[a]lthough not filed simultaneously with our recent multi case filing, ***we request that all of these cases be consolidated and otherwise subject to AAA's Supplementary Rules for Multiple Case Filings pursuant to Rule MC-1(c) thereto***" (the "April 25th MLG Letter"). (Emphasis added). A true and correct copy of the April 25th MLG Letter is attached hereto as **Exhibit H**.

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[3] On September 29, 2022, MLG began to arbitrarily change the statement of claims it files with its clients' demands to include additional claims (for example, a claim based on an authorized positive, settle negative ("APSN") theory). The demands and statement of claims filed by MLG on behalf of the four Plaintiffs in this action, however, only assert a violation of Regulation E. *See* **Exhibits C-F** (Plaintiffs' Arbitration Demands).

On May 6, 2022, Wells Fargo sent a letter to AAA responding to the April 25th MLG Letter stating that it did not object to the implementation of the Supplementary Rules, but that it expected AAA to abide by the arbitration agreements between the parties (the "May 6th Wells Fargo Letter"). A true and correct copy of the May 6th Wells Fargo Letter is attached hereto as **Exhibit I**.

5. Since that time, MLG has continued to file individual arbitration demands in tranches even after the filing of the Complaint and Motion for Preliminary Injunction. The total number of individual arbitration demands MLG has filed with AAA against Wells Fargo as of February 1, 2023 is 3,365. AAA confirmed receipt of each tranche of demands to MLG and Wells Fargo and has continued to treat all these filings as part of the MCF subject to the Supplementary Rules. At no point in time prior to the entry of the PA Order did MLG object to AAA's application of the Supplementary Rules.

6. On July 12, 2022, AAA informed the parties that AAA's Consumer Rules ("Consumer Rules") and Supplementary Rules would apply to the MCF (the "July 12th AAA Letter"). A true and correct copy of the July 12th AAA Letter is attached hereto as **Exhibit J**. On July 29, 2022, AAA confirmed via letter the appointment of the Honorable Anita Rae Shapiro to serve as Process Arbitrator for AAA dispute (the "July 29th AAA Letter"). A true and correct copy of the July 29th AAA Letter is attached hereto as **Exhibit K**. At no point in time in writing or orally did MLG object to AAA's application of the Supplementary Rules to the MCF until the filing of this lawsuit.

7. After AAA determined the MCF would be governed by the Supplementary Rules, it began invoicing Wells Fargo for the initial administrative filing fees associated with the demands filed by MLG. Thus far, AAA has invoiced Wells Fargo on eight separate occasions (April 22, 2022, May 6, 2022, May 18, 2022, June 23, 2022, July 18, 2022, August 12, 2022, October 7, 2022, and October 26, 2022) for a total amount of $501,075.00 in initial administrative filing fees

(collectively, the "Invoices"). True and correct copies of the Invoices are attached hereto as **Exhibit L**. These fee payments include invoiced fees for Plaintiffs' arbitrations. Wells Fargo has timely paid each of the Invoices, and has no outstanding or unpaid invoices with AAA. A true and correct copy of a February 3, 2023 email from AAA to Wells Fargo confirming that all the Invoices have been paid and that Wells Fargo does not have any outstanding unpaid invoices from AAA is attached hereto as **Exhibit M**.

8. Soon after MLG began its mass arbitration campaign against Wells Fargo, it became clear to Wells Fargo that MLG was not performing adequate due diligence to confirm that claimants (1) had enrolled in Wells Fargo's Debit Card Overdraft Service ("DCOS") (i.e., the overdraft program that is the focus of the claims in the MCF)—a pre-requisite to bringing their claims; (2) had incurred any overdraft fees subject to Regulation E; or (3) in some cases, even had an account with Wells Fargo. Additionally, along with its clients' arbitration demands, MLG was also submitting an "authorization" form for many claimants purporting to request the release of certain account documents. These authorizations provided the date that the individual retained MLG to represent them in arbitration against Wells Fargo, the claimant's name, address, email, and a place for the claimant to provide their Wells Fargo account number. The authorizations submitted by MLG, however, established MLG's blatant failure to vet its clients' claims. This included, for example, claimants listing their Wells Fargo account numbers as: "i don't have one"; "Idk"; "xxxxxxxxxx"; "XXX…"; "Not giving my account"; "None"; "999999999"; "N/A"; "[claimant's last name]"; "Not sure"; "Blank"; "000000000". True and correct copies of the above-described authorizations are attached hereto as **Exhibit N**.

9. Further, Wells Fargo's preliminary review of the demands filed by MLG indicated that many claimants never even agreed to participate in DCOS. Indeed, in some cases, Wells Fargo has been unable to find any checking account associated with the claimants. MLG tries to avoid its basic pleading obligations by suggesting

that this information is solely within Wells Fargo's possession. However, whether a claimant has opted into DCOS can be answered by a cursory review of the claimant's bank statement, which specifies if the claimant is enrolled in the service. A true and correct copy of a redacted bank statement is attached hereto as **Exhibit O**. The bank statements further itemize every transaction, including transactions covered by Regulation E which resulted in an overdraft fee. *See id.* Importantly, with the information currently being provided by MLG, Wells Fargo is forced to conduct multiple searches to identify the proper claimant that cost inordinate amounts of time and money, and the results of such searches cannot provide Wells Fargo information with any level of confidence as to its accuracy. This information cannot be outside of MLG's grasp, either—MLG's advertising specifically requests that individuals seeking to qualify as claimants for arbitration against Wells Fargo submit a Wells Fargo bank statement to MLG for review. *See Overdraft Fee Claims Against Wells Fargo*, https://mccunewright.com/overdraft-fee-claims-against-wells-fargo/ (last visited February 3, 2023) ("If you are a Wells Fargo customer who has been victimized by unfair overdraft fees, contact our team to see if you qualify to recover your money. To qualify quickly, submit your most current Wells Fargo bank statement to our team.").

10. It appears that many claimants found their way to MLG through advertising on MLG's website. MLG's advertising has evolved over time but at one point claimed that "[a]ny Wells Fargo customer who received an overdraft fee within the past 12 months can qualify" to join the mass arbitration campaign against Wells Fargo, and then went on to explain that each arbitration it files forces Wells Fargo to pay "a whopping $4,000.00, not including their attorneys' fees!" Thus, MLG explained, "bringing hundreds of thousands of arbitrations, each resulting in thousands paid by Wells Fargo, means consumers can finally hit one of the world's largest corporations where it hurts." A true and correct copy of a screen capture of MLG's advertising taken on June 30, 2022 is attached hereto as **Exhibit P**. The

advertisement also stated that in June 2022, MLG, while "representing hundreds of clients who have been charged unfair overdraft fees in arbitrations against Wells Fargo," "secured the return of **all overdraft fees charged within the past year plus a $1000.00 penalty** for every client." MLG did not secure any result for any of its clients in arbitration concerning overdraft fees against Wells Fargo in June 2022. Indeed, the only June 2022 arbitration MLG was handling against Wells Fargo related to overdraft fees was the Wilson matter which was decided for Wells Fargo.

11. MLG's failure to perform due diligence into its clients' claims prior to filing demands on their behalf (along with MLG's expressed intent to "hit" Wells Fargo "where it hurts") caused Wells Fargo, pursuant to AAA's rules, to raise the issue of the insufficiency of information provided in the demands with the Process Arbitrator during an initial conference call on August 24, 2022. Wells Fargo pointed out that MLG's method of procuring clients and filing demands had likely resulted in hundreds of demands being filed on behalf of individuals with no legitimate claims against Wells Fargo, thereby requiring Wells Fargo to pay hundreds of thousands of dollars in nonrefundable filing fees for arbitrations involving individuals who may have never enrolled in the overdraft program at issue, never been assessed an overdraft fee subject to Regulation E during an actionable limitations period, or who may never have even had an account with Wells Fargo.

12. On the call, the Process Arbitrator recognized the issues being raised by Wells Fargo and questioned whether certain basic information regarding each claimant's individual dispute with Wells Fargo would be helpful to the efficient and economical administration of all claims. In doing so, the Process Arbitrator opined that claimants' current demands could be amended—and future demands be required—to meet the basic information required of a demand which is set forth in the Consumer Rules so that information establishing legitimate claims was provided. MLG requested briefing on the topic, arguing that the Process Arbitrator lacked the

jurisdiction and authority to rule on the issue. The Process Arbitrator granted the briefing request and set a briefing schedule for the parties.

13. On September 7, 2022, Wells Fargo submitted a memorandum to the Process Arbitrator requesting that she, pursuant to Supplementary Rules MC-6(d)(i), (ii), and (v), enter an order requiring claimants to provide basic information about each dispute prior to proceeding through the arbitration process (the "September 7th Wells Fargo Memo"). A true and correct copy of the September 7th Wells Fargo Memo is attached hereto as **Exhibit Q**. Therein, Wells Fargo explained in detail the issues stemming from MLG's misleading solicitations and failure to conduct due diligence. Wells Fargo also requested that, to protect the integrity of the dispute, MLG be required to supply in each demand: "(a) the Claimant's Wells Fargo checking account number for the account issue, (b) sufficiently pled facts establishing that the Claimant was enrolled in the overdraft service at issue, (c) sufficiently pled facts establishing that the Claimant incurred overdraft fees in connection with transactions covered by Regulation E, (d) identification of the specific state law(s) under which Claimants assert claims (statutory or common law), and (e) …the amount of money in dispute." Wells Fargo also requested that AAA's invoicing of fees and arbitrator compensation related to the demands or arbitrations be stayed until the demands were amended to meet these requirements. The September 7th Wells Fargo Memo provided support in the Consumer and Supplemental Rules for making this request. *See Id.* at §§ II.C, III.B, III.C, III.D). Wells Fargo did not request, either in its briefing or at a hearing, that the Process Arbitrator impose requirements under California Code of Civil Procedure section 128.7.

14. MLG filed its response on September 21, 2022 (the "MLG September 21st Response Memo"), and Wells Fargo filed its reply on October 5, 2021 (the "October 5th Wells Fargo Reply Memo"). True and correct copies of the MLG September 21st Response Memo and the October 5th Wells Fargo Reply Memo are attached hereto as **Exhibits R and S**.

15. On October 18, 2022, the Process Arbitrator held an oral argument on the matter. At no time during oral argument or during the briefing of this issue did MLG take the position that the Supplementary Rules did not apply to the MCF. The parties also discussed whether MLG would withdraw any claims in light of a potential order requiring additional information and the Process Arbitrator suggested using a spreadsheet as a simpler method for handling all the claims filed to date.

16. On October 27, 2022, the Process Arbitrator entered an order regarding Wells Fargo's request (the "PA Order"). A true and correct copy of the PA Order is attached hereto as **Exhibit T**. The PA Order granted in part and denied in part Wells Fargo's request. It then went on to order each claimant to file and serve an amended demand for all claims filed before October 27, 2022—and required all demands filed thereafter to— "specifically plead, 1) each Claimant's Wells Fargo account number for the account at issue, 2) facts to establish each Claimant was enrolled in DCOS during the time period at issue and 3) facts sufficient to establish that each Claimant incurred overdraft fees in connection with transactions covered by Regulation E." *Id.* The PA Order also ordered that an attorney of record for claimants sign each amended claim as required by California Code of Civil Procedure section 128.7 or, in lieu of filing and serving a separate amended claim for each claimant, file one spreadsheet signed by an attorney of record for claimants including all the ordered information for each claimant. *Id.* The PA Order specifically stated that "claimants are not ordered; 1) to file Amended Claims specifying which state laws have been violated or 2) allege the specific amount of overdraft fees each Claimant was wrongly charged." The PA Order also stated that the "invoicing of AAA fees is stayed for all Claims that have not already been invoiced and for all new Claims filed with AAA until the [specificity] requirements [ ] have been satisfied." *Id.* Neither the Process Arbitrator nor AAA has stated that the PA Order requires that ***all*** claimants meet the PA Order's requirements prior to any individual claimant's arbitration moving forward. MLG did not previously raise this with the Process Arbitrator or AAA. Wells Fargo has

consistently stated its intent and willingness to move forward with MLG's clients' individual arbitrations as soon as an individual client files an amended demand meeting the PA Order's requirements. *See, e.g.,* Wells Fargo letter to AAA dated January 4, 2023 (the "January 4th Wells Fargo Letter"). A true and correct copy of the January 4th Wells Fargo Letter is attached hereto as **Exhibit U**.

17. Shortly after the PA Order was entered, MLG made clear that it would not abide by its terms. In a letter addressed to AAA's President and Chief Executive Office and Senior Vice President, General Counsel, and Corporate Secretary, stated its intention to challenge the arbitration agreement in a federal court filing (the "November 2nd MLG Letter"). A true and correct copy of the November 2nd MLG Letter is attached hereto as **Exhibit V**. MLG then requested that AAA executives "voluntarily stay application of" the PA Order pending its forthcoming federal filing. *See id.*

18. On November 8, 2022, Wells Fargo responded to MLG's letter by pointing out that the request to stay the PA Order was improper, as the Supplementary Rules explicitly provide the Process Arbitrator exclusive jurisdiction to decide the subject of the PA Order and state that "[r]ulings by the Process Arbitrator will be final and binding upon the parties" (the "November 8th Wells Fargo Letter"). A true and correct copy of the November 8th Wells Fargo Letter is attached hereto as **Exhibit W**. MLG replied to the November 8th Letter by informing AAA that although ***its claimants "consent to AAA arbitration pursuant to AAA rules,"*** it would move forward with filing claims with AAA that did not abide by the PA Order and would also file an action in federal court (the "November 10th MLG Letter"). A true and correct copy of the November 10th MLG Letter is attached hereto as **Exhibit X**.

19. On November 15, 2022, AAA sent a letter to the parties addressing MLG's objection to the PA Order (the "November 15th AAA Letter"). A true and correct copy of the November 15th AAA Letter is attached hereto as **Exhibit Y**. Therein, AAA informed the parties that it would not be issuing an invoice for further

case management fees for any matters until claimants filed and served amended claims as required by the PA Order. *Id.* MLG has continued to file demands on behalf of new claimants that fail to meet the requirements of the PA Order. Accordingly, on November 22, 2022, Wells Fargo wrote to AAA asking it to confirm that, pursuant to the PA Order, no fees would be invoiced until the improperly submitted demands contained the information provided in the PA Order (the "November 22nd Wells Fargo Email"). A true and correct copy of the November 22nd Wells Fargo Email is attached hereto as **Exhibit Z**. AAA responded by requesting that the parties address the issue during a scheduled November 30, 2022 status conference with the Process Arbitrator (the "November 23rd AAA Email"). A true and correct copy of the November 23rd AAA Email is attached hereto as **Exhibit AA**.

20. At the November 30, 2022 status conference, the Process Arbitrator asked the parties to discuss how compliance with the PA Order was being handled. MLG informed the Process Arbitrator that it had not complied with the PA Order, and stated its intention to challenge the PA Order in a federal district court. MLG also informed the Process Arbitrator and Wells Fargo that it intended to continue to submit new claims that did not meet the requirements of the PA Order. Wells Fargo then reiterated the Process Arbitrator's authority to rule on the matters in the PA Order and that under the Supplementary Rules, rulings by the Process Arbitrator are final and binding. The Process Arbitrator stated that invoicing of fees would be stayed until the PA Order is complied with, and ordered the parties to notify AAA within fifteen days of any order entered by a federal court regarding the matter. On December 1, 2022, the Process Arbitrator entered an order memorializing the status conference (the "December 1st PA Order"). A true and correct copy of the December 1st PA Order is attached hereto as **Exhibit BB**.

21. On December 8, 2022, Wells Fargo wrote to AAA objecting to MLG's submission of demands on December 7, 2022, which did not meet the PA Order's filing requirements, and requested confirmation that the improperly submitted

demands did not warrant imposition of AAA fees (the "December 8th Wells Fargo Letter"). A true and correct copy of the December 8th Wells Fargo Letter is attached hereto as **Exhibit CC**.

22. On December 9, 2022, MLG wrote AAA asking it to confirm whether all of the demands submitted after the PA Order were deemed filed by AAA (the "December 9th MLG Email"). A true and correct copy of the December 9th MLG Email is attached hereto as **Exhibit DD**. AAA responded on December 13, 2022, stating that given MLG's forthcoming federal filing challenging the PA Order, it would await further direction from the district court as to how the arbitrations should or should not proceed (the "December 13th AAA Email"). A true and correct copy of the December 13th AAA Email is attached hereto as **Exhibit EE**.

23. On December 13, 2022, MLG filed the Complaint in this matter. The Complaint was filed on behalf of four individuals involved in the MCF and alleges that each Plaintiff was enrolled in Wells Fargo's DCOS and was charged an overdraft fee subject to Regulation E. MLG did not serve the Complaint on AAA.

24. Plaintiffs have each submitted an arbitration demand against Wells Fargo as part of MLG's mass arbitration campaign (collectively, "Plaintiffs' Arbitration Demands"). *See* **Exhibits C-F** (Plaintiffs' Arbitration Demands). Plaintiffs Alexandra Mosley and Bruce Parker submitted their arbitration demands on April 11, 2022. Plaintiff Rejoyce Kemp submitted her arbitration demand against Wells Fargo on July 19, 2022. Plaintiff Berenice Cisneros submitted his arbitration demand against Wells Fargo on August 12, 2022. Like the other arbitration demands submitted as part of MLG's mass arbitration campaign against Wells Fargo, Plaintiffs' Arbitration Demands are virtually identical, include identical statements when required to briefly explain the dispute, and include virtually identical "Statement of Claims" that do not specify which state consumer fraud law or statutory section applies to Plaintiffs' arbitrations. *See id.* As all of the Plaintiffs' demands were submitted prior to MLG

beginning to add APSN claims on September 29, 2022, none of their demands assert a claim based on an APSN theory.

25. On January 4, 2023, AAA reached out to the parties asking for a status update on the federal filing (the "January 4th AAA Email"). A true and correct copy of the January 4th AAA Email is attached hereto as **Exhibit FF**. That same day, Wells Fargo provided a detailed response to AAA and the Process Arbitrator *See* **Exhibit U** (January 4th Wells Fargo Letter). The January 4th Wells Fargo Letter provided a timeline of events since the PA Order was entered, restated the PA Order's requirements, and noted MLG's refusal to comply with the PA Order and its continued submission of non-compliant demands. Wells Fargo then discussed the Complaint and pointed out that the federal filing was only brought on behalf of four individuals. Most notably, Wells Fargo informed AAA that, given the limited scope of the Complaint, Wells Fargo was "prepared to move forward with all claimant arbitrations" other than the Plaintiffs "as soon as those Claimants provide the information required in" the PA Order. Wells Fargo asked that MLG advise it and AAA if MLG objected to moving forward with arbitrations for other claimants and the grounds for such objection. MLG responded to the January 4th AAA Email by providing the case name and case number of this lawsuit, but did not address the January 4th Wells Fargo Letter or its request related to moving forward with arbitrations for claimants other than the Plaintiffs (the "January 5th MLG Email"). A true and correct copy of the January 5th MLG Email is attached hereto as **Exhibit GG**. On January 13, 2023, AAA reiterated that, in light of the December 1st Order and the litigation between the parties regarding the enforceability of the PA Order, it would

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wait the further direction from the District Court as to how the arbitrations should or should not procced (the "January 13th AAA Email"). A true and correct copy of the January 13th AAA Email is attached hereto as **Exhibit HH**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 3rd day of February 2023, in San Francisco, California.

By: */s/ Alicia A. Baiardo*
Alicia A. Baiardo

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Attorneys for Defendant Wells Fargo Bank, N.A. and Wells Fargo & Co.

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023 I electronically filed the foregoing document entitled **DECLARATION OF ALICIA A. BAIARDO IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION** with the Clerk of the Court for the United States District Court, Southern District of California using the CM/ECF system and served a copy of same upon all counsel of record via the Court's electronic filing system.

/s/ Alicia A. Baiardo
Alicia A. Baiardo

Exhibit N

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last four years, all opening account documents including without limitation all overdraft opt in agreements and documents to **McCune Wright Arevalo, LLP at** odstatements@mccunewright.com.

Dated: 07/26/2022

Client: [redacted]

Account Number: xxx...

Address: [redacted]

Email:

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 4/20/2022

Client: [redacted]

Account Number: 99999999

Address: [redacted]

Email:

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years, all opening account documents including without limitation all overdraft opt in agreements and documents to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 05/16/2022

Client: [redacted]

Account Number: Not sure

Address: [redacted]

Email:

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AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 2/19/2022

Client: [redacted]

Account Number: N/A

Address: [redacted]

Email:

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ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years, all opening account documents including without limitation all overdraft opt in agreements and documents to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 05/20/2022

Client: [redacted]

Account Number: claimant last name

Address: [redacted]

Email:

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AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 3/19/2022

Client: [redacted]

Account Number: xxxxxxxxxxxxxxx

Address: [redacted]

Email:

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 03/10/2022

Client: [redacted]

Account Number: Blank

Address: [redacted]

Email:

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 2/24/2022

Client: [redacted]

Account Number: Not giving my account

Address: [redacted]

Email: [redacted]

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 04/14/2022

Client: [redacted]

Account Number: i dont have one

Address: [redacted]

Email:

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 2/24/2022

Client: [redacted]

Account Number: None

Address: [redacted]

Email: [redacted]

McCUNE · WRIGHT · AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years, and all opening account documents including without limitation all overdraft opt in agreements and documents to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com.**

Dated: 05/11/2022

Client: [redacted]

Account Number: 0000000000

Address: [redacted]

Email:

McCUNE • WRIGHT • AREVALO
ATTORNEYS AT LAW

AUTHORIZATION

I have retained the law firm of McCune Wright Arevalo, LLP to represent me in an arbitration against Wells Fargo Bank, N.A. for improperly assessed overdraft fees. You are hereby authorized and directed to produce *electronic copies* of my monthly account statements for the last three years, all opening account documents including without limitation all overdraft opt in agreements and documents to **McCune Wright Arevalo, LLP at odstatements@mccunewright.com**.

Dated: 06/06/2022

Client: [redacted]

Account Number: Idk

Address: [redacted]

Email:

Exhibit P

Document title:	Wells Fargo New Arbitrations | McCune Wright Arevalo, LLP
Capture URL:	https://mccunewright.com/wells-fargo-new-arbitrations/
Page loaded at (UTC):	Thu, 30 Jun 2022 20:12:25 GMT
Capture timestamp (UTC):	Thu, 30 Jun 2022 20:12:54 GMT
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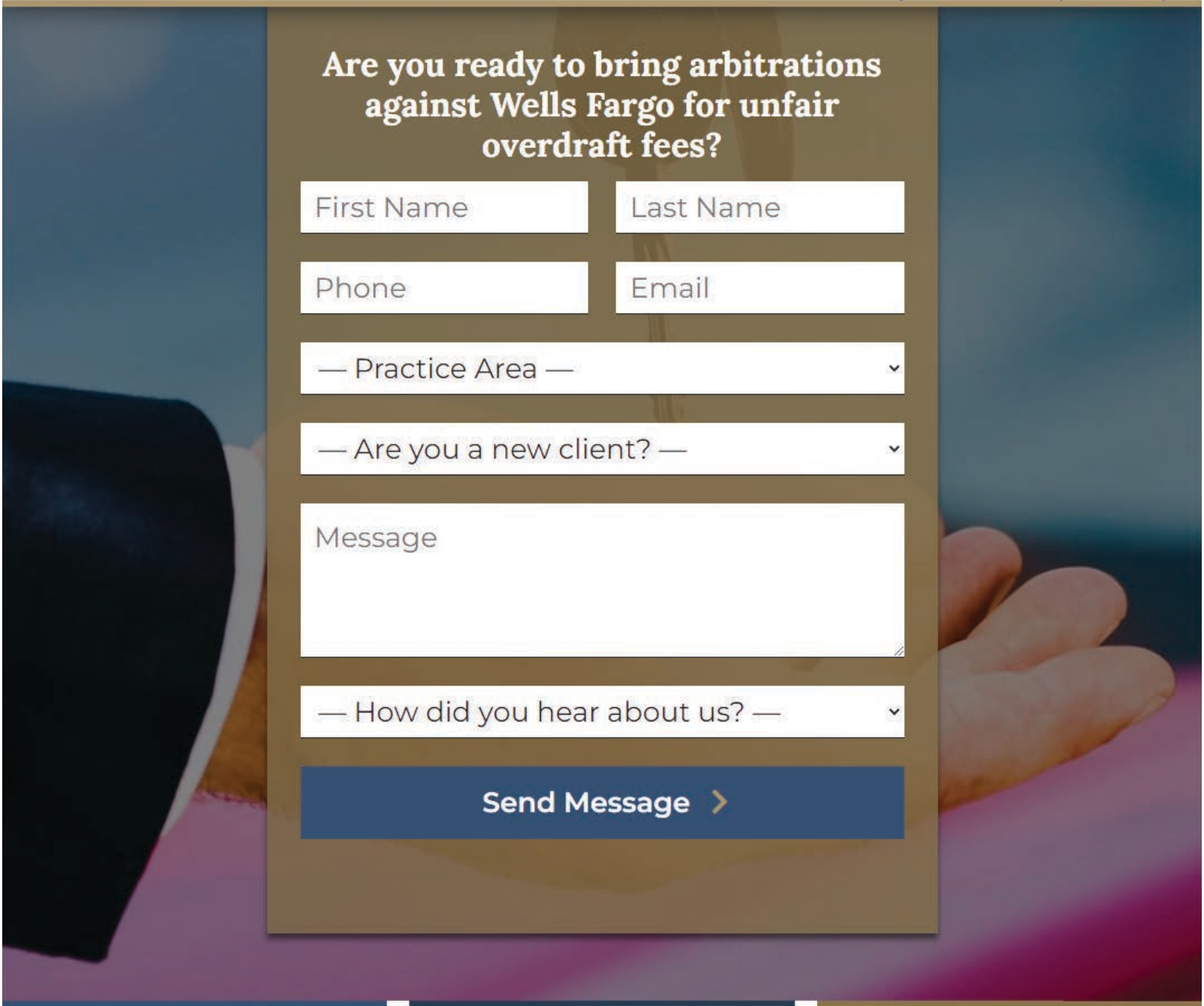

$4 MILLION SETTLEMENT MASS TORTS

$203 MILLION CLASS ACTION FINANCIAL SERVICES

$75 MILLION CLASS ACTION MASS TORTS

$200 MILLION

$200 MILLION CLASS ACTION PRODUCT LIABILITY

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Injustice: Welcome to Wells Fargo

McCune Wright Arevalo, LLP, (MWA) is fighting back against Wells Fargo's predatory overdraft practices that unjustly punish customers living paycheck-to-paycheck. Although Wells Fargo thought they'd get away with slimy, pocket-lining policies by implementing arbitration-only clauses in their account agreements that forbid consumers from bringing class actions, MWA won't let them hide from justice.

In June 2022, MWA – representing hundreds of clients who have been charged unfair overdraft fees in arbitrations against Wells Fargo – secured the return of **all overdraft fees charged within the past year plus a $1000.00 penalty** for every client. * The best part? All of that money went right into our clients' pockets with no charges for attorney's fees. And this is only the beginning.

*Results not guaranteed for all clients.

a $1000.00 penalty for every client. * The best part? All of that money went right into our clients' pockets with no charges for attorney's fees. And this is only the beginning.

*Results not guaranteed for all clients.

MWA is Ready to Represent You.

We're committed to taking on 100,000 new clients in their overdraft arbitrations against Wells Fargo. You may qualify to join the movement towards justice if:

- You've been charged an overdraft fee on an ATM or debit card purchase in the past 12 months.
- You have an active Wells Fargo account.

That's it. That's all you need to take your money back from a corporation well-known for using underhanded tactics to boost their bottom line and increase bonuses for executives at the top.

Are you a victim of unfair overdraft fees? Join MWA in the fight for justice by completing the form above.

[insert fees section]

A Moment of Clarity or Just Empty Words?

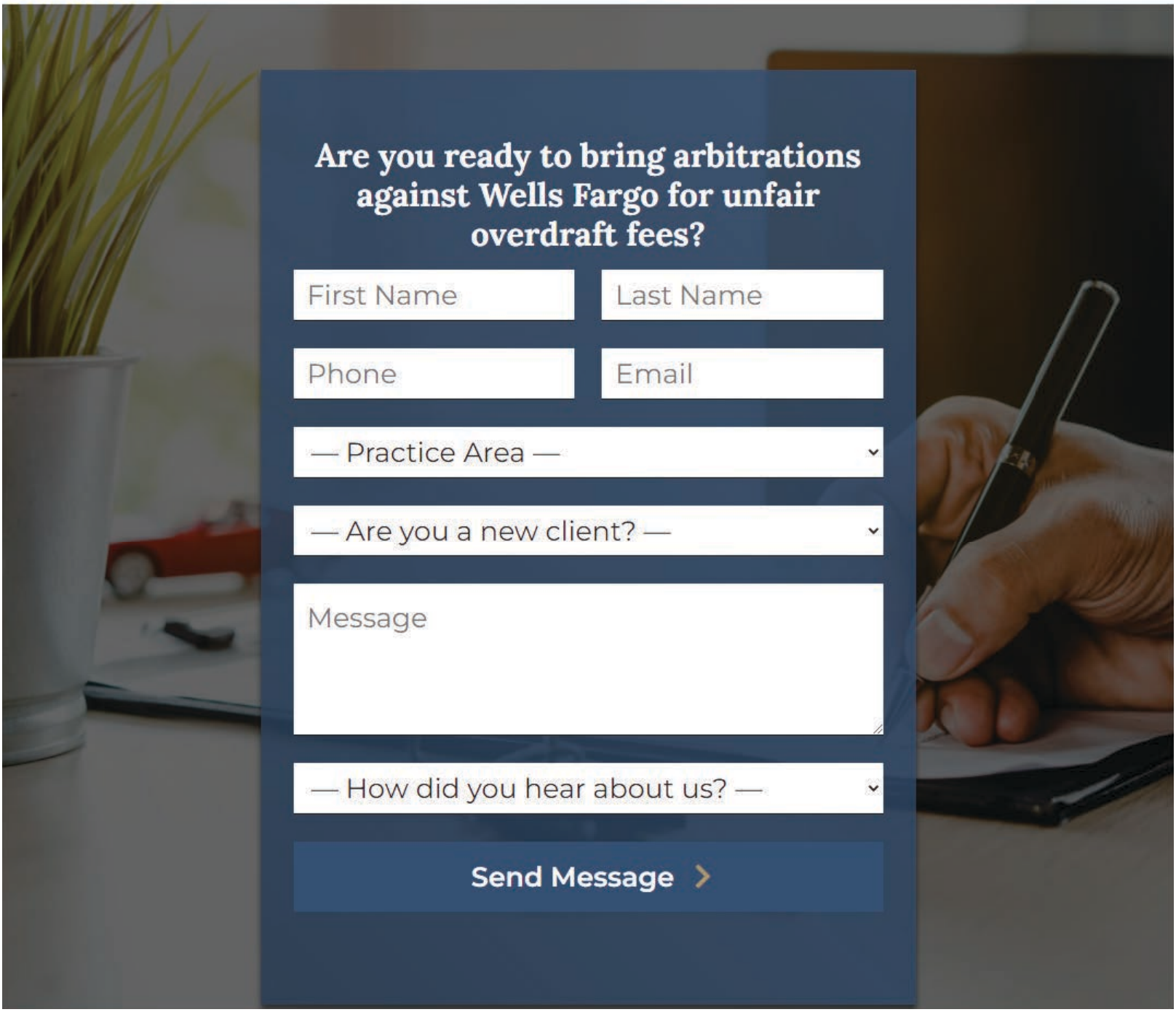
On January 6, 2022, Wells Fargo ATMs in Irvine, California, displayed the word "INJUSTICE" on their welcome screens. Though we at MWA would like to think Wells Fargo used this as a moment for self-reflection on how their practices abuse their customers, we know, based on their history of scandals, that this corporation will only listen to its wallet.

Here's how MWA is attaining justice out of Wells Fargo's injustice beyond securing overdraft fees for our clients. Arbitrations brought by the consumer costs only $50.00 paid by the attorney while Wells Fargo pays a whopping $4,000.00, not including their attorneys' fees! In short, bringing hundreds of thousands of arbitrations, each resulting in thousands paid by Wells Fargo, means consumers can finally hit one of the world's largest corporations where it hurts. Each of these thousands of arbitrations matters in holding Wells Fargo accountable.

arbitrations, each resulting in thousands paid by Wells Fargo, means consumers can finally hit one of the world's largest corporations where it hurts. Each of these thousands of arbitrations matters in holding Wells Fargo accountable.

Join MWA as we say "game on" to Wells Fargo's attempts to skirt accountability.

Complete the form above to see if you qualify for an arbitration.



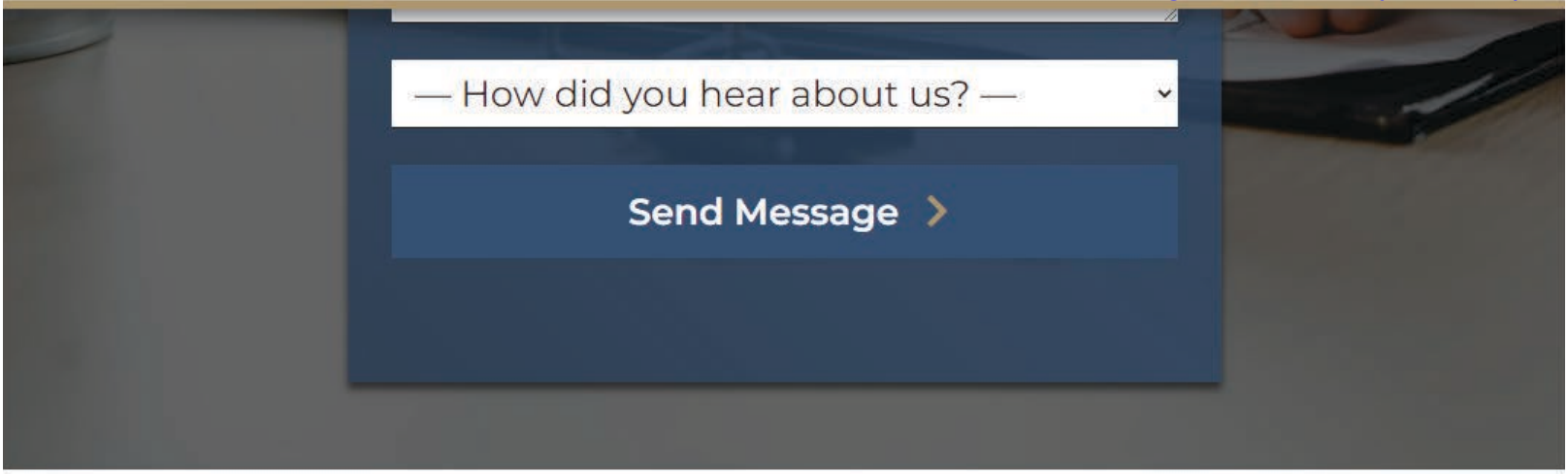


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Exhibit 3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: CENTURYLINK SALES PRACTICES AND SECURITIES LITIGATION	MDL No. 17-2795 (MJD/KMM)
This Document Relates to 0:17-cv-02832 0:17-cv-04613 0:17-cv-04614 0:17-cv-04615 0:17-cv-04616 0:17-cv-04617 0:17-cv-04618 0:17-cv-04619 0:17-cv-04622 0:17-cv-04943 0:17-cv-04944 0:17-cv-04945 0:17-cv-04947 0:17-cv-05046 0:18-cv-01562 0:18-cv-01572 0:18-cv-01573 0:18-cv-01565	**DECLARATION OF PROFESSOR NANCY J. MOORE**

1. I am Professor of Law and Nancy Barton Scholar at Boston University School of Law ("BU"). I have been a tenured full professor at BU since January 1999. From 1976 through December 1998, I was employed at Rutgers School of Law-Camden ("Rutgers") as an assistant professor, tenured associate professor, associate dean for academic affairs, and tenured full professor. I am a Member and former Chair of the Multistate Professional Responsibility Test Drafting Committee. In addition, I was Chief Reporter to the American Bar Association's Commission on Evaluation of Professional Rules of Conduct ("Ethics 2000 Commission"). I also served as an adviser to the American Law Institute's *Restatement of the Law (Third) Governing Lawyers*, and I served twice as Chair of the Professional Responsibility Section of the Association of American Law Schools. I have authored numerous articles on legal ethics, including

articles on conflicts of interest in various aggregated forms of litigation, such as class actions and mass torts.

2. I have testified as an expert on legal ethics via deposition, declaration, and in various state and federal tribunals, including testimony in courts in Connecticut, Florida, Maine, Maryland, Massachusetts, New Jersey, New York, and Pennsylvania. I am currently licensed to practice law in the Commonwealth of Massachusetts (active) and the Commonwealth of Pennsylvania (inactive). I have spoken on topics in legal ethics numerous times in the last thirty years at continuing legal education seminars and professional conferences, including national bar conferences. I have regularly taught courses in legal ethics since 1978. In addition to regularly teaching the basic course in Professional Responsibility (formerly at Rutgers and now at BU), I teach a seminar on Professional Responsibility for Business Lawyers. A current copy of my Curriculum Vitae is attached as Exhibit 1.

3. I have been retained by Wheeler Trigg O'Donnell LLP ("WTO") to render expert opinions in connection with its representation of CenturyLink, Inc. and its subsidiaries (collectively, "CenturyLink") that are relevant to ethical issues arising in *In re: CenturyLink Sales Practices and Securities Litigation* ("the Class Action Lawsuit"), and in threatened mass arbitrations by Keller Lenkner against CenturyLink, including 1,000 claims simultaneously submitted shortly before the date of this Declaration. More specifically, I have been asked to render opinions concerning ethical issues arising from Keller Lenkner's joint representation of tens of thousands of purported CenturyLink customers with respect to their potential claims against CenturyLink. Based on Keller

Lenkner's generic allegations in its arbitration demands, many of its clients are prospective class members, and their claims are apparently addressed in the proposed settlement that has been submitted for preliminary approval in the Class Action Lawsuit ("the Proposed Settlement").

4. I am being compensated at my regular hourly rate of $750 per hour.

5. I have reviewed documents supplied to me by WTO, which include the documents listed in Exhibit 2 attached.

6. These documents, along with other information provided to me by CenturyLink counsel, provide evidence of the facts on which I base my opinions. Those facts are summarized in Exhibit 3 attached.

7. The form retainer agreement Keller Lenkner used in soliciting CenturyLink customer clients ("the Retainer Agreement")[1] states that the agreement is governed by the laws of Illinois. (¶11) Regardless of whether this choice of law provision is enforceable against the consumer clients, the Keller Lenkner office is in Chicago, Illinois, so I assume that its lawyers are licensed in Illinois, although they may be licensed in other jurisdictions as well. For purposes of my opinions in this Declaration, I refer to the Illinois Rules of Professional Conduct. The provisions I cite are identical or nearly identical to similar provisions in other state rules of professional conduct, including the

[1] See Ex. 4, pp 24-29 ("CenturyLink Compensation Claims Retainer Agreement")/ See also, Ex. 3 ¶ 17; Decl. of Robert Matthews, Defendant's and Intervenors' Supplemental Brief in Support of Plaintiffs' Motion for Preliminary Approval and Request for Temporary Injunction to Stay Parallel Arbitrations, Ex. 1.E, ¶¶ 5-12, Ex. 4.

Minnesota Rules of Professional Conduct, which are based on the ABA Model Rules of Professional Conduct. For purposes of any action that Keller Lenkner takes as counsel for putative class members in the Class Action Lawsuit, I also refer specifically to the Minnesota Rules of Professional Conduct.[2]

8. On the basis of the facts described Exhibit 3 and my review of the documents in Exhibit 2, including my detailed examination of the questionnaire and the Retainer Agreement used by Keller Lenkner in signing up over 22,000 individuals to pursue mass arbitrations, which is attached to Exhibit 4, it is my professional opinion that the Keller Lenkner lawyers have engaged in numerous violations of their professional responsibilities, as set forth in detail in paragraphs 9-28 below. These violations involve fiduciary duties imposed on lawyers for the benefit of their clients. Although it is primarily the Keller Lenkner clients, many of whom are prospective class members, who may be harmed by their conduct, CenturyLink has an interest in the fair and efficient administration of justice, including a just and binding resolution of the class claims in the Class Action Lawsuit.

[2] Local Rule 83.6 for the United States District Court, District of Minnesota, provides that "[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."

I. KELLER LENKNER'S MARKETING MATERIALS, INCLUDING THE RETAINER AGREEMENT, ACTIVELY MISLED PROSPECTIVE CLASS MEMBERS TO HIRE THE FIRM TO PURSUE ARBITRATION

9. Keller Lenkner apparently began soliciting clients through the internet sometime between March and May 2019 and continued its solicitations through at least the date of this Declaration.[3] The marketing materials it used included an interactive website, a questionnaire, and a form Retainer Agreement authorizing Keller Lenkner to pursue the clients' claims through arbitration.[4] These marketing materials were actively misleading in several respects, including falsely stating or implying that: (1) arbitration is the sole or primary method by which their claims could be pursued; (2) Keller Lenkner was pursuing individual, as opposed to mass arbitrations; (3) there were no known conflicts of interest among its thousands of clients; and (4) Keller Lenkner's unreasonable legal fees would be paid by CenturyLink and not by the clients.

10. Falsely implying that arbitration is the sole or primary method by which claims could be resolved. During the time period in which it was soliciting clients to sign the Retainer Agreement, Keller Lenkner knew or was on notice of the existence of the Class Action Lawsuit.[5] Additionally, during most of this time period, Keller Lenkner also knew of the existence of the tentative settlement reached in late May and early June 2019 ("the Tentative Settlement"),[6] which was likely to include many of the individuals with

[3] Ex. 3, ¶ 17.

[4] Id.; Ex. 4.

[5] Ex. 3 at ¶ 2.

[6] Id. at ¶ 3.

potential claims against CenturyLink—the very individuals being targeted by Keller Lenkner to pursue their claims in arbitration. Nevertheless, neither the internet marketing materials, the questionnaire, nor the Retainer Agreement refers to the existence of the entirely separate Class Action Lawsuit or the Tentative Settlement. Instead, the Retainer Agreement expressly authorizes Keller Lenkner to pursue the clients' claims through arbitration (¶1), thereby falsely implying that arbitration is the sole or primary[7] method of pursuing the clients' claims.[8] In my opinion, the existence of the entirely separate Class Action Lawsuit and the Tentative Settlement were facts necessary to make the Keller Lenkner marketing materials and the Retainer Agreement, considered as a whole, not materially misleading.[9] As a result, in my opinion the Keller Lenkner lawyers made false

[7] Paragraph 1 of the Retainer Agreement expressly authorizes Keller Lenkner to file an individual arbitration. It further states that the lawyers have no obligation to represent the clients in any other matter, but that the lawyers "may also pursue resolutions of your claims outside of or before initiation arbitration, including in court." This obscure reference to a possible court action, initiated by Keller Lenkner, clearly does not refer to or provide notice of the Class Action Lawsuit pending at the time of the Keller Lenkner solicitations.

[8] Under Rule 1.2(c) of both the Illinois and Minnesota Rules of Professional Conduct, lawyers are permitted to limit the scope of a representation, but only "if the limitation is reasonable under the circumstances and the client gives informed consent." Keller Lenkner never informed its clients that it was limiting the scope of the representation to exclude consideration of other existing avenues of compensation, including informal resolution and participation in the Class Action Lawsuit. Moreover, for reasons set forth in Paragraph 20, infra, it is my opinion that such a limitation would not have been reasonable.

[9] One example of the misleading nature of the marketing materials is evidenced by Keller Lenkner's purported representation of Kathleen Lodestein. Ms. Lodestein is married to, and shares a CenturyLink account with Plaintiff John Lodestein, who is a Settlement Class Representative in the MDL. Although Ms. Lodestein apparently signed up with Keller Lenkner, Mr. Lodestein has made clear that they intend to participate in the

or misleading communications about the lawyers' proposed services, in violation of Rule 7.1 of the Illinois Rules of Professional Conduct, as well as Rule 7.1 of the Minnesota Rules of Professional Conduct. It is also my opinion that the Keller Lenkner lawyers' use of false or misleading marketing materials constitutes dishonest conduct, in violation of Rule 8.4(c) of the Illinois Rules of Professional Conduct, as well as Rule 8.4(c) of the Minnesota Rules of Professional Conduct.

11. Falsely stating that Keller Lenkner is pursuing individual, as opposed to mass arbitrations. The Retainer Agreement expressly authorizes Keller Lenkner to pursue each client's claim through an "individual arbitration" (¶ 1); however, in fact Keller Lenkner has been pursuing these claims in an aggregated, consolidated manner. Initially, Keller Lenkner aggregated thousands of claims in a single arbitration demand document and attempted to resolve all these claims together, without any individual presentation or

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Tentative Settlement and never agreed to arbitration. Thus, the Lodesteins apparently did not understand that they were signing up with Keller Lenkner to pursue arbitration in an effort that is entirely separate from the Class Action and Tentative Settlement. See Decl. of Drew Unthank, Defendant's and Intervenors' Supplemental Brief in Support of Plaintiffs' Motion for Preliminary Approval and Request for Temporary Injunction to Stay Parallel Arbitrations, Ex. 2 ("Unthank Decl."), ¶ 55.

Similarly, a class action complaint filed by Uber drivers' alleged that Keller Lenkner's marketing materials soliciting Uber drivers to pursue arbitrations were false and misleading because they did not "disclose material facts, including, but not limited to, the fact that the FTC action has been resolved, that the Funds derived from the FTC action do not require the assistance or involvement of [Keller Lenkner], that the Fee Agreement has nothing whatever to do with the FTC or the Fund and that the Fund is being distributed by the FTC regardless of whether an Uber driver enters into a Fee Agreement." Class Action Complaint (ECF No. 1), *Brown v. Keller Lenkner, LLC*, No. 1:18-cv-12423-NMG (D. Mass. Nov. 20, 2018).

attempted resolution of each claim.[10] Indeed, in its June 19 letter, Keller Lenkner specifically refused to "engage in pre-demand discussion on an individual basis," arguing that, "at 15 minutes per client, such a pre-demand 'dialogue' would consume more than 3,500 hours, or the equivalent of 145 round-the-clock days."[11] When its initial effort to obtain a pre-filing aggregate settlement of all of its more than 22,000 claims failed, Keller Lenkner simultaneously submitted 1,000 arbitration claims, providing minimal information concerning the nature of these claims, including failing to provide any information concerning the dates and specific service at issue with the alleged overcharges—information that is important to CenturyLink's efforts to determine the applicable contract for each claimant and to informally resolve meritorious claims.[12] To date, Keller Lenkner has provided no information at all concerning the individual claims of its more than 21,000 remaining clients.

12. Whether a claim will be pursued individually, or as part of an undifferentiated aggregate, is material because some individual claims are more valuable than others, depending on a number of factors affecting both the likely success of the claim and the likely damages. In addition, Keller Lenkner's mass claim approach is particularly material here because the arbitration contract on which Keller Lenkner is relying specifically prohibits pursuing claims on a consolidated basis. As a result, Keller Lenkner's approach subjects its clients to the risk that they will be found to have

[10] See, e.g., Ex. 3 at ¶¶ 5, 9.

[11] Id. at ¶ 9.

[12] Id. at ¶ 14.

materially breached the arbitration contract, thereby rendering it unenforceable. In my opinion, by falsely stating that they were pursuing individual arbitrations, the Keller Lenkner lawyers made false or misleading communications about the lawyers' proposed services, in violation of Rule 7.1 of both the Illinois and Minnesota Rules, and such conduct was dishonest, in violation of Illinois and Minnesota Rule 8.4(c).

13. Falsely stating that there were no known conflicts, including conflicts that would arise through an aggregate settlement offer or demand. In its Retainer Agreement, Keller Lenkner states: "The attorneys intend to represent many clients with claims like yours. At this time, your interests and the interests of the other clients align. We know of no conflicts of interest that would have an adverse impact on our representation of you. It is, however possible that conflicts may arise in the future, including: ….A defendant offers an aggregate or "lump sum" settlement to all of our clients that does not specify the amount each client will receive." (¶ 8) Rule 1.7 of the Illinois Rules of Professional Conduct provides that a conflict of interest among current clients exists when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." See also Minnesota Rules of Professional Conduct, Rule 1.7. In addition, Comment [13] to Illinois Rule 1.8 provides that "[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer" and, further, that "[u]nder Rule 1.7, this is one of the risks that should be discussed before undertaking the representation…." See also Minnesota Rules of Professional Conduct, Rule 1.8, cmt [13]. In my opinion, there are numerous ways in which the interests of Keller Lenkner's tens of

thousands of clients' interests were already in conflict at the moment they were asked to sign the Retainer Agreement, including the following:

a. Documented versus undocumented claims. Presumably, there are clients whose claims are documented and clients whose claims are undocumented.[13] Keller Lenkner clients with documented claims have a better chance of success than clients with undocumented claims. In my opinion, there is a significant risk that Keller Lenkner's duties to clients with undocumented claims will materially limit the lawyers' ability to advocate for the best possible recovery for clients with documented claims. This is particularly so in the case of a voluntary settlement of all claims, which appears to be what Keller Lenkner is seeking to achieve.

b. Claims barred by statute of limitations versus unbarred claims. There are clients whose claims may be barred by the applicable statute of limitations[14] and clients whose claims are not so barred.[15] In my opinion, there is a significant risk that Keller Lenkner's duties to clients

[13] These two types of claims are being treated differently under the Proposed Settlement submitted for approval in the Class Action Lawsuit, where members with documented claims are being given an opportunity to receive higher damages than members without documented claims, on an individualized basis.

[14] See, e.g., Unthank Decl. at ¶ 62.

[15] Even with respect to clients whose claims are barred by the applicable statute of limitations, there are some clients who could nevertheless recover under the Proposed Settlement reached in the Class Action Lawsuit, which permits even time-barred claims if they arose after January 1, 2014.

with claims barred by the statute of limitations will materially limit the lawyers' ability to advocate for the best possible recovery for clients with unbarred claims. This is particularly so in the case of a voluntary settlement of all claims, which appears to be what Keller Lenkner is seeking to achieve.[16]

c. Clients facing counterclaims versus clients not facing such counterclaims. There are clients as to whom CenturyLink may have meritorious counterclaims[17] and, perhaps, clients as to whom no such counterclaims can be asserted. In my opinion, there is a significant risk that Keller Lenkner's duties to clients facing counterclaims will materially limit the lawyers' ability to advocate for the best possible recovery for clients not facing counterclaims. This is particularly so in the case of a voluntary settlement of all claims, which appears to be what Keller Lenkner is seeking to achieve.

d. The possibility of an aggregate settlement. The Retainer Agreement describes the "possibility" that conflicts might arise "in the future"

[16] Keller Lenkner did not provide any information about the dates of alleged overcharges on behalf of the 1,000 clients whose arbitration claims have been submitted. Keller Lenkner's refusal to supply such information is adverse to the interests of claimants who are not time barred; their claims are clearly more valuable, and that value could be captured in any effort to informally resolve these claims. In seeking to resolve the entire group of claims in an aggregate manner, Keller Lenkner's duty to its time-barred claimants clearly conflicts with its duty to claimants with valid claims.

[17] See, e.g., Unthank Decl. at ¶ 62.

under several circumstances, including a situation where "a defendant offers an aggregate or 'lump sum' settlement that does not specify the amount each client will receive." This statement is false and misleading in several respects.

i. First, as Comment [13] to both Illinois and Minnesota Rule 1.8 states, the significant possibility of an aggregate settlement is "among the risks of common representation of multiple clients by a single lawyer" and "[u]nder Rule 1.7, this is one of the risks that should be discussed *before undertaking the representation*." (Emphasis added.) This is because under Rule 1.7, a conflict is defined to include not only actual conflicts, but "a significant risk" that the lawyer's duties to another client will limit the lawyer's ability to advocate for each client individually. Thus it was false and misleading to state that there was merely a possibility that such conflicts might arise in the future.

ii. Second, Keller Lenkner's description of an aggregate settlement was false and misleading. An aggregate settlement may be sought by plaintiffs' counsel, as well as by a defendant, and Keller Lenkner apparently intended from the beginning to attempt to resolve its tens of thousands of claims in an aggregate

manner.[18] In addition, aggregate settlements are not limited to "lump sum" payments that do not specify the amount each client will receive, but also include settlements in which the claims are presented collectively and the lawyers are simultaneously negotiating the amounts different clients will receive. Given that Keller Lenkner apparently had not and did not intend to reasonably investigate the specifics of each client's claim before negotiating a pre-filing collective settlement, it was false and misleading to mischaracterize the circumstances under which the conflicts attendant to a potential aggregate settlement would arise. In my opinion, there was a significant risk that Keller Lenkner's responsibilities to each client would materially limit the lawyers' ability to advocate for the best possible recovery for the other clients, in light of the fact that Keller Lenkner was actively seeking a collective resolution of its clients' claims.[19]

e. For all of the reasons set forth above, it is my opinion that there were blatant and serious conflicts of interest already existing at the time

[18] See, e.g., Ex. 3 at ¶¶ 5, 9.

[19] The fact that Keller Lenkner has now submitted arbitration claims on behalf of 1,000 of its more than 22,000 clients does not alter the probability that Keller Lenkner is continuing to seek an aggregate settlement on behalf of either all of its clients or the 1,000 clients whose claims have been submitted. Settling mass claims in a series of group settlements constitutes engaging in aggregate settlements under applicable rules of professional conduct.

Keller Lenkner was soliciting over 22,000 clients, including the conflicts attendant to a potential aggregate settlement. In my opinion, the Keller Lenkner lawyers' assertion that no known conflicts existed, and its false characterization of an aggregate settlement, were false and misleading communications about the lawyers' proposed services, in violation of both Illinois and Minnesota Rule 7.1, and that the Keller Lenkner lawyers' use of these communications constitutes dishonest conduct, in violation of both Illinois and Minnesota Rule 8.4(c).

14. Falsely stating or implying – to secure unreasonable legal fees – that Keller Lenkner's legal fees would be paid by CenturyLink and not by the clients.

a. Paragraph 2 of the Retainer Agreement provides a false or misleading description of the Attorneys' Fees to be collected. For example, it states: "If your case results in a recovery to you, then you will still not have to pay any costs or fees out of your own pocket, but the attorneys will collect a fee from the Company." This statement is false or misleading because it implies that the legal fees are not being deducted from the client's damages, but rather constitute a separate and additional payment from CenturyLink. There is no general right to recover legal fees in arbitration; as a result, legal fees may be be deducted from a client's damages recovery. This is particularly true when the damages are obtained as a result of a voluntary settlement, in which case CenturyLink would be under no obligation to pay a separate and

additional amount for Keller Lenkner's legal fees. In fact, Keller Lenkner specifically informed CenturyLink's counsel that it would not discuss a separate payment as part of any settlement of its arbitration claims because, as it stated, "Our fee is set by our engagement agreements with our clients and is not paid separately or independently by CenturyLink."[20] In my opinion, the above statement in the Retainer Agreement was false or misleading, in violation of Illinois Rule 7.1 and Minnesota Rule 7.1, and the Keller Lenkner lawyers' conduct in using it was dishonest, in violation of both Illinois and Minnesota Rule 8.4(c).

b. Paragraph 2 of the Retainer Agreement also states: "If your case resolves before the commencement[21] of an arbitration or court case in which you are a named party, then the attorney will collect a flat-fee of $750 in exchange for preparing your claim for filing, making a demand of the Company, and negotiating the resolution. You will never have to pay these fees and costs out of your own pocket. If you win your claim, the law requires the Company to pay you these fees and costs in addition to the damages and penalties the Company owes you. The attorneys will collect these fees from the Company as part of any award

[20] Ex. 3 at ¶ 19.

[21] With respect to the 1000 submitted claims, "commencement" has not yet occurred because the term is defined as occurring when all arbitration fees have been paid and an arbitrator is assigned. See Retainer Agreement ¶ 2.

or settlement and deduct them from the recovery as their fee. You will be entitled to retain the full recovery net of this fee." (Emphasis in original.) These statements are false and misleading. The arbitration demands assert varying legal claims, only some of which may provide that a company must pay a successful claimant's legal fees. In any event, this provision applies to resolution *prior to* the commencement of arbitration or a court case, which could only be through a voluntary settlement among the parties. There is no law that would require CenturyLink, as part of a voluntary settlement agreement, to pay the clients' legal fees in addition to the amount to be paid to the claimants, and Keller Lenkner specifically informed CenturyLink's counsel that it would not discuss a separate payment as part of any settlement of its arbitration claims.[22] In my opinion, the Keller Lenkner lawyers' use of these false and misleading statements in the Retainer Agreement violates both Illinois and Minnesota Rule 7.1, and such conduct was dishonest, in violation of both Illinois and Minnesota Rule 8.4(c).

c. Paragraph 2 of the Retainer Agreement further states: "If your case resolves after commencement, then the attorneys will collect a lodestar based on reasonable attorney's fee and recover their litigation costs from the Company under any applicable fee-shifting law. Again, the

[22] Ex. 3 at ¶ 19.

attorneys will collect this fee from the Company, not from you." These statements were false and misleading. Even if legal fees and costs might be recoverable under a fee-shifting law, such a law would not apply in a voluntary settlement among the parties. There is no law that requires CenturyLink, as part of a voluntary settlement agreement to pay the clients' legal fees in addition to the amount to be paid to the clients, and Keller Lenkner specifically informed CenturyLink's counsel that it would not discuss a separate payment as part of any settlement of its arbitration claims.[23] In addition, the arbitration contract on which Keller Lenkner is relying provides that if the client initiates arbitration, the client is required, at a minimum, to pay one-half the arbitrator's fees up to $125.[24] Absent a voluntary agreement by CenturyLink to pay this cost, it will be deducted from any damages recovered by the client.

d. Further, Keller Lenkner lawyers used these false and misleading statements to improperly secure an unreasonable legal fee by implying that CenturyLink, and not the clients, are responsible for legal fees. Rule 1.5(a) of the Illinois Rules provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee." See also Minnesota Rules of Professional Conduct, Rule 1.5(a). In my opinion,

[23] Id.

[24] Id. at ¶ 11.

charging a $750 flat fee for all claims that are resolved before the commencement of an arbitration or court case is unreasonable. Given the terms of the Proposed Settlement in the Class Action Lawsuit, it is highly unlikely that CenturyLink would pay each of Keller Lenkner's clients an amount so far in excess of $750 that $750 would constitute a reasonable legal fee. This is particularly so given that Keller Lenkner clearly indicated that prior to filing arbitration demands, it did not and would not be spending as much as 15 minutes per client attempting to resolve the individual claims.[25] In my opinion, in charging a $750 flat fee for all pre-filing claims, the Keller Lenkner lawyers violated both Illinois and Minnesota Rule 1.5(a).

II. KELLER LENKNER IS BREACHING ITS FIDUCIARY DUTIES TO PROSPECTIVE CLASS MEMBERS BY PURSUING HIGH-RISK MASS ARBITRATION WITH CONFLICTED REPRESENTATION

15. In addition to misleading prospective class members to retain the firm, Keller Lenkner has breached its fiduciary duties to its clients by pursuing a mass arbitration approach without disclosing the risks of doing so, in a joint representation involving serious conflicts of interest. After obtaining minimal individual information from purported CenturyLink customers through its questionnaire,[26] which did not include such facts as the nature of the specific service at issue, the dates of service (other than the

[25] Id. at ¶ 9.

[26] Id. at ¶ 17.

last time a higher price was paid), or the CenturyLink conduct that formed the basis for each complaint, Keller Lenkner asked such customers to sign the Retainer Agreement, which authorized Keller Lenkner to pursue their claims through individual arbitration. (¶1) Keller Lenkner did not inform the clients of the alternatives to arbitration, including the existence of the Class Action Lawsuit and the Tentative Settlement, nor did Keller Lenkner inform the clients of the risks of the mass arbitration approach that the firm would pursue. As a result, Keller Lenkner manipulated the clients into choosing arbitration as the objective of the representation,[27] in violation of Rules 1.2 and 1.4 of both the Illinois and Minnesota Rules of Professional Conduct, as explained below. In addition, as described in Paragraph 11 above, Keller Lenkner has pursued its mass arbitration approach with tens of thousands of clients, despite the fact that there were already serious conflicts of interest among the Keller Lenkner clients at the time of retention. For the reasons set forth below, it is my opinion these conflicts were nonconsentable, and, in any event, the Keller Lenkner clients did not give their informed consent to the conflicts at the time of retention. As a result, the Keller Lenkner lawyers violated both Illinois and Minnesota Rule 1.7.

[27] As noted earlier, the Retainer Agreement mentioned the possibility that Keller Lenkner might (at its option) pursue some form of court proceeding; however, that was clearly not a reference to the existing Class Action Lawsuit brought by other lawyers. See n. 2, supra.

A. Manipulation of Clients to Pursue High-Risk Mass Arbitration Despite a Lower Risk Alternative

16. Rule 1.2(a) of the Illinois Rules of Professional Conduct provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." See also Minnesota Rules of Professional Conduct, Rule 1.2. Rule 1.4(b) provides that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." See also Minnesota Rules of Professional Conduct, Rule 1.4(b). Rule 1.4(a)(2) further states that the lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." See also Minnesota Rules of Professional Conduct, Rule 1.4(a)(2). The Keller Lenkner lawyer requested their clients to authorize them to seek to arbitrate their claims without providing them with *any* information about alternatives to arbitration, including waiting to see if the Tentative Settlement in the Class Action Lawsuit obtained preliminary approval, in which case the clients could decide, when notified, whether to accept the settlement (without having to pay legal fees) or to opt out of the settlement and pursue claims in individual arbitration or small claims court. The required explanation should have included not only the existence of the Class Action Lawsuit and the Tentative Settlement, but also the advantages and disadvantages of the alternative courses of action.

17. The disadvantages of Keller Lenkner's mass arbitrations approach include the following increased risks for the clients.

a. Difficulty of proving actionable misconduct by CenturyLink. In order to succeed in individual arbitrations, Keller Lenkner has to prove that each client is entitled to recover damages. This would include proving actionable misconduct by CenturyLink, without the benefit of the extensive discovery obtained by Plaintiffs in the Class Action Lawsuit. That discovery material is not publicly available, and, in any event, is not focused on proving individualized claims. Plaintiffs in arbitration are not typically entitled to any discovery as a matter of right[28] and, to the extent permitted, tends to be more limited than in court litigation. If the Proposed Settlement is approved in the Class Action Lawsuit, the Plaintiffs in that action do not need to establish CenturyLink's liability in order for class members to participate in the settlement. If Keller Lenkner is unable to prove actionable misconduct by CenturyLink, then clients who have decided not to participate in any settlement of the Class Action Lawsuit will be unable to recover any alleged damages.

b. Difficulty of proving each individual's right to recover. Even if Keller Lenkner could convince an arbitrator that CenturyLink engaged in actionable misconduct affecting some of its customers, in order to succeed in individual arbitrations, Keller Lenkner has to prove: (1) that CenturyLink engaged in actionable misconduct with respect to each

[28] See, e.g., AAA Consumer Arbitration Rules, Rule R-22(a)(1).

individual client, (2) that each client suffered actual damages, and (3) that CenturyLink has no meritorious defenses (such as statute of limitations) or counterclaims (such as unpaid bills) with respect to each client. If CenturyLink prevails on any of these issues for any individual clients, then such clients who have decided not to participate in any settlement of the Class Action Lawsuit will be unable to recover any alleged damages.

c. Risk of unfair aggregate settlement without court oversight. In MDL class actions, Rule 23 of the Federal Rules of Civil Procedure provides protections to class members, and an Article III judge has a duty to protect absent class members. With respect to any settlement in the Class Action Lawsuit, the court will determine whether the settlement is fair to class members before it awards any recovery to the lawyers. On the other hand, there is no similar protection or judicial oversight to ensure that any aggregate settlement resulting from Keller Lenkner's threatened mass arbitrations is fair and that the attorneys' fees are reasonable.

d. Risk of material breach as a result of Keller Lenkner's refusal to comply with the arbitration contract. Keller Lenkner expressed unwillingness to spend as little as "15 minutes" to resolve each claim pre-filing.[29] Yet,

[29] Ex. 3 at ¶ 9.

CenturyLink's consumer contracts generally require its customers to provide Century Link the opportunity to resolve each dispute before proceeding to arbitration. [30] Thus, CenturyLink has taken the position,[31] and there is a risk a court will agree, that Keller Lenkner's repeated refusal to investigate, obtain, and supply individualized information to CenturyLink constitutes bad faith conduct that is a material breach of the clients' contracts and that results in a loss of any right to submit the claims for arbitration,[32] and as discussed below in the final section, Keller Lenkner may withdraw from its representation.[33] If this happens, then clients who have decided not to participate in any settlement of the Class Action Lawsuit could be left without legal representation and be unable to recover any damages.

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[30] Id.

[31] See Unthank Decl. at ¶¶ 72-73.

[32] Keller Lenkner included additional information on behalf of the 1,000 clients within the claims it submitted to the AAA. However, as noted above, the arbitration contracts generally require that the clients provide CenturyLink an opportunity to resolve their claims prior to filing, and CenturyLink has maintained that Keller Lenkner's clients have materially breached their arbitration contracts through their repudiation and failure to comply with this requirement. Also, as noted earlier, Keller Lenkner has provided only minimal additional information on behalf of the 1,000 clients whose claims have been submitted for arbitration. See supra ¶11. Keller Lenkner did not provide any dates or identify specific services at issue with the alleged overcharges, information that is important to efforts by CenturyLink to identify and resolve meritorious claims. Id.

[33] See infra, ¶ 27.

e. Risk of material breach as a result of Keller Lenkner's attempt to resolve claims on an aggregated basis. CenturyLink's consumer contracts generally require its customers to agree to the use of mandatory arbitration "on an individual basis" to resolve disputes, rather than on a "consolidated basis."[34] Yet, Keller Lenkner has threatened to "simultaneously" file thousands of demands for "individual arbitrations,"[35] and has already simultaneously submitted 1,000 demands, and CenturyLink has taken the position that the manner in which Keller Lenkner is aggregating and requiring that its clients' claims be addressed on a class, consolidated, or mass basis constitutes a material breach of the clients' contractual obligation to pursue their claims on an individual basis.[36] There is therefore a risk that Keller Lenkner's tactics will result in the loss of any right to submit these claims for arbitration, and as discussed below in the final section, Keller Lenkner may withdraw from its representation.[37] If this happens, then clients who have decided not to participate in any settlement of the

[34] Ex. 3 at ¶ 8.

[35] See, e.g., id. at ¶ 5.

[36] See Unthank Decl. at ¶¶ 72-73.

[37] See infra, ¶ 27.

Class Action Lawsuit could be left without legal representation and unable to recover any damages alleged basis.

f. Risk that claims could be moved to small claims court. The public filings in the Class Action Lawsuit confirm that claims by CenturyLink customers are generally small, making them more appropriate for small claims court.[38] CenturyLink's consumer contracts provide that either party has the right to pursue claims in small claims court, instead of arbitration.[39] The AAA Consumer Rules, to the extent applicable, reinforce this right.[40] In addition, CenturyLink has informed Keller Lenkner that it intends to pursue appropriate claims in small claims court.[41] Thus, there is a risk that Keller Lenkner's clients will not have the right to pursue any claims in arbitration, and as discussed below in the final section, Keller Lenkner may withdraw from its representation

[38] Although Keller's 1,000 demands seek damage amounts for higher amounts, the stated damages amount in 92% of the claims is 10 - 300 times more than claimants' purported actual damages. See Unthank Decl. at ¶ 58. The Colorado statute provides for triple damages, but only "if it is established by clear and convincing evidence that [the defendant] engaged in bad faith conduct." C.R.S.A. §6-1-113 (2)(a)(iii). Although Keller Lenkner cited the Colorado statute as one of the statutes governing all of the 1,000 claims, Keller Lenkner has not established that Colorado law applies to all these claims under the CenturyLink contract agreed to by each individual client and most of the clients are from states other than Colorado.

[39] Ex. 3 at ¶ 10.

[40] AAA Consumer Arbitration Rules, Rule R-9.

[41] Ex. 3 at ¶ 10.

and refuse to pursue any claims in small claims court. If this happens, then clients who have decided not to participate in any settlement of the Class Action Lawsuit could be left without legal representation and unable to recover any damages.

g. Risk of being assessed with CenturyLink's costs. If a claim is determined to be groundless or submitted in bath faith or for the purpose of harassment, then there is a risk that the claimant will be assessed CenturyLink's costs of the action.[42] Claimants whose claims are facially time-barred or who demand damages 10-300 times more than their purported actual damages[43] are especially at risk for such an assessment.

18. For the reasons set forth above, it is my opinion that the Keller Lenkner lawyers manipulated the clients to select arbitration as the means of resolving their claims, without informing the clients of the existence of and advantages of alternative

[42] See, e.g., *Lochridge v. Lindsey Mgt. Co., Inc.,* 824 F.2d 780 (8th Cir. 2016) (court has discretion to award costs to prevailing defendant in F.L.S.A. case); C.R.S.A. § 6-1-113(3) (party submitting claim determined "to be groundless or in bad faith or for purpose of harassment *shall* be liable to the defendant for the costs of the action *together with reasonable attorney's fees*" (emphasis added); AAA Consumer Rules, Rule R-44(c) (arbitrator may allocate compensation, expenses and administrative fees upon a determination that claim was "filed for purposes of harassment or is patently frivolous"); AAA Consumer Rules, Costs of Arbitration, p. 33 (arbitrator compensation, expenses and administrative fees are subject to reallocation "as may be required by applicable law or upon the arbitrator's determination that a claim . . . was filed for purposes of harassment or is patently frivolous.").

[43] See supra n. 13.

objectives, including the existence of the Class Action Lawsuit and the Tentative Settlement, in violation of Rules 1.2 and 1.4 of both the Illinois and Minnesota Rules.

B. Incompetent Representation of Clients with Nonconsentable Conflicts of Interests

19. As explained in Paragraph 13 above, it is my opinion that under Rule 1.7 of both the Illinois and Minnesota Rules, there were serious conflicts of interest among Keller Lenkner's tens of thousands of clients at the time of retention. Rule 1.7 provides that a lawyer may not represent a client if there is a concurrent conflict of interest unless the conflict is consentable and "each client gives informed consent." The general standard of consentability is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" (Rule 1.7(b)(1). In my opinion, the conflicts of interest among Keller Lenkner's clients are nonconsentable because of: (1) the unusually large number of clients (more than 22,000 to date), particularly since they may be differently situated; (2) Keller Lenkner's insistence on treating the clients on a class, consolidated, or mass basis; and (3) the existence of the Class Action Lawsuit, which will likely provide an alternative, essentially cost-free remedy for many of the clients' claims.

20. Under the standard for consentability, the Keller Lenkner lawyers cannot reasonably believe that they can provide competent and diligent representation to their clients with conflicting interests, and thus the Keller Lenkner lawyers' representation of their clients is nonconsentable and improper. I am particularly concerned with Keller Lenkner's statement in its June 19 letter, in which it refused to "engage in pre-demand

discussions on an individual basis," arguing that, "at 15 minutes per client, such a pre-demand 'dialogue' would consume more than 3,500 hours, or the equivalent of 145 round-the-clock days."[44] In making this statement, the Keller Lenkner lawyers conceded their unwillingness to spend as little as "15 minutes" on each individual client's representation, which in my opinion, constitutes a concession that they are not treating the clients as persons to whom they owe all of the duties associated with an individual lawyer-client relationship.[45] In my opinion, this approach does not provide "competent and diligent representation to each affected client."[46]

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[44] Ex. 3 at ¶ 9.

[45] It is unclear how much time Keller Lenkner spent in preparing the 1,000 arbitration claims that it recently submitted. Those mostly generic claims provide minimal additional information with respect to each client, and do not contain important information such as the dates and the specific service at issue with the alleged overcharges or any indication as to whether the client has documentation to support the claim. In any event, Keller Lenkner has more than 21,000 additional clients.

[46] Under some circumstances, it may be permissible for a lawyer to request a client to limit the scope of a representation to group representation, rather than traditional individual representation; that is, representation in which the lawyer will represent large groups of similarly situated clients, and the lawyer will seek primarily to advance the interests of the group. However, under Rule 1.2(c) of both the Illinois and the Minnesota Rules of Professional Conduct, such a limitation is permissible only when "the limitation [on the scope of the representation] is reasonable under the circumstances and the client gives informed consent." The Keller Lenkner clients were never informed that the representation was being limited to arbitration over other existing alternatives, nor were they informed that the representation was being pursued on a group basis, where the lawyers would consider the interests of the group rather than the interests of any individual client; as a result, they never gave their informed consent to the limited representation. It is further my opinion that because of the unusually large number of differently situated clients, the high risk of mass arbitrations under the CenturyLink arbitration agreements, the seriousness of the conflicts, and the existence of the Class Action Lawsuit, such a group representation would not have been reasonable or consentable under the circumstances presented here.

21. The inability of Keller Lenkner to provide "competent and diligent representation to each affected client" with a conflict of interest is compounded by the fact that, in addition to the more than 22,000 clients it represents with claims against CenturyLink, it is actively soliciting tens of thousands of clients with complaints against other companies, which Keller Lenkner is similarly attempting to resolve through mass arbitrations. In March 2019, Keller Lenkner informed DoorDash, Inc. that it was representing 3,000 current or former employees with arbitration claims against that company, and subsequently added 3,500 more for a total of 6,500.[47] In April, 2019, Keller Lenkner stated that it had signed up more than 17,000 persons to file arbitration demands against DraftKings, Inc. and FanDuel, Inc., and that Keller Lenkner's client base with respect to those two companies was increasing on a daily basis.[48] In addition, Keller Lenkner has claimed to represent at least 5,257 individuals in arbitrations against Postmates.[49] Thus, the total number of current clients that Keller Lenkner has claimed to represent, all of whom are pursuing "individual arbitration," appears to be at least 50,000.

22. The risks associated with representing tens of thousands of clients with potentially different views toward settlement are aggravated with respect to the claims against CenturyLink because of the existence of the Tentative Settlement (now a Proposed Settlement) in the Class Action Lawsuit. The Proposed Settlement might be more attractive than arbitration to some but not all of Keller Lenkner's clients—

[47] Ex. 3 at ¶ 16.

[48] Id.

[49] Id.

especially those clients who would have difficulty proving meritorious claims or are subject to defenses or counterclaims. It is not reasonable to expect that Keller Lenkner can adequately advise its CenturyLink clients about their potential participation in any approved settlement in the Class Action Lawsuit, especially when Keller Lenkner has refused to spend "15 minutes" on each claim. As a result, it is likely that some clients will be confused and uncertain how to proceed when they receive notice of a settlement in the Class Action Lawsuit and they will not receive competent representation.

23. For the reasons set forth above, it is my opinion that the serious conflicts among Keller Lenkner's CenturyLink clients are nonconsentable; as a result, the Keller Lenkner lawyers violated Rule 1.7 of both the Illinois and Minnesota Rules when they undertook the multiple representation of over 22,000 clients. It is further my opinion that, even if the conflicts are consentable, Keller Lenkner failed to obtain the clients' informed consent at the time of retention, as required. No consent was requested at the time of retention because, according to the false and misleading statements in the Retainer Agreement, there were no known conflicts. Moreover, any such consent would not have been informed because of Keller Lenkner's false and misleading statements and the absence of a meaningful explanation of the disadvantages and risks of the conflicted representation at the time of retention. As a result, it is my opinion the Keller Lenkner lawyers violated Rule 1.7 of both the Illinois and Minnesota Rules when they undertook the representation of these clients.

III. KELLER LENKNER HAS PUT PROSPECTIVE CLASS MEMBERS IN AN UNTENABLE POSITION WITH THE CLASS SETTLEMENT AND GOING FORWARD

24. Keller Lenkner's improper conduct detailed above, combined with the additional terms in the Retainer Agreement discussed below, lead me to conclude that Keller Lenkner's clients, many of whom are prospective class members, are in an untenable position with respect to the Proposed Settlement and any continued representation by Keller Lenkner.

25. Client Termination. Paragraph 7 of the Retainer Agreement states: "You may terminate attorneys at any time by written notice….If you do so, you agree that the attorneys are entitled to a reasonable fee and reimbursement of costs for the work performed prior to termination."[50] Rule 1.16(a) of the Illinois Rules of Professional Conduct provides that a lawyer must withdraw from representation if "the lawyer is discharged." See also Minnesota Rules of Professional Conduct, Rule 1.16(a). That rule does not provide that the attorney is nevertheless entitled to legal fees when the client has agreed to either a contingent fee or a flat fee, as is true here. If the client agreed to a contingent fee, or a flat fee that contemplated completion of the representation, then a discharged lawyer can only recover fees (and costs) on a quantum meruit basis.

[50] The class action complaint in the Uber drivers' action alleges that Keller Lenkner used a similar provision in the form retention agreement it used to sign up Uber drivers for mass arbitrations. The complaint characterized this provision as "impos[ing] an outrageous, unconscionable and oppressive penalty on the driver in the event that the Uber driver (i.e., the client) desires to terminate the services of [Keller Lenkner]." Class Action Complaint (ECF No. 1), *Brown v. Keller Lenkner, LLC*, No. 1:18-cv-12423-NMG (D. Mass. Nov. 20, 2018).

Ordinarily, a quantum meruit award could not exceed the amount the lawyer would have received under the fee agreement. Paragraph 2 of the Retainer Agreement provides that the clients will not be responsible for any legal fees or reimbursement of costs *unless the client recovers damages*. As a result, under quantum meruit, Keller Lenkner may not be entitled to *any* legal fees (or reimbursement of costs) if the clients decide not to pursue their claims or if they pursue them unsuccessfully.

26. In addition, if a client discharges Keller Lenkner because the client has learned of an approved settlement in the Class Action Lawsuit, and decides to participate in that settlement, then it is unlikely that Keller Lenkner would be entitled to any legal fee—that is, unless Keller Lenkner could establish that its conduct contributed significantly to the value of the settlement. In my opinion, the provision of the Retainer Agreement that purports to require a fee when a client discharges Keller Lenkner unfairly operates as a means of actively discouraging clients from discharging the firm, and that the statement is false and misleading in its implication that significant legal fees (and costs) will be owed whenever a client discharges Keller Lenkner, regardless of the client's reason for doing so. It is further my opinion that the Keller Lenkner lawyers' use of this false and misleading statement in the Retainer Agreement violates Rule 7.1 of both the Illinois and Minnesota Rules, and such conduct is dishonest, in violation of Rule 8.4(c) of both the Illinois and Minnesota Rules. Because the provision actively discourages and thereby burdens the clients' right to accept a settlement in the Class Action Lawsuit, it is further my opinion that the Keller Lenkner lawyers' use of this

provision violates Rule 1.2(a) of both the Illinois and Minnesota Rules, which provides that it is the client's decision whether to accept a settlement offer.

27. Attorney Withdrawal. If Keller Lenkner's clients opt out of an approved class settlement, Paragraph 6 of the Retainer Agreement provides that "the attorneys have the right to stop representing you at any time if, in their professional judgment and consistent with their ethical responsibilities, they come to believe that your potential claims are unlikely to result in a recovery for any reason."[51] Rule 1.16(b) of the Illinois Rules of Professional Conduct provides that unless withdrawal can be "accomplished without material adverse effect on the interests of a client," a lawyer may not withdraw, except in certain specified situations or when "other good cause for withdrawal exists."[52] See also Minnesota Rules of Professional Conduct, Rule 1.16(b). There are numerous situations in which Keller Lenkner clients would be materially prejudiced by Keller Lenkner's withdrawal, including one where a client has opted out of an approved settlement in the Class Action Lawsuit and is unable to find another lawyer willing to represent the client in an individual arbitration. Clients also could be materially prejudiced if Keller Lenkner withdraws after the arbitration agreements are rendered unenforceable, due to its high-risk mass arbitration approach, or the claims are moved to

[51] The class action complaint in the Uber drivers' action alleges that Keller Lenkner used an identical provision in the form retention agreement it used to sign up Uber drivers for mass arbitrations. Id.

[52] The specified situations do not include the lawyer's belief that a potential claim is "unlikely to result in a recovery for any reason," nor does that constitute other "good cause" for withdrawal.

small claims court. It is my opinion that requiring its clients to agree that Keller Lenkner has the right to withdraw any time it concludes that some potential claims are unlikely to result in a recovery,[53] constitutes an attempt to violate Rule 1.16, in violation of Rule 8.4(a) of both the Illinois and Minnesota Rules, which provides that it is professional misconduct to "violate or attempt to violate" any of the Rules of Professional Conduct.

28. Power of attorney. Paragraph 13 of the Retainer Agreement provides that "[c]onsistent with the attorney ethics rules and other requirements for powers of attorney, you grant us the power of attorney to execute all documents connected with your claims." Keller Lenkner may argue that this paragraph grants its lawyers the authority to opt the clients out of an approved class settlement, despite the fact that Paragraph 3 purportedly grants Keller Lenkner only a limited authority to accept a "full-value" settlement offer, and no authority to reject less than a "full-value" settlement offer. In my opinion, any effort by the Keller Lenkner lawyers to opt their clients out of a class settlement after misleading their clients at the time of retention and without obtaining their fully informed consent, including information concerning the advantages and disadvantages of opting out in order to pursue high risk arbitration (including advice concerning whether the

[53] The fact that the provision includes the phrase "consistent with their ethical responsibilities" does not, in my opinion, cure the ethical deficiencies of the provision. The only way in which withdrawal would be consistent with Rule 1.16 is if it would not materially prejudice the client, and this is unlikely to be the case. The clients could not possibly know under what circumstances it would be unethical for the lawyers to withdraw; therefore, in my opinion it was improper for the Keller Lenkner lawyers to ask clients to acknowledge the lawyers' presumptive right to withdraw if they decide that a client's claims is unlikely to succeed.

statute of limitations may have expired for individual clients), would violate Rules 1.2(a) and 1.4 of the Illinois and Minnesota Rules of Professional Conduct.[54]

Dated: January 10, 2020

I hereby declare under the penalty of perjury that the foregoing is true and correct

/s/ Nancy J Moore

PROFESSOR NANCY J. MOORE

[54] The fact that the provision includes the phrase "consistent with their ethical responsibilities" does not, in my opinion, cure the problem. The clients could not possibly know under what circumstances it would be unethical for Keller Lenkner to invoke the power of attorney; therefore, in my opinion, it was improper for the Keller Lenkner lawyers to ask clients to acknowledge the lawyers' presumptive right to invoke such a power of attorney to execute potentially any documents Keller Lenkner deems necessary to pursue its chosen strategy.

Exhibit 3

Facts Forming the Basis of Expert Opinion of Professor Nancy J. Moore

1. In the summer of 2017 multiple consumer class actions were filed against CenturyLink, Inc. and various of its subsidiary operating companies ("CenturyLink"), resulting in the formation of an MDL before this Court on October 10, 2017.[1] Plaintiffs contend that CenturyLink overbilled customers for its services, including by: (1) promising a discount or promotion that was never applied, (2) charging more for services than it advertised or otherwise promised, (3) charging for services it did not provide, (4) charging for services customers did not request, (5) charging undisclosed or higher-than-agreed upon fees, (6) charging improper termination fees, and (7) putting customers into collections as a result of unpaid overcharges.[2]

2. CenturyLink filed a motion to compel arbitration and enforce class-action waivers and a motion to dismiss.[3] Following extensive discovery and briefing on these initial motions, the parties agreed to mediate.[4] They met on May 20, 2019, and on May 24, 2019 they agreed to the terms of a potential class settlement, signing an initial term sheet.[5] Acceptance of the terms of the agreement was contingent upon confirmatory discovery that would test CenturyLink's representations and warranties given during the mediation process and the signing of a final settlement agreement.[6] On June 7, 2019 and through the date of settlement, the parties provided status reports to the Court regarding the successful mediation and discussed the details of the executed term sheet ("the Tentative Settlement").[7]

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[1] Consolidated Class Action Complaint (ECF No. 38), *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM, pp. 1-106; Plaintiffs' Memorandum of Law in Support in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Provisional Class Certification (ECF 468), *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM (hereinafter "Mot. for Prelim. Approval"), p. 1.
[2] Mot. for Prelim. Approval at pp. 1-2.
[3] *Id.* at p. 2.
[4] *Id.* at p. 9.
[5] *Id.* at p. 10; Transcript of Proceedings (ECF 412-4), June 7, 2019, *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM (hereinafter "June 7 Transcript"), p. 8.
[6] Mot. for Prelim. Approval at p. 10; June 7 Transcript at p. 8.
[7] June 7 Transcript at p. 8; Letter from Mr. D. Lobel to The Honorable M. Davis (ECF 418), July 22, 2019, *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM, p. 1; Letter from Mr. D. Lobel to the Honorable M. Davis (ECF 454), September 5, 2019, *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM, p. 1; Letter from Mr. D. Lobel to the Honorable M. Davis

After Plaintiffs pursued extensive confirmatory discovery of CenturyLink, focused largely on the scope of class damages, a final settlement agreement ("the Proposed Settlement") was signed on October 15, 2019, and submitted to this Court for preliminary approval on October 16, 2019.[8]

3. CenturyLink counsel have informed me that Ashely Keller and Warren Postman, both partners in Keller Lenkner, confirmed in various telephone conversations during the summer of 2019 that they were aware of the Class Action Lawsuit and the Tentative Settlement.

4. The Proposed Settlement is designed to provide monetary and non-monetary relief to current and former CenturyLink customers who, from January 1, 2014 though the date of preliminary approval, allegedly overpaid CenturyLink in a variety of ways.[9] It provides for $18 million in Settlement funds, $15.5 million of which will, in part, be used to pay settlement class members who submit either: (1) a Flat Payment Claim that provides a set payment of $30, adjusted by a Pro Rata Multiplier (depending on the total amount of claims to be paid), which needs no separate supporting documentation beyond completing a sworn claim form; or (2) a Supported Document Claim, which allows claimants to pursue the full amount of their overpayment for up to 6 months multiplied by both a Litigation Risk factor of 40% and the Pro Rata Multiplier by describing and demonstrating their overpayment through supporting evidence.[10] The Flat Fee Payment was derived by applying the 40% Litigation Risk Factor to the value of $68, which Plaintiffs confirmed was the average amount CenturyLink reimbursed to remedy escalated and unresolved complaints during the class period.[11]

5. On May 14, 2019, Keller Lenkner notified CenturyLink that more than 9,000 persons had retained it to pursue claims against Century Link for consumer fraud and that Keller Lenkner was prepared to file simultaneous demands for arbitration

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(ECF 461), October 4, 2019, *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM, p. 1.

[8] Mot. for Prelim. Approval at pp. 2-3, 10, 44; Settlement Agreement and Release (ECF 469-1), *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM.

[9] Mot. for Prelim. Approval.at p. 3.

[10] *Id.*

[11] *Id.* at pp. 23, 25-26.

on behalf of each client with the American Arbitration Association ("AAA").[12] It enclosed a list of clients, which included names, addresses and telephone numbers, but did not provide any information concerning the individual claims of each client, such as the relevant time frame, the services ordered, the alleged conduct giving rise to the claims, the amount claimed, or the client's customer account number with CenturyLink. Despite failing to provide such information, Keller Lenkner claimed that the letter, as well as an enclosed sample arbitration demand, constituted pre-filing notice of the claims as required by their clients' arbitration agreements. The sample arbitration demand consisted of a single document, which essentially tracked many of the factual allegations and legal claims made in the Class Action Lawsuit complaint.[13] The arbitration demand provided no individualized description of any individual client's claim. The letter threatened to proceed with every arbitration "simultaneously," noting that proceeding to arbitration would obligate CenturyLink to pay AAA more than $30 million in initial fees and costs, which amount would grow as Keller Lenkner continued to sign up additional clients.[14] Keller Lenkner suggested that the parties "explore whether we can agree on an alternative process for resolving our clients' claims."

6. On May 31, 2019 Keller Lenkner sent CenturyLink a second letter, including the same sample arbitration demand.[15] It further notified CenturyLink that Keller Lenkner had signed up an additional 3,000 individuals, who purportedly had consumer fraud claims against CenturyLink. The second letter stated: "As we stated previously, we are willing to honor the letter and spirit of the notice provisions in our clients' contracts with CenturyLink by discussing in good faith whether we can agree on an alternative process for resolving our clients' claims." As with the May 14 letter, this letter did not provide any information concerning the individual claim of any client.

7. Keller Lenkner now apparently has over 22,000 individual clients who have signed retention letters authorizing Keller Lenkner to represent them in arbitration

[12] Letter from Mr. A. Keller to CenturyLink regarding Arbitration Demands, May 14, 2019 (hereinafter "May 14 Letter") p. 1, attached to Decl. of Andrew Unthank (hereinafter "Unthank Decl."), as Ex. H.
[13] *Id.* at Enclosure (hereinafter "Demand for Arbitration").
[14] *Id.* at p. 1.
[15] Letter from Mr. A. Keller to CenturyLink regarding Arbitration Demands, May 31, 2019, p. 1, attached to Unthank Decl. as Ex. I.

against CenturyLink for one or more of the types of claims described in the generic sample demand.[16]

8. CenturyLink's consumer contracts, including the contract attached to Keller Lenkner's sample arbitration demand, generally require its customers to agree to have their claims decided through arbitration or small claims court "on an individual basis."[17] The contracts also feature waivers of the rights to proceed on a class or consolidated basis.

9. CenturyLink's contracts, including the contract attached to Keller Lenkner's sample arbitration demand, generally provide CenturyLink and its customers the opportunity to resolve their disputes before proceeding into formal legal proceedings.[18] In a letter dated June 19, 2019, Keller Lenkner refused "to engage in pre-demand discussions on an individual basis," arguing that "at 15 minutes per client, such a pre-demand 'dialogue' would consume more than 3,500 hours, or the equivalent of 145 round-the-clock days."[19] It insisted that CenturyLink engage in "a practical, pre-arbitration discussion that addresses all of our clients' claims, or we will proceed to individual arbitrations."[20]

10. CenturyLink's consumer contracts, including the contract attached to Keller Lenkner's sample arbitration demand, also generally provide that either party has a right to have disputes decided in small claims court.[21] In a letter dated July 10, 2019, CenturyLink informed Keller Lenkner that CenturyLink will invoke its right to have many of the clients' disputes decided in small claims court as opposed to arbitration.[22]

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[16] Email from Mr. W. Postman to Mr. M. Williams regarding Draft of Proposed Agreement to Evaluate Claims for Potential Presuit Resolution, September 24, 2019, attached to Unthank Decl. as Ex. N (hereinafter "September 24 Email").
[17] Defendant and Intervenors' Response to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Provisional Class Certification (ECF 481), *In re: CenturyLink Sales Practice and Securities Litigation,* No. 17-md-02795-MJD-KMM, p. 4; Demand for Arbitration, Exh. C (High-Speed Internet Subscriber Agreement (hereinafter "Subscriber Agreement")), pp. 2, 29, 30.
[18] *See* Subscriber Agreement at p. 29.
[19] Letter from Mr. A. Keller to Mr. D. Lobel re Claims Against CenturyLink, Inc., June 19, 2019, p. 1, attached to Unthank Decl. at Ex. K.
[20] *Id.*
[21] Subscriber Agreement at p. 29.
[22] Letter from Mr. M. Williams to Mr. A. Keller re Mass Arbitration Demand, July 10, 2019, attached to Unthank Decl. at Ex. L. (hereinafter "July 10 Letter").

11. The arbitration contract on which Keller Lenkner is relying requires, at a minimum, customers to pay one-half of the arbitrator's fee up to $125.[23]

12. Due to Keller Lenkner's refusal to provide basic information regarding its clients' claims, CenturyLink spent considerable time and resources attempting to locate business records that potentially could be connected to Keller Lenkner's clients.[24] As CenturyLink informed Keller Lenkner in a July 10 letter, CenturyLink's preliminary research raised red flags about the claims and underscored the need for Keller Lenkner to provide individualized information so that CenturyLink could understand and evaluate the claims.[25] Notably, CenturyLink's preliminary research pointed to the potentially varied and unique circumstances of the claims, which seemed to involve customers in three states where CenturyLink provides no internet or local telephone services to consumers, as well as customers whose prior complaints appeared to have been fully addressed.[26] Further, the research suggested that some of Keller Lenkner's clients potentially may be connected to customers whose accounts indicated they owed money to CenturyLink, customers with a long history of failing to pay bills on time, and customers who had failed to comply with alternative payment arrangements to which they had agreed with CenturyLink.[27]

13. CenturyLink also notified Keller Lenkner in CenturyLink's July 10 letter that it is reserving "all rights and defenses it has under the applicable contracts, by statute and at common law, including but not limited to statutes of limitations, the voluntary payments doctrine, breach of the duty of good faith and fair dealing, accord and satisfaction, payment and release, and waiver;" it also "intends to file counterclaims, in the appropriate forum, as applicable, and will demand full payment of all amounts owed to CenturyLink."[28] Additionally, CenturyLink stated that Keller Lenkner's clients' claims could be subject to different state laws, including not only Colorado (the only state law mentioned in the sample arbitration demand), but also Louisiana, which applies a one-year statute of limitations, and the state where services were provided.[29]

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[23] Subscriber Agreement at p. 30.
[24] July 10 Letter at p. 3.
[25] *Id.* at pp. 2-3.
[26] *Id* at p 3.
[27] *Id.* at p. 4.
[28] *Id*. at p. 5.
[29] *Id.* at p. 5.

14. On November 21, 2019, Keller Lenkner submitted arbitration claims on behalf of 1,000 of its more than 22,000 clients. Those claims provided only minimal information concerning the nature of the claims, including failing to provide any information concerning the dates of the alleged overcharges—information that is important to CenturyLink's efforts to determine the applicable contract for each claimant and to attempt to informally resolve meritorious claims. As of January 8, 2020, Keller Lenkner has provided no information at all concerning the individual claims of its more than 21,000 remaining clients.

15. Although Keller's 1,000 demands seek damage amounts for higher amounts, in 92% of the claims the stated damages amount is 10 -300 times more than claimants' purported actual damages.[30] A Colorado statute provides for treble damages, but only "if it is established by clear and convincing evidence that ['the defendant] engaged in bad faith conduct."[31] Although Keller Lenkner cited the Colorado statute as one possible state statute governing all of the 1,000 claims submitted, the claimants are from multiple other states and it has not been established that Colorado law applies to all these claims.

16. Keller Lenkner has recently engaged in similar conduct against other companies, i.e., soliciting and signing up thousands of individuals to threaten mass arbitration of claims that are typically pending in class action lawsuits), including: an April 3, 2019 letter to DraftKings Inc. threatening to file mass arbitration demands on behalf of more than 9,000 individuals; an April 3, 2019 letter to FanDuel Inc. threatening to file mass arbitration demands on behalf of more than 8,000 persons.[32] These letters were virtually identical to the May 14, 2019 and May 31, 2019 letters to Century Link, in that they: (1) provided a list of clients without any specific information concerning their individual claims, (2) attached a consolidated draft arbitration demand that similarly failed to describe any individual's claim, (3) threatened to proceed with every arbitration simultaneously, (4) noted that proceeding to arbitration would obligate the company to pay extensive fees, (5) stated that the client base was expanding on a

[30] See Unthank Decl. at ¶ 58.
[31] C.R.S.A. 6-1-113(2)(a)(iii).
[32] Letter from Mr. A. Keller to Mr. R. Stanton Dodge re Arbitration Demands to DraftKings (ECF 394-5), April 3, 2019, *In re: Daily Fantasy Sport Litigation,* D. Mass., Case No. 1:16-md-02677, p. 1; Letter from Mr. A. Keller to Mr. C. Genetski re Arbitration Demands to FanDuel (ECF 394-2), April 3, 2019, *In re: Daily Fantasy Sport Litigation,* D. Mass., Case No. 1:16-md-02677, p. 1, attached as Ex. B. to Unthank Decl..

daily basis, and (6) sought to explore "an alternative process" for resolving the claims. Keller Lenkner wrote these letters at a time that both companies were defendants in class action lawsuits that were consolidated in an MDL proceeding in the federal district court in Massachusetts.[33] In addition, Keller Lenkner has claimed to represent at least 5,257 individuals with arbitration claims against Postmates, Inc. and 6,500 current and former employees with arbitration claims against DoorDash[34]; further, a November 19, 2018 class action complaint filed by an Uber driver in the federal district court in Massachusetts alleged that Keller Lenkner engaged in a marketing campaign to sign up thousands of Uber drivers to pursue arbitration claims that had been the subject of an FTC settlement against Uber.[35]

17. I have reviewed a copy of Keller Lenkner's form retainer agreement ("Retainer Agreement") [36] and questionnaire[37] used in internet solicitations for CenturyLink customers. It is my understanding that these documents were generated from a Keller Lenkner marketing website in late August 2019.[38] The documents purport to be on behalf of Troxel Law LLP and Keller Lenkner.[39] I assume that these are materially identical, or at least substantially similar, to the questionnaire and form retainer agreement that Keller Lenkner has been using in its internet marketing

[33] On October 21, 2019, attorneys for FanDuel and DraftKings informed the Massachusetts MDL judge that on October 11, 2019 Keller Lenkner filed with the AAA 1,000 mass arbitrations against FanDuel and another 1,000 against DraftKings. The defendants informed the court that these mass arbitrations pose the risk of inconsistent rulings while the MDL remains before the Court pending resolution of defendants' motion to compel arbitration. Correspondence from Mr. J. Sommer to Judge O'Toole (ECF 399), *In re: Daily Fantasy Sport Litigation*, D. Mass., Case No. 1:16-md-02677, p. 1.

[34] Motion to Compel Arbitration (ECF 4), *Adams v. Postmates,* No. 4-19-cv-03042-SBA, p. 4; Declaration of Joshua Lipshutz (Doc 35-5), *Abernathy v. DoorDash, Inc.,* No. 3:19-cv-07545-WHA (N.D. Cal.), pp. 2-3, 6.

[35] Class Action Complaint (ECF 1), *Brown v. Keller Lenkner,* No.1:18-cv-12423-NMG, pp. 1-2.

[36] Ex. 4, pp. 24-29 ("CenturyLink Compensation Claims Retainer Agreement").

[37] Id. at pp. 21-23 ("CenturyLink Overbilling Compensation Questions").

[38] Id., at pp. 1-4 (webpage entitled "Reclaim the Money CenturyLink Overbilled You"), p. 5 (website pop-up to "Sign Up for a Claim"), pp. 6-18 ("Troxel Law, LLP Terms & Conditions of Use").

[39] Id. at 20 (Cover letter).

efforts beginning at least as early as March 2019[40] and continuing through the date of my Declaration.[41] The Retainer Agreement includes the following, without limitation:

a. "We agree to represent you in investigating and, if appropriate in the attorneys' opinion, filing an individual arbitration . . . . The attorneys shall have no obligation to represent you in any other matter . . . . If we think it will help reach a successful resolution of your claims, we may also pursue resolution of your claims outside of or before initiating arbitration, including in court." (¶ 1)

b. "If your case results in a recovery to you, then you will still not have to pay any costs or fees out of your own pocket, but the attorneys will collect a fee from the Company." (¶ 2)

c. "If your case resolves before the commencement of an arbitration or court case in which you are a named party, then the attorney will collect a flat-fee of $750 in exchange for preparing your claim for filing, making a demand of the Company, and negotiating the resolution. You will never have to pay these fees and costs out of your own pocket. If you win your claim, the law requires the Company to pay you these fees and costs in addition to the damages and penalties the Company owes you. The attorneys will collect these fees from the Company as part of any award or settlement and deduct them from the recovery as their fee. You will be entitled to retain the full recovery net of this fee." (Id.)

d. "If your case resolves after commencement, then the attorneys will collect a lodestar based on reasonable attorney's fee and recover their litigation costs from the Company under any applicable fee-shifting law. Again, the attorneys will collect this fee from the Company, not from you." (Id.)

e. "By signing this Agreement, you instruct the attorneys to, without further direction or authorization from you, accept a 'full-value' settlement offer. A

[40] According to the website WHOis.net, the website was created on March 10, 2019. See also, Unthank Decl. at ¶¶ 19-21.

[41] A materially identical Retainer Agreement was being used immediately prior to filing on January 6, 2020. See Decl. of Robert Matthews, Defendant's and Intervenors' Supplemental Brief in Support of Plaintiffs' Motion for Preliminary Approval and Request for Temporary Injunction to Stay Parallel Arbitrations, Ex. 1.E, ¶¶ 5-12, Ex. 4.

full-value settlement offer is any settlement offer made to you by the Company that:

- pays to you an amount equal to or more than the amount of any overpayments you made to paid to the Company in the past 36 months based on the information you provided . . . ." (¶ 3)

f. "[T]he attorneys have the right to stop representing you at any time if, in their professional judgment and consistent with their ethical responsibilities, they come to believe that your potential claims are unlikely to result in a recovery for any reason." (¶ 6)

g. "You may terminate attorneys at any time by written notice….If you do so, you agree that the attorneys are entitled to a reasonable fee and reimbursement of costs for the work performed prior to termination." (¶ 7)

h. "The attorneys intend to represent many clients with claims like yours. At this time, your interests and the interests of the other clients align. We know of no conflicts of interest that would have an adverse impact on our representation of you. It is, however possible that conflicts may arise in the future, including: ….A defendant offers an aggregate or "lump sum" settlement to all of our clients that does not specify the amount each client will receive." (¶ 8)

i. "Consistent with the attorney ethics rules and other requirements for powers of attorney, you grant us the power of attorney to execute all documents connected with your claims." (¶ 13)

18. Portions of the Retainer Agreement are strikingly similar to provisions in the form retention agreement allegedly used by Keller Lenkner to sign-up Uber drivers for mass arbitrations, as set forth in the Massachusetts class action complaint described above.[42]

19. During discussions with CenturyLink counsel over the summer of 2019, Keller Lenkner expressly informed CenturyLink's counsel that it would not discuss a separate payment of its clients' legal fees as part of any settlement of its arbitration

[42] See supra note 32.

claims, stating, "Our fee is set by our engagement agreements with our clients and is not paid separately or independently by CenturyLink."[43]

20. CenturyLink also recently has learned that one of the individuals in Keller Lenkner's lists of more than 22,000 clients is Kathleen Lodestein, who is married to and shares a CenturyLink account with Plaintiff John Lodestein. Mr. Lodestein is a Settlement Class Representative in this MDL and intends to participate in the Tentative Settlement. Although Ms. Lodestein apparently signed up with Keller Lenkner, the Lodesteins intend to participate in the Tentative Class Settlement so Ms. Lodestein apparently did not understand that Keller Lenkner's effort was entirely separate from the Class Action and Tentative Settlement. [44]

21. CenturyLink recently has learned that some CenturyLink customers have raised complaints about Keller Lenkner's solicitation efforts.[45]

[43] Email from Mr. W. Postman to Mr. M. Williams regarding Draft of Proposed Agreement to Evaluate Claims for Potential Presuit Resolution, August 22, 2019; Draft Agreement to Evaluate Claims for Potential Presuit Resolution, August 20, 2019, p. 5, Comment 12.
[44] See Unthank Decl. at ¶¶ 27-29.
[45] Customer complaints of solicitations, dated April – October 2019, attached as Ex. F and G to Unthank Decl.

Exhibit 4

Mr. Johnny Lang
806 S. Center Ave., Unit 6
Jefferson, WI 53549
Case No: 2023CV001652

Clerk of Circuit Court
Waukesha County Court House
515 West Moreland Blvd
Waukesha, WI 53188

November 7, 2023

To Whom It May Concern:

I am writing to you in response to the Declaratory Judgement I received on November 6, 2023, involving case number 2023CV001652.

Keller Postman LLC is not my legal representative and has falsely represented me in this class action lawsuit. Due to their false representation, I wish to immediately drop any involvement in this lawsuit pursuant to any kind of claim against KOHL'S, Inc.

Please remove me as a defendant.

Sincerely,

Johnny Lang

---------- Forwarded message ---------
From: **Melinda Maxson** <melinda.maxson@kellerpostman.com>
Date: Tue, Nov 7, 2023, 2:49 PM
Subject: Kohls False Discount Claim and Lawsuit
To: jlthe6th@gmail.com <jlthe6th@gmail.com>
Cc: Matt Zevin <mzevin@aol.com>

Dear Johnny,

Our law firm previously represented you in a false discount claim against Kohls. In June of this year, you asked us to withdraw your claim. We did as you requested, terminated our representation of you in the Kohls matter, and have taken no further action on your Kohls claim.

We were recently notified that Kohls has filed a lawsuit against you and several others in Waukesha County, Wisconsin. Our co-counsel, Matthew Zevin, attempted to contact you and left a message requesting a call back. Please be aware that there are court-imposed deadlines for responding to the suit and it is very important that you contact either us or Mr. Zevin at your earliest convenience.

Thank you for your urgent attention to this matter. We look forward to talking with you.

Sincerely,

Melinda Maxson
Attorney
Keller | Postman
314-987-9007 | Email | Website

Exhibit 5

HANSEN REYNOLDS LLC

MILWAUKEE CHICAGO MADISON MINNEAPOLIS

November 20, 2023

Clerk of Court
Waukesha County Circuit Court
515 W. Moreland Blvd.
Waukesha, WI 53188

Re: *Kohl's Inc. v. Johnny Lang, et al*
Waukesha County Case No. 23CV1652

Dear Clerk:

Please find the attached letter from Defendant Johnny Lang.

Sincerely,

HANSEN REYNOLDS LLC

Timothy M. Hansen
414.273.8473
thansen@hansenreynolds.com

November 19, 2023

Clerk of the Circuit Court
Waukesha County Court House
515 West Moreland Blvd.
Waukesha, WI 53188

Re: Case No. 2023-CV-001652; *Kohl's Inc. v. Lang, et al.*

To the Court and all parties of record:

I hereby withdraw my November 7, 2023 letter filed with the Court on November 13, 2023 (Doc. 14) and write to clarify the record.

When I wrote the November 7, 2023 letter, I had just been personally served with the complaint in this action. I did not understand at that time that Kohl's was suing me in court with that complaint. Instead, I mistakenly believed that the complaint reflected my continued participation in an arbitration from which I had previously withdrawn. Specifically, in late June 2023, I decided to stop pursuing an individual arbitration I filed against Kohl's in May 2023. That arbitration has been closed, and I do not intend to pursue that arbitration demand anymore.

I now understand that this action is a separate case that Kohl's has filed in court against me. I am represented in this case by Keller Postman, LLC, Kitner Woodward PLLC, Lynch Carpenter LLP, and Hansen Reynolds, LLC.

To be clear, neither Keller Postman nor any of the other firms falsely represented me in this or any other litigation, and they do represent me here. I apologize to the Court and parties for any confusion caused by my November 7, 2023 letter.

Sincerely,

Johnny Lang

Dropbox Sign

Audit trail

Title	Lang Letter_ 2023_11_19
File name	Lang Letter_ 2023_11_19.pdf
Document ID	f52cc2b92e9afe90c80ab9b8eab375ec7ebad176
Audit trail date format	MM / DD / YYYY
Status	Signed

Document History

SENT	**11 / 20 / 2023** 00:47:56 UTC	Sent for signature to Johnny Lang (jlthe6th@gmail.com) from mzevin@aol.com IP: 162.125.47.19
VIEWED	**11 / 20 / 2023** 00:49:01 UTC	Viewed by Johnny Lang (jlthe6th@gmail.com) IP: 47.12.73.205
SIGNED	**11 / 20 / 2023** 00:49:53 UTC	Signed by Johnny Lang (jlthe6th@gmail.com) IP: 47.12.73.205
COMPLETED	**11 / 20 / 2023** 00:49:53 UTC	The document has been completed.

Exhibit 6

EXHIBIT 34

July 6, 2023

Mr. Enrique Zuniga
Public Trust Liaison
The State Bar of California
845 S. Figueroa Street
Los Angeles, CA 90017-2515

Re: Request for Inquiry into Potential Ethical Issues Arising in the Context of Mass Arbitration Filings

Dear Mr. Zuniga,

Congratulations on your appointment as the first Public Trust Liaison for the California State Bar! By way of introduction, my name is Jaime Huff and I am the Vice President and Counsel for the Civil Justice Association of California (CJAC). We are a more than 40-year-old nonprofit organization representing a broad and diverse array of businesses and professional associations. A trusted source of expertise in legal reform and advocacy, we confront legislation, laws, and regulations that create unfair litigation burdens on California businesses, employees, and communities.

We are reaching out to express our concern about a phenomenon that has grown in California and across the nation in recent years: abusive "mass arbitrations," in which counsel threaten to file massive numbers of identical arbitration demands against a business—which would immediately obligate the business to pay huge fees to the arbitration provider—to extract a settlement unrelated to the merits of the claims.

As you well know, arbitration greatly benefits consumers and workers who are able to have their disputes resolved fairly in a faster and more efficient manner than in California's overcrowded courts. When handled appropriately, there is nothing inherently wrong with the same set of lawyers representing multiple bona fide clients who seek to pursue legitimate claims. Arbitration enables those claims to be resolved on the merits at a low cost.

But for certain lawyers who have abused the arbitral process, resolution of their clients' claims on the merits is not the goal. Instead, their goal is to use the threat of arbitration fees to coerce settlements unrelated to the merits of the underlying claims. These lawyers use online solicitations to amass as large a pool of clients as possible. That way, they can threaten the targeted business with ever-greater arbitration fees, which the business must pay even if it wins every case. These lawyers' goal is to make it too expensive for the business to defend itself; the only option is to settle.[1]

[1] A recent report published by the U.S. Chamber of Commerce Institute for Legal Reform, attached to this letter, provides additional details about the mass arbitration playbook and the ethical issues that it poses. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* (Feb. 28, 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf ("*Mass Arbitration Shakedown*").

Reasonable observers can debate the policy implications of the rise in mass arbitrations. But when some lawyers treat their clients as fungible entries on a spreadsheet designed to maximize settlement payments and concomitant attorneys' fees—rather than treating their clients as unique individuals with claims to be resolved—ethical abuses predictably can and do occur. Unscrupulous or negligent lawyers may transgress the ethical rules relating to vetting claims, creating an attorney-client relationship, soliciting clients, and communicating with their clients. They may also run afoul of the rules prohibiting the unauthorized practice of law.

Below we discuss some of the issues that are implicated by reports about publicly disclosed mass arbitrations—almost all of which include arbitration demands or threatened arbitration demands involving California claimants or California defendants.[2] And because many threatened or actual mass arbitrations are never made public; the reported issues may be only the tip of the iceberg.

Failure to vet claims - because complaints or arbitration demands, and threats to file them, make factual assertions about a client's situation at the time of filing, lawyers are required to investigate and disclose whether their clients are legitimate claimants.[3] Yet business defendants, including businesses located in California, have alleged numerous ways in which lawyers filing or threatening to file mass arbitrations in the names of people recruited online have not properly vetted their putative clients' claims. For example, businesses have alleged that they have faced arbitration demands or threatened arbitration demands brought on behalf of:

- fake or fictitious claimants;
- claimants who are deceased or incarcerated, and thus almost certainly never authorized an arbitration filing;
- individuals who were never consumers of or workers for the defendant, yet assert claims as if they were;
- individuals who are in bankruptcy, and therefore aren't permitted to assert claims outside the bankruptcy process;
- multiple purported individuals who turn out to be the same person;
- individuals who never authorized the filing; and
- individuals already represented by other lawyers in pursuing similar claims against the same company.[4]

Businesses also have argued that the online solicitations used to recruit claimants nationwide, including recruiting of claimants residing in California, worsen the problem because the solicitations are misleading. For example, some businesses have reported that the advertisements make it appear that individuals are merely signing up to participate in an investigation or a class action, rather than an individual arbitration proceeding in which the claimant must engage personally. Businesses also have argued that advertisements describe the claims at issue in

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[2] *See Mass Arbitration Shakedown*, *supra*, at 19-21 (providing examples of publicly reported mass arbitrations).

[3] *See*, *e.g.*, ABA Model R. of Prof. Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous ...."). As the comments to the rule make clear, lawyers bringing an action have an obligation 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." *Id.* cmt. 2; *see also Mass Arbitration Shakedown*, *supra*, at 35-38. California's ethical rules similarly require lawyers to have "probable cause" to "bring or continue an action." Cal. R. of Prof. Conduct 3.1(a).

[4] *See Mass Arbitration Shakedown*, *supra*, at 36-38; *see also id.* at 38 (discussing findings by a federal district court judge in California about insufficiently supported arbitration demands).

misleading ways (causing individuals without claims to believe they are affected when they are not).[5]

There has been little to no consequence for the filing or threatened filing of these bogus demands. Unlike in court cases governed by Federal Rule of Civil Procedure 11 or California Code of Civil Procedure § 128.7, businesses have no ready mechanism to seek sanctions against lawyers who file frivolous claims in arbitration. Rather, the mass arbitration filers typically just voluntarily cross the bogus claimants off their list of clients once the defendant identifies them—essentially outsourcing to defendants the vetting that the mass arbitration filers were ethically obligated to conduct *before* bringing the claims. That result turns the ethical rules on their head. And if the arbitration already has been filed, as is sometimes the case, the business already has been forced to pay arbitration fees that are not refunded merely because the arbitration is later withdrawn.

Failure to convey settlement communications and offers or to obtain informed consent to aggregate settlements - another problem that occurs when some lawyers purport to represent thousands of individual clients is that they are unable to meet their ethical obligations to communicate with each of their individual clients.

For example, the ethical rules require lawyers to notify clients promptly of all settlement offers.[6] The rules also give clients the right to decide whether to accept or reject the offer and require lawyers to abide by that decision.[7]

Businesses faced with mass arbitration may have good reason to respond with individualized settlement offers. Such offers are often tied to the merits of the particular claims, which vary from claimant to claimant. These offers can make legitimate claimants whole (or more than whole) without the need for any further adversarial proceedings. And (as in civil litigation) defendants sometimes make "nuisance-value" settlement offers that individual plaintiffs would accept when they know that their claims are meritless.

Yet there is reason to doubt that at least some lawyers threatening or filing mass arbitration filings are engaging in the thousands—or even tens or hundreds of thousands—of individualized communications needed to meaningfully convey and discuss settlement offers with each of their clients.[8] Certainly plaintiffs' counsel have little incentive to engage in these discussions. The threat of a mass arbitration filing is most acute when the filing is imminent (unless the defendant agrees to settle, of course), and once the demands are filed, the business has a very short time to try and resolve the demands before it is required to pay case-management, administrative, and arbitrator fees on top of the filing fees it has already paid. Lawyers pursuing mass arbitrations are unlikely to forgo the leverage from these looming fees by having meaningful settlement discussions with each of their clients. But that is what the ethics rules require.

Relatedly, these lawyers often insist on aggregate settlements rather than individualized ones, under which claimants with stronger claims get larger recoveries, claimants with weaker claims get less, and bogus claimants get nothing at all. These lawyers use the threat of arbitration fees that

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[5] *See id.* at 32-34.

[6] *See* Cal. R. of Prof. Conduct 1.4.1 ("A lawyer shall promptly communicate to the lawyer's client … all amounts, terms, and conditions, of any written offer of settlement made to the client."); ABA Model R. of Prof. Conduct 1.4.

[7] *See* Cal. R. of Prof. Conduct 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter."); ABA Model Rule 1.2(a).

[8] *See Mass Arbitration Shakedown*, *supra*, at 38-39.

even false claims can trigger in order to increase the payoff. The ethics rules require that each client give informed consent to an aggregate settlement.[9] But it is hard to see how lawyers pursuing mass arbitrations designed to extract aggregate settlements can adequately represent both those clients who want to accept whatever settlement the firm decides is fair and those clients who do not. Rather than protecting their individual clients' interests, as the ethical rules require, the lawyers may only be looking out for their own bottom line.

Unauthorized practice of law - *u*nfortunately, some lawyers pursuing mass arbitrations do not seem to care where they are licensed to practice, instead simply soliciting consumers or workers across the country—including in California—in order to maximize the number of arbitrations they can threaten to file.

This approach, however, is highly likely to result in the unauthorized practice of law. Many states do not permit law firms to prepare or file arbitration demands or negotiate settlements on behalf of claimants who live in states where their lawyers are not admitted to practice.[10] Such law firms are likely routinely ignoring the requirements of programs like California's Out-of-State Arbitration Counsel (OSAAC) program, which requires the out-of-state attorney to associate with a California attorney, complete an application process for each arbitration taking place in California, and obtain the arbitrator's approval.[11]

Nor could a Florida or Texas lawyer, for example, justify soliciting residents of our state and filing mass arbitrations on their behalf in California by invoking Model Rule of Professional Conduct 5.5(c). That rule applies only when, among other circumstances, the client has previously been represented by the lawyer, or lives in or has substantial contacts with the lawyer's home state.[12]

In sum, the State Bar should investigate these serious alleged ethical violations in the mass-arbitration context. Given the potential for literally hundreds of thousands of ethical violations, this issue could rival the Tom Girardi scandal that has brought discredit to our profession in California. If the Bar finds these ethical concerns to be well founded, it should propose mechanisms to prevent California lawyers, and out-of-state lawyers purporting to pursue arbitrations here, from undermining the State's ethical standards and rules of professional conduct. If you have any questions or would like to chat further, please contact me at jhuff@cjac.org or at 916-956-2905.

Sincerely,

Jaime Huff
Vice President and Counsel, Public Policy

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[9] *See* Cal. R. of Prof. Conduct 1.8.7 ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, … unless each client gives informed written consent."); ABA Model R. of Prof. Conduct 1.8(g) (similar); *see also Mass Arbitration Shakedown*, *supra*, at 39-40.

[10] *See* Cal. R. of Prof. Conduct 5.5(a)-(b); ABA Model R. of Prof. Conduct 5.5(a)-(b); *see also Mass Arbitration Shakedown*, *supra*, at 30-31.

[11] *See* Cal. Code of Civil Proc. § 1282.4; *see also* https://www.calbar.ca.gov/Admissions/Special-Admissions/Out-of-State-Attorney-Arbitration-Counsel-OSAAC.

[12] *See Mass Arbitration Shakedown*, *supra*, at 31-32.

Exhibit 7

McGuireWoods

McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
Phone: 804.775.1000
Fax: 804.775.1061
www.mcguirewoods.com

Matthew A. Fitzgerald
Direct: 804.775.4716
mfitzgerald@mcguirewoods.com
Fax: 804.698.2251

November 15, 2023

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: *Mosley, et al. v. Wells Fargo & Co. et al.*, No. 23-55478

Dear Ms. Dwyer:

Appellee Wells Fargo submits this letter under Rule 28(j) to keep the Court apprised of the ongoing arbitration proceedings.

Given that there is no underlying stay, the Process Arbitrator has moved forward with enforcing the PA Order addressed in this appeal. *See* Ans. Br. 13 (outlining deadlines in the summer of 2023 for compliance with the PA Order).

As it turns out, only a small fraction of the thousands of claimants apparently can comply with the PA Order. Of the nearly 4,000 claimants, their counsel has asserted that only 432 meet the minimal pleading-type standard set in the PA Order. That is, only one in nine claimants was able to provide, as the Process Arbitrator required, a Wells Fargo account number, confirmation of enrollment in the relevant overdraft service required to give rise to the underlying claim, and being charged an overdraft fee in connection with Regulation E. Meanwhile, more than 1,600 have admitted they do "not qualify." The status of the rest remains uncertain.

At this point, it appears that most of the claimants never had a Regulation E claim against Wells Fargo, or at least that a year later, claimants' counsel still lacks the basic information needed to bring their claims. Yet claimants' counsel filed arbitration demands on behalf of each of them, seeking to trigger millions of dollars in filing fees for Wells Fargo.

On November 10, 2023, the Process Arbitrator issued an order (Exh. 1). The order allows the "compliant" claimants to proceed forward once their counsel signs under California Code of Civ. Proc. § 128.7. Exh. 1, at 1. (The four plaintiff-appellants in this case qualified to proceed). The November 10 order also dismisses the thousands of other claimants without prejudice to re-filing if they comply with the PA Order's requirements. *Id*.

These facts are addressed in further detail in the attached briefs. *See* Exh. 2 (Wells Fargo's memorandum); Exh. 3 (Claimants' response); Exh. 4 (Wells Fargo's reply).

Very truly yours,

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

cc: All counsel of record (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2023, the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

Exhibit 1

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

ORDER

Case Number: 01-22-0003-6161

Individual Consumers
-vs-
Wells Fargo & co.
Wells Fargo Bank, N.A.

Claimants filed and served a Motion to File Amended Claims and to Amend the October 27, 2022, and June 14, 2023, Orders. These are AAA Consumer cases. Pursuant to AAA Consumer Rule R-24, the arbitrator may consider a party's request to file a written motion only after the parties and the arbitrator conduct a conference call to attempt to resolve the issues that give rise to the proposed motion. A conference call was held with Process Arbitrator Anita Rae Shapiro, Claimants' Attorney Richard D. McCune and Respondents' Attorney Alicia A. Baiardo on August 15, 2023.

During the August 15th conference call, Claimants' Motion was deemed to be a request to File a Motion to Amend Claims and to Amend the October 27, 2022, and June 14, 2023, Orders. Claimants' written request to file this Motion was submitted on the pleadings and oral argument. The request to file a Motion to File Amended Claims is granted. Claimants may have until December l, 2023, to either file and serve a new Motion to File Amended Claims or a statement that they wish their July 21, 2023, pleading to be the Motion. Respondents may have until December 11, 2023, or 10 days after service of the new Motion or notice that the July 21st Motion is the operative pleading, whichever is earlier, to file and serve an Opposition. Claimants may have until December 18, 2023, or 5 days after service of the Opposition, whichever is earlier, to file and serve a Reply.

Claimants' request to file a Motion to Amend the October 27, 2022, and June 14, 2023, Orders is denied. (AAA Consumer Rule R-24.)

The August 15th Order also contains another briefing schedule that was discussed during the conference call, Claimants had until August 22, 2023, to file and serve an explanation of the August 14, 2023, spreadsheets. Respondents had until September 22, 2023, to file and serve a request for any clarifying questions concerning the spreadsheets and a response to the four issues raised in Claimants' two-page August 14, 2023, letter. Claimants had until October 6, 2023, to file and serve a Reply to Respondents' Response. Although a deadline for a Sur-Reply was not included in the briefing schedule, Respondents filed and served a Sur-Reply to Claimants' Reply on October 13, 2023, and it has been read and considered with the other three pleadings. Claimant also filed and served another spreadsheet on September 13, 2023, with an explanation of each of its four columns.

Claimants have complied with the pleading requirements in the October 27, 2022, Order with respect to the claims included under "Order Compliant Cases" in the first sheet of the August 14, 2023, and September 13, 2023, spreadsheets and AAA may proceed to administratively appoint Merits Arbitrators as soon as Claimants' Attorney signs the September 13th spreadsheet as required by California Code of Civil Procedure Section 128.7.

Claimants have failed to comply with the pleading requirements in the October 27, 2022, Order for the rest of the Claimants for over a year. Claimants' request for a Preliminary Injunction in the Federal District Court challenging the Arbitrator's October 27th Order was denied. While the denial of the Preliminary Injunction has been appealed and that appeal is currently pending in the United States Court of Appeals for the Ninth Circuit, there is no stay in effect.

Consequently, the Claims in the second sheet, identified as "Amended Claim Cases," and third sheet, identified as "'Cases Still Working On" of the August 14, 2023, and September 13, 2023, spreadsheets of Claimants who allege they have qualifying Regulation E transactions but have not complied with the pleading requirements in the October 27th Order are Dismissed without Prejudice. Those Claimants may re-file Claims concerning qualifying Regulation E transactions in this Consumer Mass Arbitration on the condition that l) they comply with the three pleading requirements in the October 27th Order, and 2) Claimants' Attorney complies with the requirement of California Code of Civil Procedure Section 128.7. The invoicing of AAA fees is stayed for these refiled Claims until it is determined that the refiled Claims have complied with these two conditions.

The Process Arbitrator's authority is limited in MA-6(d) of the AAA Mass Arbitration Supplementary Rules to administrative issues and does not include the enforcement of discovery. Whether Respondent can or should be required to provide Claimants with their account records is within the jurisdiction of the Merits Arbitrator.

The August 14, 2023, and September 13, 2023, spreadsheets referenced in the Order are attached.

November 10, 2023
Date

Anita Rae Shapiro
Hon. Anita Rae Shapiro, Arbitrator

Exhibit 8

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Attorneys for Respondent DOORDASH, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TERRELL ABERNATHY, et al.,

Petitioners,

v.

DOORDASH, INC.,

Respondent.

CHRISTINE BOYD, et al.,

Petitioners,

v.

DOORDASH, INC.,

Respondent.

CASE NOS. 3:19-cv-07545-WHA
3:19-cv-07646-WHA

RESPONDENT DOORDASH, INC.'S OPPOSITION TO PETITIONERS' AMENDED MOTION TO COMPEL ARBITRATION

[*Declarations of Richard Zitrin, Marta Vovchenko, Andrew Spurchise, Joshua Lipshutz, and Michael Holecek filed concurrently herewith*]

Action Filed: November 15, 2019

Hearing Date: February 10, 2020
Hearing Time: 2:00 p.m.
Hearing Place: Courtroom 12 – 19th Floor
Honorable William Alsup

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INTRODUCTION

DoorDash stands by its arbitration agreements. Many of the Petitioners in this case have valid and enforceable arbitration agreements with DoorDash and DoorDash intends to honor them. Before that happens, however, this Court should ensure that both sides' contractual and due process rights are protected—something AAA has thus far refused to do. Even though Keller Lenkner tried to force DoorDash into paying nearly $12 million in nonrefundable AAA filing fees for 6,250 claimants, it has become clear that a substantial number of Petitioners have no arbitrable claims against DoorDash, and indeed some never even signed up for a DoorDash account. Further, the evidence so far calls into question whether Keller Lenkner actually represents many of the Petitioners in this action. Nearly each day, new facts come to light that support DoorDash's decision not to pay millions of dollars in nonrefundable filing fees to AAA and to seek another arbitration provider for future arbitrations—one that understands the serious due process concerns raised by these types of mass arbitrations and, unlike AAA, is willing to develop procedures to handle them fairly and efficiently.

Now that Keller Lenkner has provided DoorDash with more information about the Petitioners, DoorDash has discovered the following:

- Approximately 104 original Petitioners are entirely unknown to DoorDash, having never signed up for a Dasher[1] account on the DoorDash platform;
- Approximately 39 original Petitioners never completed the Dasher account creation process, meaning they were never eligible to perform any services using the DoorDash platform;
- Approximately 133 original Petitioners completed the Dasher account creation process but never actually performed any work using the DoorDash platform.

Those three groups alone represent over $500,000 in nonrefundable filing fees that a AAA administrator commanded DoorDash to pay, even though the claims being asserted on those Petitioners' behalf would not have satisfied Rule 11. And, indeed, in its Amended Motion to Compel Arbitration, Keller Lenkner withdrew these and other Petitioners from this case (361 in total), essentially conceding there is no basis to arbitrate their claims. But there is more:

[1] DoorDash refers to independent contractors who use the DoorDash platform to find delivery opportunities as "Dashers."

- Approximately 448 of the remaining Petitioners that are supposedly represented by Keller Lenkner in this case appear to be represented by *different law firms*, based on the client lists and arbitration demands that other plaintiffs' firms have submitted to DoorDash;
- Despite being required by this Court to obtain declarations from their clients attesting to the facts necessary to compel arbitration, Keller Lenkner was unable to secure signed declarations from 869 of the remaining Petitioners;
- The declarations that Petitioners did submit contain electronic signatures, and the "certificates of completion" associated with those e-signatures suggest that Petitioners are represented by a solo practitioner in New York named Jeremy Troxel, not by Keller Lenkner. Mr. Troxel has not made any appearance in this case and is not licensed to practice law in California;
- The certificates further indicate that communications with the Petitioners are being handled by a telemarketing company named Pioneer Town Media, raising serious questions about how Keller Lenkner (or Mr. Troxel) procured these "clients" in the first place.

DoorDash's investigation continues. But based on the current record, it would be premature for the Court to grant Keller Lenkner's motion to compel arbitration.

In addition, before compelling arbitration of Petitioners' claims, this Court should protect Petitioners' right to participate in the $39.5 million *Marciano* settlement, which would provide each Petitioner with a substantial sum of money and release their claims. The San Francisco Superior Court is scheduled to hold a preliminary approval hearing on January 30, 2020, and, once the settlement is preliminarily approved, Petitioners will receive notice of the settlement and the ability to opt out. Compelling the parties to arbitrate and triggering nonrefundable fees on both sides makes little sense unless Petitioners confirm that is their desire, based on full knowledge of the offer on the table. In fact, just last week, the parties to a class-action settlement in the District of Minnesota filed a lawsuit asserting that Keller Lenkner is concealing a similar class-wide settlement from its purported clients in order to manufacture thousands of mass-arbitration demands and subvert the settlement. Nationally recognized ethics professor Nancy Moore opined that Keller Lenkner's conduct was both dishonest and contrary to the rules of professional ethics. *See In re: CenturyLink Sales Practices & Sec. Litig.*, No. 17-md-2795-MJD-KMM, Dkt. 510 (D. Minn. Jan. 10, 2020) (attached as Lipshutz Decl. Ex. P). In this case, California ethics expert Richard Zitrin has similarly opined that Keller Lenkner may have violated American Bar Association and California ethics standards designed to protect its clients' interests. *See* Zitrin Decl. ¶¶ 16–17, 29.

DoorDash is—and always has been—willing to arbitrate claims with Dashers who actually entered into arbitration agreements with DoorDash, follow the applicable arbitration-filing rules, and

submit non-frivolous arbitration claims themselves or through their actual lawyers. Indeed, DoorDash paid $475,000 in filing fees to AAA to arbitrate the first 250 of Keller Lenkner's purported clients in August 2019. But AAA has made virtually no progress on the initial 250 arbitrations that DoorDash paid for nearly five months ago—it has not even assigned arbitrators to approximately 180 of those cases, and has scheduled an arbitration in only one of the cases. DoorDash should not be forced to pay millions of dollars in nonrefundable filing fees simply because Keller Lenkner submits a list of names to AAA, without establishing an attorney-client relationship or properly vetting those petitioners' claims—let alone giving DoorDash an opportunity to vet the names and ensure that claimants and their counsel have followed the rules. When this Court does grant arbitration for certain Petitioners, it should take steps to ensure that AAA protects the parties' contractual and due process rights, rather than simply collecting millions of dollars in administrative fees so the claims can sit on the shelf for months or years on end.

Keller Lenkner also attacks DoorDash's decision to switch to a *new* arbitration provider (CPR) that developed a mass-arbitration protocol aimed at resolving claims efficiently and expediently. But that issue is not before the Court; DoorDash is not seeking to force any of the Petitioners in this case to use CPR. In any event, Keller Lenkner's allegations have been thoroughly debunked by CPR's President, who testified under oath that his team (not Gibson Dunn or DoorDash) created the new protocol and refuted Keller Lenkner's theory that DoorDash and Gibson Dunn coerced CPR into doing so. In fact, CPR retained the Hon. Shira Scheindlin to be in charge of its new mass-arbitration protocol and ensure it is carried out in a fair and equitable manner. *See* Alison Frankel, REUTERS, "Ex-judge atop controversial mass arbitration program: Give it a chance to work" (Dec. 23, 2019), https://reut.rs/2thkGMG. As Judge Scheindlin—who "ha[s] credibility with both sides of the bar"—exhorted, "[i]t should at least be tried." *Id.*

From day one, all DoorDash has wanted is an orderly approach to vetting and arbitrating thousands of claims before it is forced to pay millions of dollars in nonrefundable fees—something it is finally getting in this Court and which should continue until it is clear that Petitioners have arbitrable claims and are properly represented by Keller Lenkner. Requiring the parties here to proceed in an organized way such that only bona fide claims are pursued in arbitration ensures that: (i) DoorDash's

due process rights are protected, (ii) DoorDash will not pay millions of dollars in up-front fees for arbitrations that should never happen either because the Petitioner has no claim or would rather accept the *Marciano* settlement, and (iii) Petitioners are proceeding with this litigation only if they have given informed consent to their counsel of choice. In contrast, Permitting Keller Lenkner to rush to AAA would harm both DoorDash and Petitioners.

Alternatively, as set forth in DoorDash's concurrently filed motion to stay, the Court should stay this action pending the $39.5 million *Marciano* settlement, which would resolve nearly all of Petitioners' claims. A stay would allow the Court and parties time to determine which of the thousands of Petitioners chooses to accept the settlement and release their claims before spending resources initiating unnecessary arbitrations.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

A. Keller Lenkner Seeks A Quick Payout By Threatening DoorDash With Millions Of Dollars In Nonrefundable Arbitration Filing Fees

In March 2019, Keller Lenkner sent a letter to DoorDash purporting to represent more than 3,000 "Dashers" who allegedly were misclassified as independent contractors. *See* Dkt. 35-5 Ex. A. The letter expressed an intent to file arbitration demands on behalf of those delivery providers, warning DoorDash of the administrative costs of doing so:

> Although DoorDash's agreement requires individual arbitration, we understand that individual arbitration is expensive. As you know, DoorDash's agreement requires DoorDash to pay all arbitration-related costs, including arbitration retainers and filing fees. Applying its Employment/Workplace Fee Schedule, AAA will require DoorDash to pay a $2,200 filing fee, a $750 administrative fee, and an arbitrator's retainer of $4,000 or more.
>
> If we conclude that it is necessary to proceed to arbitration, we believe it is in our clients' interests to proceed with every arbitration simultaneously. Based on 3,000 drivers, ***proceeding to arbitration would obligate DoorDash to pay AAA more than $20 million***—to say nothing of DoorDash's attorneys' fees and its underlying liability, which we believe is substantial. ***These numbers will continue to grow***, as several hundred additional DoorDash drivers engage our firm each week.

Id. (emphasis added). The letter went on to explain Keller Lenkner's true intention: extract a multi-million dollar payment from DoorDash to avoid the administrative costs of these arbitrations, irrespective of the merits of their alleged clients' claims. "Before we serve demands on AAA that will trigger DoorDash's obligation to pay the costs outlined above, it would be sensible for the parties to

explore whether we can agree on an alternative process for resolving our clients' claims." *Id.*

Keller Lenkner has deployed this same strategy against other companies—using social media to generate thousands of "clients" and then extracting a quick settlement by threatening to overwhelm the company with millions of dollars in arbitration filing fees, regardless of the claims' merit.[2]

Here, when DoorDash investigated the "client list" that Keller Lenkner submitted with its demand letter, it could not find any record that a substantial number of those clients were delivery providers using the DoorDash platform or had executed an arbitration agreement. DoorDash raised these concerns with Keller Lenkner. *See* Dkt. 35-5 ¶ 3; *id.* Ex. C; Dkt. 35-4 ¶ 6.

B. DoorDash Pays AAA Filing Fees For 250 Keller Lenkner Arbitrations

On July 2, 2019, Keller Lenkner filed its first batch of AAA demands on behalf of 250 purported Dashers. DoorDash supports arbitration and has successfully utilized AAA to resolve individual disputes with numerous delivery providers. *See, e.g.*, Dkt. 35-5 ¶ 13. So even though DoorDash had serious doubts about the validity of Keller Lenkner's initial 250 demands, DoorDash paid $475,000 in AAA filing fees and commenced arbitration of those claims. *Id.* ¶ 6.

DoorDash has continued to expend considerable time and money arbitrating those initial 250 claims, despite AAA's difficulties in handling so many simultaneous claims. On December 11—more than three months after DoorDash paid its filing fees—AAA told the parties that it was having difficulty finding arbitrators for so many claims and asked the parties to, among other things, consent to arbitrators they had previously struck as unacceptable or unqualified. *Id.* To date, arbitrators have been selected in only 66 cases. Spurchise Decl. ¶ 5. DoorDash has had calls with only five arbitrators regarding 12 cases. *Id.* ¶ 6. Only one case has an arbitration date set—for July 16–17, 2020, one year after the demands were filed. *Id.* ¶ 8.

[2] In 2018, for example, Keller Lenkner filed approximately 12,500 arbitration demands against Uber and 3,420 demands against Lyft. *See* Erin Mulvaney, *Plaintiffs Lawyers Pressure Lyft to Pay Millions in Arbitration Fees*, Law.com (Dec. 14, 2018), https://bit.ly/2Z11iit; Erin Mulvaney, *"Calling Uber on Their Bluff," Plaintiffs Lawyers Strike Back to Compel Arbitration*, Law.com (Dec. 6, 2018), https://bit.ly/2Z2yJkB. Recently, Keller Lenkner has filed or threatened to file thousands of arbitration demands against Postmates and DraftKings. *See* Chris Villani, *Ruling on Arbitration Due Soon In DraftKings & FanDuel MDL*, Law360 (Aug. 28, 2019), https://bit.ly/34tCtgc. Keller Lenkner and other law firms have used social media to gather names, hold those names until they have a long list of putative "clients," and then send those lists to companies as leverage to extract settlements. *See* "*Calling Uber*," *supra*.

C. Keller Lenkner Files Thousands Of Deficient Arbitration Demands With AAA

Despite the fact that AAA had struggled to make progress on the initial 250 arbitrations, Keller Lenkner began filing thousands of additional arbitration demands with AAA. On August 26, Keller Lenkner filed 2,250 identical demands, and on September 27, Keller Lenkner filed another 4,000. Dkt. 35-5 ¶¶ 7-8. Each of these carbon-copy demands was facially deficient—none included an email address associated with a Dasher account, any individualized factual allegations supporting the claims, the applicable arbitration agreement, or the amount in controversy. *See id.* Ex. E. And, once again, DoorDash could not identify many of those claimants as Dashers.

AAA rules require that arbitration demands must, among other things, "include the applicable arbitration agreement," describe the "nature of the dispute," and state "the amount in controversy." AAA Employment Arbitration Rule 4(b)(i)(1). These requirements allow defendants to evaluate the allegations against them and decide whether to arbitrate on the merits, enter settlement discussions, or allow a default judgment. For example, if a claimant seeks only a few hundred dollars from a company, it might make sense for the company to pay that amount without engaging in arbitration *or* litigation. *See, e.g.*, Chandrasekher & Horton, "Arbitration Nation: Data from Four Providers," 107 CAL. L. R. 1, 56 (2019) ("Litigants should be able to value, and thus settle, most disputes."); JAMS, "ADR Frequently Asked Questions," https://bit.ly/2spN92w (explaining that mediation requires "enough information . . . to warrant an interest in settlement, and to assess the dispute's approximate settlement value"). Not a single one of the thousands of arbitration demands filed by Keller Lenkner complied with AAA's rules—leaving DoorDash unable to evaluate whether the claimants had even potentially viable, non-frivolous claims, whether the claimants had actually entered into arbitration agreements with DoorDash, and which defense or settlement strategy to pursue with respect to each of them.

Despite the facial deficiencies of these 6,250 claims, AAA demanded payment from DoorDash of $11,875,000 in nonrefundable filing fees, without which AAA would not initiate arbitrations or even address DoorDash's concerns over the unwarranted fees. Holecek Decl. ¶ 2; Dkt. 35-5 ¶ 9; AAA Employment/Workplace Fee Schedule, https://bit.ly/2rWv3V3. DoorDash repeatedly attempted to work with AAA to find a solution—for example, requesting that payments be due on a rolling basis as arbitrators were assigned to each claim. Holecek Decl. ¶ 3. This was a more-than-reasonable request

given that AAA had made little progress on the first 250 claims for which DoorDash had paid $475,000. Dkt. 35-5 ¶ 9. But according to AAA, so long as claimants' counsel provides "a list of names" even "in crayon," AAA would bill DoorDash $1,900 for each claimant's name provided. Dkt. 144 at p. 4. Indeed, when Gibson Dunn asked hypothetically whether, if claimants' counsel submitted one million names to AAA, AAA would invoice DoorDash $19 billion, the AAA representative responded "yes." *Id.*

DoorDash also told AAA that Keller Lenkner's demands were substantively deficient and violated AAA's own rules. Dkt. 35-5, Ex. J; AAA Employment Rule 4(b)(i)(1). Keller Lenkner sent an email disputing DoorDash's objections and less than two hours later, a regional vice president from AAA emailed her "administrative determination" that all of Keller Lenkner's 6,250 claims were proper and triggered DoorDash's obligation to pay nonrefundable fees. Dkt. 35-5, Ex. J at 3. AAA never asked DoorDash to identify the deficiencies in Keller Lenkner's demands, let alone provide a fair and orderly hearing before making a $12 million determination. Instead, AAA simply asked DoorDash whether it had "a specific question regarding information provided" and punted the issue *to the parties* and asked them to work it out themselves *after declaring the demands to be valid*. *Id.*

On November 6, DoorDash engaged in a meet and confer with Keller Lenkner and explained the problems with its arbitration demands. But Keller Lenkner—having no incentive to help DoorDash out from under AAA's $12 million invoice—refused to withdraw any of its arbitration demands and instead reported to AAA that the issues between the parties were unresolvable and that AAA should force DoorDash to pay the fees. *Id.* ¶ 10 & Ex. K. When DoorDash did not pay, Keller Lenkner asked AAA to close the 6,250 cases, which AAA did on November 8. *Id.* Ex. L & ¶ 12.

D. Gibson Dunn And Other Law Firms Urge Arbitration Organizations To Develop A Fair, Workable Solution To Mass Arbitration

As explained in its December 19 letter to the Court, Dkt. 144, Gibson Dunn discussed AAA's administration of mass arbitrations with several AAA representatives over the course of many months. Holecek Decl. ¶ 3. AAA told Gibson Dunn that it was already aware of certain challenges with mass arbitrations, and that it had a committee looking for solutions. *Id.* Gibson Dunn provided input based on the firm's practical experience with mass arbitrations. *Id.* Gibson Dunn offered several potential

solutions, including the deferment of filing fees until arbitrators are assigned, discounted filing fees for both sides (claimants and respondents) when a high volume of similar arbitration demands are filed, and charging companies annual flat fees for administration regardless of the number of arbitrations filed. *Id.* ¶ 4.

AAA reported that it had decided to address the challenges of mass arbitrations by publishing a new "group filing-fee schedule." Holecek Decl. ¶ 5. Under AAA's new fee schedule, if 25 or more arbitration demands are filed simultaneously against the same party by claimants represented by the same counsel, discounted and deferred filing fees apply. *Id.* AAA announced that the schedule would be published on July 1, but that rollout was delayed until July 15, then to August 1, and then finally to November 1. *Id.*; *see* AAA, *Employment/Workplace Fee Schedule* (Nov. 1, 2019), https://bit.ly/2rWv3V3.

At the same time, Gibson Dunn had multiple discussions with JAMS representatives about their approach to mass arbitration. Holecek Decl. ¶ 6. JAMS stated it was aware of challenges posed by mass arbitration, and openly received Gibson Dunn's thoughts for addressing those challenges. *Id.* Gibson Dunn is currently unaware of any published fee schedules or protocols by JAMS specifically addressing mass arbitrations, but understands that JAMS has been modifying its fee schedules on a case-by-case basis.

Gibson Dunn also contacted CPR to discuss these same issues. Holecek Decl. ¶ 7. CPR was already aware of the unique problems associated with mass arbitrations, having published an article on the subject in February 2019—several months *before* Gibson Dunn first contacted it regarding mass arbitrations. *Id.*; *see* CPR, *More on Mass Individual Arbitration As an Alternative to Class Arbitration* (Feb. 15, 2019), https://bit.ly/35LjXS5. CPR was eager to discuss these complex arbitration issues and try to find a solution that would be fair to claimants and respondents. Holecek Decl. ¶ 8. As it did with AAA, Gibson Dunn proposed several ideas for addressing mass arbitration's challenges, including various types of new fee schedules. *Id.* CPR stated that it preferred to create a new mass arbitration protocol, and welcomed Gibson Dunn's input. *Id.*

CPR also invited and received input from a variety of stakeholders, including labor-and-employment counsel on both the labor side and the management side, and prominent arbitrators and

mediators. Dkt. 137-2 at 4. But as CPR's President Alan Waxman testified, CPR drafted the protocol itself and unilaterally decided which suggestions to accept or reject. Lipshutz Decl. Ex. O at 119–20. CPR ultimately created a protocol that anyone could adopt: "This was not for DoorDash or Gibson Dunn . . . . This was for the general marketplace." *Id.* at 120.

At all times, the goal of the CPR Protocol was to create a fair process that would make mass arbitration more administrable and withstand any procedural or substantive challenges. *E.g.*, *id.* at 117–18. The protocol's express aim is to complete 10–20 bellwether arbitrations in less than six months (by comparison, little progress has been made to date in any of the 250 AAA cases that Keller Lenkner filed six months ago). Under the CPR Protocol, the claimant nominates the arbitrator for each case from CPR's Master List of arbitrators, and the company/employer is bound to arbitrate with one of the neutrals nominated by the claimant. Giving claimants unilateral say in arbitrator selection is both worker-friendly and designed to expedite the arbitration process by avoiding rank-and-strike lists. Moreover, after completing the 10–20 bellwether arbitrations and a mediation to determine the best way to resolve the remaining claims, claimants can choose to proceed with individual arbitrations or *opt-out* of arbitration entirely and file claims in court. *E.g.*, *id.* at 120. This innovative feature of CPR's protocol provides unprecedented rights and options to claimants.

On December 16, CPR announced that former District Judge Shira Scheindlin would become the Administrative Arbitrator for its new protocol. *See* CPR, "Former U.S. District Court Judge for the Southern District of New York, Shira Scheindlin, Named Administrative Arbitrator for CPR's Mass Claims Protocol" (Dec. 16, 2019), https://bit.ly/2tYAfIU. Judge Scheindlin is well-prepared to administer the protocol: "As a United States District Judge in the Southern District of New York for 22 years, Judge Scheindlin had significant experience managing a number of cases in which mass (or multiple) individual claims were asserted against the same defendant or defendants. On five separate occasions, Judge Scheindlin was selected by the Judicial Panel on Multi-District Litigation to manage mass claims in the courts. Judge Scheindlin was also a member of the American Law Institute (ALI) Working Group on Aggregate Litigation." *Id.* Judge Scheindlin explained that CPR's new protocol "offers advantages not only to claimants, whose cases will likely be resolved at the defendant's cost and far more quickly than they would be in court, where mass claims often take years to resolve, but

also to defendants, with the greater odds it offers of reaching a prompt global resolution in a more cost-effective manner than the courts would offer." *Id.*[3]

E. DoorDash Incorporates The CPR Protocol Into Its ICA On A Going-Forward Basis

Gibson Dunn told CPR that DoorDash would like to implement the new CPR Protocol in the next iteration of DoorDash's ICA, which DoorDash periodically updates and amends, and urged CPR to publish the protocol as soon as possible. Holecek Decl. ¶ 9. CPR published the protocol on November 4, and DoorDash published the updated ICA on the Dasher mobile app on November 9. *See* Dkt. 35-3 ¶ 9. Thus, any delivery provider who has logged onto his or her Dasher account since November 9 has had the opportunity to review the updated ICA and the CPR Protocol and determine whether he or she wants to agree to the new arbitration terms with DoorDash or opt out of arbitration entirely and resolve his or her potential disputes with DoorDash in court.

The only contractors who were shown and asked to agree to the updated ICA were those who contacted DoorDash by logging into the DoorDash platform on or after November 9 in order to seek a delivery opportunity. *Id.* ¶ 11. Any contractor who did not want to agree to the new ICA was free to stop using the DoorDash platform. And those who do agree to the updated ICA are permitted to opt out of the arbitration agreement within 30 days. Dkt. 150-6, § XI.

F. Keller Lenkner Files Two Petitions To Compel Thousands of Arbitrations

On November 15, Keller Lenkner filed a petition to compel arbitration on behalf of Terrell Abernathy and 2,235 other purported Dashers, seeking an order requiring that DoorDash arbitrate each Petitioner's claims and pay all of AAA's requested arbitration fees and costs. Dkt. 1, ¶ 34. That same day, Keller Lenkner filed a motion to compel arbitration, and attached a single declaration from one of the 2,236 Petitioners alleging that he "worked" for DoorDash. *See* Dkt. 5-2. Four days later, Keller Lenkner filed a nearly identical case, *Boyd*, in state court on behalf of 3,997 Petitioners. *Boyd* was removed and related to *Abernathy*. Dkts. 82, 139.

[3] Keller Lenkner complains that many claimants may have to wait several months until the bellwether arbitrations are complete. Dkt. 10 at 1–2. However, 180 of Keller Lenkner's current 246 claimants are still waiting for AAA to select their arbitrators, six months after they served their arbitration demands. Spurchise Decl. ¶¶ 4–5. Further, Keller Lenkner routinely forces its clients to wait before filing their demands until the firm has gathered a large number of additional claimants, so it can threaten companies with a large number of arbitrations all at once. CPR's new protocol has the potential to resolve claims on a much faster schedule.

On November 17, Keller Lenkner moved for a TRO that would enjoin DoorDash and its counsel from "forcing" Petitioners to sign new arbitration agreements. Dkt. 10 at 22–23. On November 25, the Court heard argument on Petitioners' TRO motion, and DoorDash explained to the Court that it will permit any Petitioner who filed an arbitration demand with AAA before November 9 to arbitrate with AAA if they opt out of DoorDash's new arbitration agreement. Lipshutz Decl. Ex. J at 57:10. In response, Petitioners withdrew their TRO motion. *Id.* at 75:20.

The day after the hearing, the Court ordered that "[b]efore [it] can grant injunctive relief compelling arbitration as to any petitioner, there must be a sworn declaration from that petitioner at least setting forth his or her name and the identifying information he or she used to register with DoorDash, the approximate dates of service, and at least referencing in an ascertainable way the specific arbitration agreement he or she clicked through." Dkt. 50. The Court ordered that "the petitioner himself or herself must sign" the declarations. *Id.*

G. The Parties Exchange Information And Keller Lenkner Files An Amended Motion That Removes Hundreds Of Petitioners

After the hearing, the parties agreed to exchange information informally. Keller Lenkner provided DoorDash with email addresses and other identifying information for the Petitioners—something DoorDash had long been requesting—and DoorDash was able to compare that data against its own business records. Vovchenko Decl. ¶ 4. On December 4, DoorDash sent Keller Lenkner a spreadsheet showing that, based on the data Keller Lenkner provided, DoorDash found that approximately 141 Petitioners had no relationship with DoorDash. Lipshutz Decl. Ex. A; Vovchenko Decl. ¶ 5. Another approximately 39 Petitioners accepted the ICA but never completed the Dasher account creation process and thus necessarily completed no deliveries on the DoorDash platform. Vovchenko Decl. ¶ 6. And another approximately 133 Petitioners completed the Dasher account creation process but chose not to perform any deliveries. *Id.* ¶ 7. Thus, none of these approximately 313 Petitioners possibly could have a valid Labor Code or FLSA claim, despite the fact that Keller Lenkner filed AAA arbitration demands and a petition to compel arbitration on their behalf.

On December 19, Keller Lenkner provided DoorDash with additional information regarding 79 of these original Petitioners. *Id.* ¶ 5. DoorDash found approximately 37 of these individuals in its

records only after Keller Lenkner provided this additional, corrected information; however, others still appear not to have completed any deliveries on the DoorDash platform. *Id.*[4]

On December 23, Keller Lenkner filed an amended motion to compel arbitration on behalf of 5,879 individuals—most (but not all) of whom were part of the original 6,233 *Abernathy* and *Boyd* Petitioners. Dkt. 151. In support of its amended motion, Keller Lenkner submitted 5,010 declarations (Dkts. 153-6, 153-7), and 869 "witness statements" (Dkt. 153-8). The amended motion notably *omits* approximately 361 original Petitioners, including the Petitioners described above.[5]

Keller Lenkner also submitted 5,010 declarations from Petitioners in response to this Court's order. Dkt. 50. But, as to the other 869 Petitioners, Keller Lenkner did not procure declarations; rather, it submitted "witness statements" that do not comply with this Court's order. Specifically, the witness statements were apparently signed months ago and list only the individual's mailing address, length of time they have used the DoorDash platform, state that they have retained Keller Lenkner, and state that they do not recall opting out of arbitration. *See* Dkt. 153-8. These statements fail to state "the identifying information he or she used to register with DoorDash, the approximate dates of service," or "at least referenc[e] in an ascertainable way the specific arbitration agreement he or she clicked through." Dkt. 50. Moreover, Keller Lenkner's amended petition now asserts an alleged amount in controversy on behalf of each Petitioner, in an attempt to comply with AAA's rules. But many Petitioners assert grossly unreasonable amounts in controversy. For example, approximately 920 Petitioners have earned less than $200 on the DoorDash platform. Vovchenko Decl. ¶ 8. Yet each of them alleges an amount in controversy in the tens or hundreds of thousands of dollars.

Moreover, hundreds of Petitioners in this action appear to be to be *represented by different counsel*. DoorDash has received "client lists" from several other plaintiffs' firms purporting to

[4] On December 11 and 12, DoorDash provided Keller Lenkner with information regarding Petitioners who accepted the updated ICA on or after November 9, including information on who opted out of the updated arbitration agreement containing the CPR Protocol. Lipshutz Decl. Ex. B.

[5] Keller Lenkner's amended petition omits an additional 48 Petitioners who do not fall into any of the categories described above. It is unclear why these 48 Petitioners were omitted. The amended petition also adds 11 *new* Petitioners who were not parties when this action was filed. Further, four Petitioners originally appeared on both the *Abernathy* and *Boyd* lists; now, these four Petitioners appear on only one list.

represent DoorDash delivery providers seeking to assert misclassification claims. Approximately 448 Petitioners appear on another firm's client list, and approximately 22 Petitioners appear on more than one other firm's client list, meaning that three different law firms purport to represent the same individual in the same dispute. Lipshutz Decl. ¶ 13. Indeed, at least one original Petitioner in this case (Jaysfer Duarte) already filed an arbitration against DoorDash through a different plaintiffs' firm, DoorDash paid the filing fee, and the parties are presently in arbitration. Spurchise Decl. ¶ 9. Keller Lenkner's original motion to compel arbitration thus effectively sought to require DoorDash to pay a *second* nonrefundable filing fee to arbitrate that same individual's claims.

H. Petitioners' DocuSign Certificates Raise Even More Questions

None of Petitioners' declarations included handwritten signatures; rather, Keller Lenkner submitted "DocuSign" electronic stamps. DoorDash requested proof that Petitioners actually approved those declarations, and Keller Lenkner produced "DocuSign Certificates of Completion" for 400 of the 5,879 Petitioners on January 9, 2020. *See* Lipshutz Decl. ¶ 15; Ex. N.

The Certificates of Completion contain several apparent anomalies. Keller Lenkner is not mentioned anywhere on the Certificates (or in the declarations). *See* Lipshutz Decl. ¶ 16. Rather, the "Envelope Originator" is listed as Jeremy Troxel with an address in "Washtington, DC" (misspelling in original). *Id.* ¶ 16. Mr. Troxel's law firm does not seem to have a website, but according to his LinkedIn profile, Mr. Troxel appears to be a solo practitioner in New York where he is licensed as an attorney—unlike in Washington, DC or California, where he is not. *See* https://bit.ly/2TfT8BI. Each Certificate states that the signer has a "relationship with Troxel Law," without mentioning Keller Lenkner. Lipshutz Decl. ¶ 16.

In addition, each Certificate states that Petitioners who wish to withdraw their consent to receive electronic notices and disclosures should email jon@pioneertownmedia.com. *See id.* at 4. Pioneer Town Media is a telemarketing company, whose website brags about "track[ing] and retarget[ing] visitors who do not convert on the first visit with additional messaging that makes [potential attorneys] sound like a human and not just another lawyer. With subsequent targeting we continue to lead them down the client conversion funnel of filling out a contact form, replying to our calls/emails/and texts, and ultimately sending back a complete and accurate intake package." Pioneer Town Media, "What

We Do," https://bit.ly/2Fx8YjD. It is unclear why Petitioners would need to email a telemarketing company to withdraw consent from communications from a law firm with whom they supposedly have an attorney-client relationship.

LEGAL STANDARD

As in any litigation, the Court in this case must determine whether the parties are properly before the Court and whether they are actually being represented by the law firm that purports to represent them. *See Graves v. U.S. Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982) (appearance of an attorney raises rebuttable presumption of authority to act). In determining whether to compel arbitration, the court considers "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Sweeney v. Tractor Supply Co.*, 390 F. Supp. 3d 1152, 1157 (N.D. Cal. 2019). As the parties seeking arbitration, Petitioners "bear[] the burden of proving the existence of an arbitration agreement by a preponderance of the evidence." *Id.* (quotation marks omitted).

ARGUMENT

Petitioners' motion to compel arbitration raises several concerns that should be addressed by this Court before anyone is compelled to arbitration. *First*, by omitting hundreds of original Petitioners from the amended petition, Keller Lenkner implicitly concedes what the evidence demonstrates—that it filed frivolous arbitration demands and a frivolous petition to compel arbitration as to those individuals. *Second*, hundreds of *other* Petitioners appear on other law firms' client lists regarding the same underlying misclassification dispute, suggesting that another firm (not Keller Lenkner) may represent them. *Third*, hundreds *more* Petitioners have not complied with this Court's November 26 order to submit a declaration with particular identifying information. *Fourth*, a sample set of Petitioners' DocuSign Certificates of Completion raises serious questions about the roles of Troxel Law and Pioneer Town Media, and the nature of Keller Lenkner's true relationship with Petitioners (if any). In addition, before compelling arbitration before AAA, this Court should take steps to ensure that AAA will protect the parties' contractual and due process rights—something that has not happened so far. Finally, as set forth in DoorDash's concurrently filed motion to stay, the Court should not compel arbitration until Petitioners are notified of the full details of the *Marciano* settlement and decide

whether to accept it, as Petitioners have the right to make an informed decision before choosing arbitration over settlement.

A. The Evidence So Far Indicates Keller Lenkner May Not Represent Many Petitioners And Has Not Properly Vetted Their Claims

There are substantial reasons to question whether Keller Lenkner actually represents each of the thousands of Petitioners involved in this proceeding, and whether Petitioners have given informed consent to be represented by Keller Lenkner in this action.

The Court has the inherent authority to manage the proceedings and conduct of attorneys who appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). DoorDash should not be compelled to arbitrate Petitioners' claims until it and the Court (and, indeed, Petitioners themselves) know who (if anyone) represents each Petitioner and is authorized to act on their behalf. Making such a determination will achieve three important aims. *First*, it will protect Petitioners' right to their choice of counsel by ensuring they are in fact represented by their counsel of choice. *See, e.g.*, *Cole v. U.S. Dist. Court*, 366 F.3d 813, 817 (9th Cir. 2004) ("Parties normally have the right to counsel of their choice."). *Second*, it will protect the intended speed and efficiency of the arbitration process. Compelling arbitration before determining Petitioners' representation could lead to duplicative proceedings that will bog down courts and the arbitration process, further delaying the resolution of Petitioners' claims. It also would improperly put the onus on DoorDash to ascertain against whom it is litigating. The best time to address this issue is now, while the Court addresses the other problems with Petitioners' amended petition. *Third*, the Court should ensure there is no gamesmanship by Petitioners or other law firms. Multiple firms purport to represent hundreds of the same individuals for the same legal issues. The only conclusion is that these firms are not taking the necessary care with respect to retaining purported clients.

1. Approximately 361 Original Petitioners Have No Conceivable Claim Against DoorDash

Questions surrounding Keller Lenkner's representation of individuals in this action stretch back to when it filed AAA demands and a petition to compel arbitration on behalf of hundreds of individuals who could not possibly have a claim against DoorDash. By signing a pleading, an attorney certifies that "the factual contentions have evidentiary support or, if specifically so identified, will likely have

evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). Rule 11 thus requires attorneys "to conduct a reasonable inquiry into the facts and the law *before* filing." *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 551 (1991) (emphasis added).

The amended motion contains 361 fewer named Petitioners than the original petition—many of which come from the December 4 spreadsheet DoorDash sent to Keller Lenkner showing (based on information provided by Keller Lenkner) which original Petitioners could not possibly have a valid claim against DoorDash. Keller Lenkner told this Court that it "put an extensive amount of resources to litigate petitioner's claims because [it] think[s] the claims are incredibly strong." Lipshutz Decl. Ex. J at 7:1–4. Keller Lenkner further represented "there is an evidentiary basis to show … [t]hat every single petitioner is a party to a valid arbitration agreement with DoorDash." *Id.* 21:16–21. Now, with the amended petition, 361 of those "incredibly strong" claims have disappeared.

In fact, an investigation revealed that most of these individuals have no conceivable claim against DoorDash because they never performed any work using the DoorDash platform. Yet these 361 Petitioners' claims were filed for arbitration with the AAA, and counsel for Petitioners demanded that DoorDash pay nonrefundable filing fees for these 361 claims—amounting to $685,900. Such lack of diligence raises serious concerns about the process by which Keller Lenkner vets and files claims.[6]

2. Approximately 448 Petitioners Appear On Other Firms' Client Lists

Beyond those *original* Petitioners who no longer appear in the amended petition, hundreds of *remaining* Petitioners raise representation concerns. Keller Lenkner is not the only firm to amass hundreds or thousands of purported plaintiffs and then send a list of names to DoorDash as a way to extract a settlement. Approximately 448 Petitioners' names appear on client lists sent to DoorDash by three other law firms purporting to represent them regarding the same issue of misclassification.

[6] Keller Lenkner has also abandoned its request that the Court "require DoorDash to . . . pay[] the arbitration fees and costs that AAA determines are necessary to empanel arbitrators and proceed with arbitrations." Dkt. 4 at 19. And for good reason: The Court lacks authority to grant such relief. *See, e.g.*, *Adams v. Postmates, Inc.*, No. 4:19-cv-3042, Dkt. No. 253 (N.D. Cal. Oct. 10, 2019) (denying Keller Lenkner's "request for an order directing Postmates to tender payment of outstanding and future arbitration fees"); *Dealer Comput. Serv., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 888 (5th Cir. 2009); *VHS Univ. Labs., Inc. v. Local 283 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 54 F. Supp. 3d 827, 839 (E.D. Mich. 2014); *cf. Lifescan, Inc. v. Premier Diabetic Serv., Inc.*, 363 F.3d 1010, 1012–13 (9th Cir. 2004).

Lipshutz Decl. ¶ 13 & Ex. L. In fact, approximately 22 of these Petitioners' names appear on two other firms' client lists. *Id.* It is impossible for DoorDash or the Court to know which (if any) of *three different law firms* actually represents these Petitioners, particularly where none of the 5,010 declarations from Petitioners states that the Petitioner has retained Keller Lenkner.

3. 869 Petitioners Failed To Submit Declarations Complying With This Court's Order

An additional 869 Petitioners did not comply with this Court's order to submit a personally signed declaration containing certain identifying information. A court can compel arbitration only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. "Although challenges to the validity of a contract within an arbitration clause are to be decided by the arbitrator, challenges to the very existence of the contract are, in general, properly directed to the court." *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017); *accord King v. AxleHire, Inc.*, 2019 WL 1925493, at *2 (N.D. Cal. Apr. 30, 2019) (rejecting argument that issue of contract formation was delegated to arbitrator because "it begs the question of whether the parties formed a contract" and is not "consonant with the law" that challenges to the existence of contracts are properly directed to the court); *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712, 720 (N.D. Cal. 2012) (determining whether an agreement to arbitrate was created before examining its validity); *cf. Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) ("If the parties contest the *existence* of an arbitration agreement, the presumption of arbitrability does not apply.").

Courts routinely address the existence of a contract when resolving motions to compel arbitration. *See, e.g.*, *Gelow v. Cent. Pac. Mortg. Corp.*, 560 F. Supp. 2d 972, 978–79 (E.D. Cal. 2008) (refusing to compel arbitration as to two of ten plaintiffs because no contract with them was tendered, they did not acknowledge signing a contract, and the movant's evidence consisted only of "imprecise descriptions and recollections" of them signing contracts with arbitration provisions); *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, 2013 WL 5539563, at *4 (N.D. Cal. Oct. 8, 2013) (denying motion to compel "because a determination that a valid agreement to arbitrate exists is a prerequisite to granting a motion to compel" and later compelling arbitration only after the agreement was submitted).

Here, 869 Petitioners have not complied with this Court's order to submit a personally signed declaration "at least setting forth his or her name and the identifying information he or she used to register with DoorDash, the approximate dates of service, and at least referencing in an ascertainable way the specific agreement he or she clicked through." Dkt. 50. Keller Lenkner concedes that the 869 "witness statements" it submitted with its amended motion provide only "some of this information" required by the Court. Dkt. 151 at 13 n.10; *see also* Dkt. 153-8; *Rushing v. Viacom Inc.*, 2018 WL 4998139 (N.D. Cal. Oct. 15, 2018) (denying motion to compel because proponent of arbitration failed to provide sufficient evidence of notice to prove existence of valid agreement); *LegalForce RAPC Worldwide P.C. v. Trademark Engine LLC*, 2018 WL 3126389, at *2–4 (N.D. Cal. Jun. 26, 2018) (same); *Bernal*, 2013 WL 5539563, at *4 (same). The absence of declarations from these Petitioners despite Keller Lenkner's efforts to obtain them raises questions about whether those Petitioners were unwilling to sign such declarations for some reason.

Unlike this Court, which ordered Keller Lenkner to provide *proof* that it has real clients with arbitrable claims, AAA has been unwilling to demand or investigate anything before extracting nonrefundable fees. If and when the Court grants arbitration for certain Petitioners, it should take steps to ensure that AAA protects DoorDash's due process rights, rather than simply collecting millions of dollars in nonrefundable fees based only on Keller Lenkner's boilerplate arbitration demands.

4. Petitioners' DocuSign Certificates Of Completion Raise More Questions Regarding Who Actually Represents Petitioners

Petitioners' DocuSign Certificates of Completion, which accompany the declarations Petitioners submitted in response to this Court's order, raise even more questions. The Certificates do not mention Keller Lenkner and appear to be originated by Jeremy Troxel, a solo practitioner licensed in New York, working out of "Washington, DC" [*sic*]. Each Certificate states that the signer has a "relationship with Troxel Law," not Keller Lenkner. *See* Lipshutz Decl. ¶ 16; Ex. N. And to withdraw consent from certain communications from Troxel Law, Petitioners are instructed to email a telemarketing company's address, jon@pioneertownmedia.com. It is unclear why Petitioners who have a "relationship with Troxel Law" would need to email a telemarketing company to withdraw consent from certain communications from Troxel Law. It is even more unclear why Keller Lenkner

is not mentioned alongside either Troxel Law or Pioneer Town Media, or why a lawyer barred only in New York is working from Washington D.C. to represent California clients in a California court.

Nothing in the declarations indicates that any of the Petitioners wants Keller Lenkner to represent them, or even that they know who Keller Lenkner is. It is not clear from the Certificates of Completion or any filing in this case what relationship Petitioners have with Troxel Law or Keller Lenkner—or, for that matter, Pioneer Town Media. In any event, there is *no* indication that Keller Lenkner represents Petitioners in this action, particularly in light of the hundreds who appear on other firms' client lists and the "relationship with Troxel Law" that each Petitioner apparently has.

Even if Keller Lenkner represents each Petitioner in this action, that representation appears to raise serious ethical concerns, according to two ethics experts. Although there is no direct evidence of Keller Lenkner's representation in this action (such as a retention agreement), Prof. Nancy Moore recently examined a Keller Lenkner retention agreement in a similar mass action against another company and gave her "professional opinion that the Keller Lenkner lawyers have engaged in numerous violations of their professional responsibilities." *See In re: CenturyLink Sales Practices & Sec. Litig.*, No. 17-md-2795-MJD-KMM, Dkt. 510, ¶ 8 (D. Minn. Jan. 10, 2020) (Moore Declaration) (attached as Lipshutz Decl. Ex. P); *id.* Dkt. 512, Ex. 4 (D. Minn. Jan. 10, 2020) (retainer agreement) (attached as Lipshutz Decl. Ex. Q).

Professor Moore concluded that Keller Lenkner, through misleading advertisements and retainer agreements, unethically subverted the proposed class settlement in *CenturyLink*—a particularly relevant concern here given the pending *Marciano* class settlement. Among other things, Prof. Moore found that Keller Lenkner (1) issued misleading advertising that failed to disclose the settlement to prospective clients and instead falsely implied that arbitration was the "sole or primary" method of pursuing claims (Ex. P, ¶ 10); (2) falsely implied that the defendant would pay its clients' legal fees in addition to any damages, which was inconsistent with the proposed settlement (*id.* at ¶¶ 11–12); (3) charged a $750 flat fee for all claims resolved before the commencement of arbitration or litigation, which was unreasonable in light of Keller Lenkner's knowledge of a proposed settlement that would pay its clients less than $750 (*id.* at ¶ 14(d)). Overall, Prof. Moore concluded that "Keller Lenkner manipulated the clients into choosing arbitration as the objective of the representation," and

Keller Lenkner "requested their clients to authorize them to seek to arbitrate their claims without providing them with *any* information about alternatives to arbitration, including waiting to see if the Tentative Settlement in the Class Action Lawsuit obtained preliminary approval, in which case the clients could decide, when notified, whether to accept the settlement (without having to pay legal fees) or to opt out of the settlement[.]" *Id.* at ¶¶ 15, 16.

In this case, ethics expert Richard Zitrin reviewed the retention agreement at issue in *CenturyLink* and concluded that "unless Keller Lenkner can demonstrate that its engagement agreement in the within cases is materially and substantially different than that in the *CenturyLink* matter, Keller Lenkner's representation of its clients herein falls far below the standards required both by the American Bar Association's ethical standards and those of the state of California." Zitrin Decl. ¶ 29. Professor Zitrin identified several shortcomings stemming from the *CenturyLink* retention agreement, including a fee-splitting arrangement that "does not meet the California requirements," *id.* ¶ 23, a "particularly onerous" clause allowing Keller Lenkner to withdraw representation of any client at any time, *id.* ¶ 25, a "grossly inadequate" disclosure of potential conflicts, *id.* ¶ 26, and an "inappropriately overbroad" power of attorney clause, *id.* ¶ 28. To the extent any retention agreement signed by Petitioners in this case is substantially similar to that in *CenturyLink*, there are serious concerns with the adequacy of Keller Lenkner's representation of Petitioners here.

5. Any Dispute Over The CPR Protocol Is Not Properly Before This Court

Petitioners attack the CPR Protocol, *see* Dkt. 151 at 21–22, but the enforceability of the CPR Protocol is not at issue in this case, as DoorDash is not seeking to force Petitioners to arbitrate with CPR against their express wishes. *See* Dkts. 153-6 and 153-7 (declarations requesting "to opt-out of that [CPR Employment-Related Mass-Claims Protocol] agreement and remain governed by the prior [AAA] agreement").[7] In any event, the CPR Protocol is valid and enforceable. Petitioners' counsel has described CPR alongside AAA and JAMS as "leading arbitration providers," *O'Connor v. Uber*

[7] The deficient witness statements of the 869 Petitioners who did not submit declarations do not request to opt out of the CPR Protocol. *See* Dkt. 153-8. If and when the Court considers compelling arbitration as to those Petitioners, DoorDash requests time to determine which, if any, of those Petitioners have chosen CPR by agreeing to the updated terms and not opting out of the arbitration provision within 30 days. Petitioners who wish to arbitrate with CPR under the updated agreement should not be forced to arbitrate with AAA.

Techs., Inc., No. 15-17420, Dkt. 20 at 27 (9th Cir. Mar. 25, 2016) (signed by Warren Postman), and CPR continues to demonstrate its willingness to lead—here, leading efforts to solve a challenging mass-arbitration problem affecting a large number of companies and claimants. That leadership and innovation should be praised, not attacked. As Judge Scheindlin has explained, the CPR Protocol "offers advantages not only to claimants, whose cases will likely be resolved at the defendant's cost and far more quickly than they would be in court, where mass claims often take years to resolve, but also to defendants, with the greater odds it offers of reaching a prompt global resolution in a more cost-effective manner than the courts would offer." CPR, "Former U.S. District Court Judge for the Southern District of New York, Shira Scheindlin, Named Administrative Arbitrator for CPR's Mass Claims Protocol" (Dec. 16, 2019), https://bit.ly/2tYAfIU.

B. Alternatively, The Court Should Stay This Action Pending Final Approval Of The *Marciano* Settlement

Alternatively, the Court should stay this action pending final approval of the *Marciano* class settlement for the reasons set forth in DoorDash's concurrently filed motion to stay. At the appropriate time after the settlement is preliminarily approved, Petitioners will have an opportunity to choose whether to accept the *Marciano* settlement and release their claims against DoorDash—including the underlying claims giving rise to this action. Thus, *Marciano* has the potential to substantially reduce the number of parties to this action. It would be efficient and logical to determine which Petitioners will choose to release their claims after being informed of the settlement terms before compelling arbitration of their claims.

C. S.B. 707 Is Inapplicable To This Case And Preempted By The FAA

In addition to asking the Court to compel arbitration, Petitioners request "substantive remedies" under California S.B. 707, a law that took effect on January 1, 2020 and is codified in relevant part at California Code of Civil Procedure §§ 1281.97 and 1281.99. *See* Dkt. 151 at 24. The new law states that when the drafting party of a consumer or employment arbitration agreement does not pay required arbitration fees within thirty days, that party is in default of the agreement, waives its right to compel arbitration, and is subject to automatic sanctions if the employee or consumer proceeds in court. *See*

Cal. Civ. Proc. Code § 1281.97. But S.B. 707 is inapplicable for two independent reasons: (i) it cannot apply retroactively to the events at issue here; and (ii) it is preempted by the FAA.

1. S.B. 707 Does Not Apply Retroactively To Arbitrations Closed In 2019

The "presumption against retroactive legislation is deeply rooted in our jurisprudence" and "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). To determine whether a law is given retroactive effect, courts first determine "whether [the legislature] has expressly prescribed the statute's proper reach." *Id.* at 280. If it has not, courts then determine "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If so, the presumption against retroactivity applies "absent clear [legislative] intent" favoring retroactivity. *Id.*; *see also McClung v. Emp't Dev. Dep't*, 99 P.3d 1015, 1019 (Cal. 2004) (applying *Landgraf* to a California statute). This is especially true for "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271.

S.B. 707 does not apply retroactively to the events at issue in this case, all of which took place in 2019. The California legislature declared that S.B. 707 would not take effect until January 1, 2020. *See* Cal. Civ. Proc. Code § 1281.97 (stating effective date). There is no evidence of legislative intent that the provision should apply retroactively. This is highlighted by the fact that another provision of S.B. 707 specifies that it should be applied retroactively. *See* S.B. 707, 2019-2020 Reg. Sess. (Cal. 2019); Cal. Civ. Proc. Code § 1281.96(g) (applying amended provision to arbitrations administered after January 1, 2015). When a legislature uses a term in one portion of a statute but not another, the omission is presumed to be intentional. *Russello v. United States*, 464 U.S. 16, 23 (1983).

The conduct of which Petitioners complain occurred prior to S.B. 707's effective date. DoorDash was sent invoices totaling $11,875,000 in AAA fees in September and October 2019, Keller

Lenkner asked AAA to close the cases on November 6, 2019, and AAA closed the cases on November 8, 2019. Under the presumption against retroactivity and due process, S.B. 707 does not apply here.[8]

2. S.B. 707 Is Preempted By The FAA

Even if S.B. 707 applied retroactively, it is preempted by the FAA. S.B. 707 provides that a party who drafts an arbitration agreement—unlike any other type of contract—is placing itself at risk of severe punishment by courts for failure to pay certain fees, irrespective of the amount of the unpaid fee, the extent of the delay in paying, or the reason for the failure to pay. *Any* failure to pay certain upfront arbitration fees within 30 days of a due date set unilaterally by an arbitration organization is deemed to be a "material breach of the arbitration agreement," leaving the drafter "in default of the arbitration" and forcing the drafter to "waive[] its right to compel arbitration." Cal. Civ. Proc. Code § 1281.97(a). S.B. 707 further permits the non-drafting party to proceed with his or her claim in court and seek drastic monetary and non-monetary sanctions—including default on the underlying claims and contempt of court—or compel arbitration and seek attorneys' fees and costs. *See id.* § 1281.97(b), (d); *id.* § 1281.99. The new law has the obvious intent and effect of discouraging parties from drafting arbitration agreements and is plainly improper under the FAA.

"The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). As the Supreme Court explained just two years ago, the FAA preempts state laws that "flout[] the FAA's command to place [arbitration] agreements on an equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426–1427 (2017); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (per curiam) (2012) (FAA preempted West Virginia law that contained "a categorical rule" inconsistent with the FAA). Rather, under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The savings clause applies only to generally applicable

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[8] S.B. 707 is not, as Petitioners imply, merely an extension of common law contract principles whereby courts "may require specific performance by a breaching party." Dkt. 151 at 24. Courts have recognized that arbitration fee disputes belong with the arbitrator, not courts. *See Lifescan*, 363 F.3d at 1012–13; *Adams*, *supra*, Dkt. No. 253 (Oct. 10, 2019); *Dealer Comput. Serv.*, 588 F.3d at 888; *VHS Univ. Labs.*, 54 F. Supp. 3d at 839. But S.B. 707 puts courts in the middle of disputes traditionally left to arbitrators and overrides the parties' contractual agreements.

contract defenses. *Concepcion*, 563 U.S. at 339. And even state-law rules that could be construed as generally applicable are preempted if they stand "as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343; *see also Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 825 (9th Cir. 2019) (FAA's savings clause "does not save [contract] defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration.") (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018)) (quotation marks and brackets omitted).

California's S.B. 707 fails all of these principles of federal law and stands as an obstacle to the FAA's objective by directly targeting and discouraging the drafting of arbitration agreements. Indeed, by its terms, ***S.B. 707 applies only to arbitration agreements***, even though "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration agreements." *Doctor's Assocs., Inc. v. Casaratto*, 517 U.S. 681, 687 (1996). The law engrafts onto arbitration agreements—and no other type of contract—a highly restrictive and onerous definition of material breach, and then punishes that breach by mandating default, sanctions, waiver of arbitration, and even contempt of court without any opportunity to justify the breach or argue its non-materiality. S.B. 707 thus fails to recognize that "'efficient' breaches" are "acceptable, even desirable, in our economic system." *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 157 Cal. App. 3d 1154, 1159 (1984). Because S.B. 707 penalizes non-payment by a party to an *arbitration* contract, but does not penalize non-payment outside the arbitration context, it "singles out arbitration agreements for disfavored treatment" and thus "violates the FAA." *Kindred*, 137 S. Ct. at 1425.

S.B. 707 fails to recognize the many perfectly valid reasons a party may determine not to pay filing fees within 30 days of the deadline set by an arbitration organization administrator. For example, when AT&T and T-Mobile attempted to merge, several courts enjoined arbitrations challenging the merger. *See, e.g.*, *AT&T Mobility LLC v. Bernardi*, No. 3:11-cv-03992-CRB, Dkt. 86 (N.D. Cal. Oct. 26, 2011). There would have been no reason to pay fees for arbitrations that federal courts had ruled could not proceed, and the FAA's objective of "facilitat[ing] streamlined proceedings," *Concepcion*, 563 U.S. at 344, would not have been furthered by penalizing AT&T for not paying those fees. Many other valid reasons exist, including many of the concerns raised by this case, as set forth above. The Supreme Court recently cautioned courts to be wary of "new devices and formulas" that fail to put

arbitration agreements on the same footing as other contracts. *Epic Sys.*, 138 S. Ct. at 1623. Because S.B. 707 is just such a new device, it is preempted by the FAA.

Moreover, S.B. 707 stands as an obstacle to the FAA's objectives because it prevents arbitration agreements from being enforced "according to their terms." *Epic Sys.*, 138 S. Ct. at 1619. Parties to arbitration agreements agree to certain terms, including, as relevant here, the rules for filing fees and the consequences for failing to pay those fees. *See* AAA Employment Arbitration Rule 43. The FAA preempts state laws that (as here) "would impose inconsistent and conflicting procedural rules upon those specifically agreed upon by the parties." *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1114 (N.D. Cal. 2003). S.B. 707's usurpation of the procedural rules to which the parties agreed directly impedes the FAA's command. *Epic Sys.*, 138 S. Ct. at 1619; *Concepcion*, 563 U.S. at 344.

CONCLUSION

This Court should not grant Petitioners' motion until the concerns expressed above have been resolved and the parties' contractual and due process rights are adequately protected. Alternatively, the Court should stay this action pending final approval of the *Marciano* settlement.

Dated: January 16, 2020

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Joshua Lipshutz*
Joshua Lipshutz

Attorneys for Respondent DoorDash, Inc.

Exhibit 9

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

KOHL'S INC.,

Plaintiff,

v.

JOHNNY LANG, DIANE STUMPP, LOUISE StMICHEL, REBECCA SHERO, and RUTH ANZALONE,

Defendants.

Case No. _____

Case Code: 30701

COMPLAINT

Plaintiff Kohl's Inc. ("Kohl's"), by and through its undersigned attorneys, alleges the following for its Complaint against Defendants Johnny Lang, Diane Stumpp, Louise StMichel, Rebecca Shero, and Ruth Anzalone (collectively, "Defendants"):

1. Three law firms—Keller Postman LLC ("Keller Postman"), Lynch Carpenter LLP ("Lynch Carpenter") and Kitner Woodward PLLC ("Kitner") (collectively, "Claimants' Counsel")—have solicited clients by the tens of thousands to assert claims in arbitration against Kohl's. Those firms solicited those clients without regard to whether those clients had any genuine claim against Kohl's. They then bypassed the pre-arbitration dispute-resolution process required by the arbitration agreements that they contend apply here and filed 54,495 individual arbitrations against Kohl's in the wrong arbitral forum. The ultimate goal of this scheme has been to extract an enormous settlement from Kohl's based on the threat of forcing Kohl's to pay in excess of $100 million in arbitration fees, an amount completely untethered from the merits of their clients' putative claims.

2. Defendants in this action are among the clients solicited by Claimants' Counsel. They have alleged in the arbitration demands filed on their behalf that they are Kohl's customers. Kohl's values its customers and does not want to bring legal action against them. Kohl's has attempted to avoid this action—but Claimants' Counsel's actions have left Kohl's with no other choice. Notwithstanding Kohl's' efforts to encourage Claimants' Counsel to participate in the contractual pre-arbitration dispute-resolution process, and Kohl's' agreement to an arbitral forum where their clients' claims could be resolved, Claimants' Counsel has persisted in a course of conduct calculated (i) to deprive Kohl's of a reasonable opportunity to investigate the merits of Defendants' claims and (ii) to impose unreasonable and excessive arbitration fees.

3. Kohl's therefore asks this Court to require Defendants to engage in the mandatory pre-arbitration dispute-resolution process required by their agreements with Kohl's and then (if that process proves unsuccessful) to proceed in the correct arbitral forum, National Arbitration and Mediation ("NAM").

4. By way of background, in December 2022, Keller Postman mailed a thumb drive containing 10,004 "Notices of Dispute" to Kohl's and threatened to initiate 10,004 individual arbitrations against Kohl's. Keller Postman's December 22, 2022 Letter, enclosing 10,004 Notices of Dispute, is attached hereto as **Exhibit A**. The Notices of Dispute, sent by Claimants' Counsel on behalf of Defendants, are attached hereto as **Exhibit B through F**.

5. The Notices of Dispute generally alleged that each of the putative claimants were offered a "false discount" in connection with unidentified products that they purchased from Kohl's, *i.e.*, that Kohl's offered a product at a "sale" price even though it does not actually sell the product at the non-sale price for a sustained period of time. Kohl's vigorously disputes those allegations.

6. The 10,004 Notices of Dispute were substantively the same. The only difference between them was the customer's name, place of residence, and email address. There was no information about what product each customer purchased, when he or she purchased the product, what the "sale" price was, or what the allegedly deceptive non-sale price was. Those omissions made it impossible to for Kohl's to identify the transactions at issue and, in turn, impossible to evaluate the merits of each customer's claims.

7. Kohl's' review of the claimants identified numerous individuals who could not assert any claims against Kohl's, including people who were deceased, people who had not made *any* recent purchase at Kohl's (and certainly not within the applicable statutes of limitations), and people in active bankruptcy proceedings.

8. Notwithstanding those issues—and notwithstanding that Keller Postman could not have conducted any legitimate pre-suit investigation to verify that over 10,000 clients had non-frivolous claims—Kohl's agreed to participate in a mediation on April 17, 2023.

9. Prior to the scheduled date of the mediation, Keller Postman revealed the involvement of the Lynch Carpenter and Kitner firms in their scheme. Attorneys from both firms had previously litigated similar claims against Kohl's in class actions filed in court, but in each attempt failed to certify a class of consumers (and are subject to confidentiality restrictions imposed by the courts in each of those cases).

10. A week before the scheduled mediation, on April 10, 2023, Keller Postman served Kohl's with another 44,656 Notices of Dispute. Keller Postman's April 10, 2023 letter enclosing 44,656 Notices of Dispute is attached hereto as **Exhibit G**. The Notices of Dispute were again substantively identical. The mediation was unsuccessful.

11. Kohl's is committed to maintaining a fair and reasonable arbitration program for customer disputes and was not willing to stand by while that process was abused. Accordingly, on May 22, 2023, Kohl's updated its Terms & Conditions for Site Use and In-Store Purchases (the "Terms & Conditions") and its Rewards Member Agreement Terms & Conditions (the "Rewards Terms"). A copy of the May 2023 Terms & Conditions is attached hereto as **Exhibit H**. A copy of the May 2023 Rewards Terms is attached hereto as **Exhibit I**.

12. The current Terms & Conditions and Rewards Terms require arbitration before NAM, not the American Arbitration Association ("AAA"), the arbitral forum identified in the prior version of the Terms & Conditions. The AAA had previously informed Kohl's on several occasions in unrelated matters that it would not administer arbitrations between Kohl's and its customers. Kohl's informed Claimants' Counsel of the AAA's position.

13. The May 2023 Terms & Conditions and Rewards Terms are binding on Defendants, who agreed that Kohl's reserved the right to update its Terms and Conditions and Rewards Terms, and who continued to maintain a relationship with Kohl's, including through their participation in the Kohl's Rewards program and/or making purchases of Kohl's products on Kohl's' website after Kohl's updated its terms in May 2023.

14. The fact that Kohl's updated its Terms & Conditions and Rewards Terms should have come as no surprise to Defendants, as every historical version of Kohl's' Terms & Conditions and Rewards Terms expressly stated that Kohl's reserved the right to update its terms in the future.

15. After Kohl's updated its Terms & Conditions and Rewards Terms, Claimants' Counsel proceeded to file approximately 54,495 individual demands for arbitration—which, like the Notices of Dispute, were substantively identical and lacked any information about each customer's purchase(s) claimed to be at issue—with the AAA rather than NAM.

16. Claimants' Counsel filed the 54,495 individual demands for arbitration in three batches: 2,231 on May 22, 2023, 27,691 on May 23, 2023, and 24,573 on May 26, 2023. The Demands for Arbitration, filed by Claimants' Counsel on behalf of Defendants, are attached as **Exhibit J through N**.

17. By correspondence dated June 20, 2023, in accordance with its prior representations to Kohl's, the AAA declined to administer the arbitrations, in accordance with its rules and policies.

18. Kohl's now seeks a declaratory judgment that Defendants have not properly engaged in the pre-arbitration dispute-resolution process and that NAM is the proper forum for any arbitration between Kohl's and Defendants.

THE PARTIES

19. Kohl's is a Delaware corporation with a principal place of business located at N56 W17000 Ridgewood Drive, Menomonee Falls, Wisconsin 53051.

20. Upon information and belief, Defendants are individuals who are residents of Wisconsin, North Carolina, Massachusetts, and New York.

JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to Wis. Stat. §§ 801.05, 806.04 and/or 227.40.

22. Venue for this action is proper in this Court pursuant to Wis. Stat. §§ 801.50(2)(a), 801.50(2)(d), 801.50(3)(b) and/or 227.40(1).

23. In addition, the Terms & Conditions—both current and historical—provide that the state and federal courts that encompass Waukesha County, Wisconsin are the exclusive venue for

any disputes that are not subject to arbitration or any disputes that relate to the enforceability of the Terms & Conditions.

24. Through their agreement to the Terms & Conditions, Defendants also submitted to the jurisdiction of the state and federal courts that encompass Waukesha County, Wisconsin.

ALLEGATIONS

I. The Terms & Conditions

A. *Pre-Arbitration Informal Dispute Resolution*

25. The Terms & Conditions spell out a detailed dispute-resolution process.

26. As defined in the Terms & Conditions, "Disputes" are subject to arbitration.

27. The definition of "Dispute" is broad, reaching claims that arose before the customer entered into the Terms & Conditions and claims that arose out of a customer's prior agreement with Kohl's.

28. Before starting an arbitration proceeding, the Terms & Conditions require Kohl's and its customers to "engage cooperatively to try to resolve any Dispute informally."

29. To that end, the customer or Kohl's must send written notice to the other party containing "a detailed description of the Dispute," "sufficient information to . . . identify any transaction at issue (including any receipts or purchase details)," and "a detailed description of: (a) the nature and basis of the Dispute and any claims and (b) the nature and basis of the relief sought (including a detailed calculation of any damages)."

30. If a customer is the party delivering the pre-arbitration notice, the notice must be personally signed by the customer (and the customer's attorney if the customer is represented by counsel).

31. For the 60-day period following receipt of the notice, the parties then must use "reasonable efforts" to try to resolve the Dispute. Those "reasonable efforts" include participation in a telephone conference if the other party requests one.

32. Only if the Dispute is not resolved within that 60-day period (which can be extended on the consent of the parties) can either the customer or Kohl's commence an arbitration.

33. The Terms & Conditions make clear—in bold print—that compliance with the informal pre-arbitration dispute-resolution process is mandatory and a condition precedent to starting an arbitration.

34. Indeed, the Terms & Conditions specifically provide that "[i]f the sufficiency of a notice or compliance with this informal dispute resolution process is at issue, such issue may be raised with and decided by a court of competent jurisdiction at either party's election, and any arbitration shall be stayed pending resolution of the issue."

35. Prior iterations of the Terms & Conditions similarly provided that, "at least 30 days in advance of initiating any arbitration," customers must provide notice to Kohl's specifically describing "the nature of the claim and the relief being sought" and must engage in informal dispute resolution for at least 30 days before proceeding to initiate an arbitration.

B. *Arbitration Rules and Procedures.*

36. The Terms & Conditions designate NAM as the arbitral forum and NAM's Comprehensive Dispute Resolution Rules and Procedures and its Supplemental Rules for Mass Arbitration Filings as the governing rules, as applicable.

37. To start an arbitration, either the customer or Kohl's must deliver an arbitration demand to NAM and certify to compliance with the informal dispute-resolution process. And by delivering the arbitration demand, the party (and that party's counsel) represents that the arbitration

demand complies with the standards applicable to a complaint filed in federal court under Rule 11 of the Federal Rules of Civil Procedure (*e.g.*, that the arbitration demand is not being presented for an improper purpose, that the claims asserted are supported by existing law or a good-faith argument for extending or modifying the law, and that the factual contentions therein have evidentiary support). Notably, many jurisdictions foreclose—as a matter of law—"false discount" claims like those asserted by Claimants' Counsel on behalf of claimants from all 50 states.

38. The Terms & Conditions also provide that "[i]f 25 or more similar Disputes (including yours) are asserted against Kohl's by the same or coordinated counsel or are otherwise coordinated ('Mass Filing'), consistent with the definition and criteria of Mass Filing set forth in the NAM Rules, you understand and agree that by choosing to be part of a Mass Filing, these additional procedures shall apply, and the resolution of your Dispute might be delayed and ultimately proceed in court if not resolved through the process set forth below."

39. The Terms & Conditions then proceed to detail a two-stage process through which claims in Mass Filings would be resolved.

40. A court of competent jurisdiction has the authority to enforce the Mass Filing procedures, "including by enjoining the Mass Filing, the prosecution or administration of arbitrations, and the assessment or collection of arbitration fees."

II. Defendants (and 54,490 Other "Clients" of Claimants' Counsel) File Arbitration Demands with the AAA

41. On December 22, 2022, Keller Postman sent a thumb drive containing 10,004 "Notices of Dispute" to Kohl's' legal department on behalf of 10,004 separate individual clients.

42. The Notices of Dispute were substantively identical. For each of their 10,004 clients, Keller Postman explained "[o]ur client brought various products from Kohl's, including on kohls.com, believing Kohl's at its word that those products were being offered at deep discounts

from original or regular prices." But according to Keller Postman, "[o]ur client did not know that Kohl's almost never (if ever) offers those products at the stated original or regular prices."

43. The Notices of Dispute asserted that "each product purchased from Kohl's at a false discount is a separate violation of the laws."

44. Every one of the 10,004 Keller Postman clients estimated their individual damages at $2,500.

45. Kohl's explained to Keller Postman that the limited information contained in the Notices of Dispute was insufficient to allow Kohl's to investigate the transactions at issue and engage in a meaningful pre-arbitration dispute resolution pursuant to the Terms & Conditions. Kohl's asked Keller Postman to provide basic information about its clients' purchases: *i.e.*, the product, the purchase date, the purchase price, and the allegedly deceptive non-sale price.

46. Keller Postman did not provide information sufficient to allow Kohl's to investigate the allegedly deceptive transactions at issue or respond to the merits of Defendants' individual claims.

47. Notwithstanding the bare-bones Notices of Dispute, Kohl's agreed to a pre-arbitration mediation to be held April 17, 2023. A week before the mediation, on April 10, 2023, Keller Postman sent Kohl's an additional 45,656 Notices of Dispute.

48. The April 10, 2023 Notices of Dispute are substantively identical to the December 22, 2022 Notices of Dispute.

49. The April 17, 2023 mediation was unsuccessful.

50. On May 22, 2023, Kohl's updated its Terms & Conditions and Rewards Terms—as it expressly reserved the right to do in every historical version of its terms—and posted the Terms & Conditions and Rewards Terms on its website, designating NAM as the required arbitral

forum rather than the AAA. Over the following weeks, Kohl's provided e-mail notice of the updated terms to customers for which it had an e-mail address on file, including Defendants.

51. Defendants are bound by the May 2023 Terms & Conditions and Rewards Terms. Defendants did not opt out of arbitration within 60 days of being notified of the updated terms, and Defendants have otherwise evidenced their agreement to the updated terms, including by continuing to purchase Kohl's products, browsing and shopping on Kohl's website, and/or maintaining enrollment in Kohl's Rewards Program.

52. On May 22, 2023, after the Terms & Conditions were updated, Claimants' Counsel filed 2,231 arbitration demands with the AAA. The next day, Claimants' Counsel filed 27,697 arbitration demands. And three days after that, Claimants' Counsel filed an additional 24,573 arbitration demands.

53. Defendants named herein were among those claimants.

54. In a letter dated June 20, 2023, the AAA informed both Claimants' Counsel and Kohl's that it was declining to administer the arbitrations; that it closed its files in those cases; that it was returning the fees paid by claimants; and that Kohl's had no outstanding payment obligations to the AAA.

COUNT I
(Declaratory Judgment)

55. Kohl's incorporates by reference all of the above paragraphs, as if set forth fully herein.

56. An actual controversy exists between Kohl's, on the one hand, and Defendants, on the other, over the parties' legal rights and duties.

57. An actual controversy exists between Kohl's and Defendants regarding Defendants' duties and performance under the Terms & Conditions, including their non-

compliance with the requirement that they engage in a good-faith effort to resolve their Dispute informally pursuant to the pre-arbitration dispute-resolution process set out in the Terms & Conditions dated May 22, 2023, or prior iterations of the Terms & Conditions.

58. An actual controversy likewise exists regarding the proper arbitral forum. In response to the Terms & Conditions designating NAM as the arbitral venue for all Disputes, Defendants (as claimants) filed their arbitration demands with the AAA instead of with NAM.

59. These controversies affect Kohl's' rights under the Terms & Conditions.

60. These controversies are ripe for adjudication, as Kohl's has a right to the applicable pre-arbitration dispute-resolution process and the agreed-upon arbitral forum, and has sought to exercise these rights, and Defendants have attempted, and will continue to attempt, to bypass the applicable pre-arbitration dispute-resolution process and maintain their arbitrations in the wrong arbitral forum.

61. Pursuant to Wis. Stat. § 806.04, Kohl's seeks declarations from the Court that: (i) Defendants have not complied with the Terms & Conditions' pre-arbitration dispute-resolution process; (ii) any arbitration must be filed with NAM under the Mass Filing procedures in the Terms & Conditions only after compliance with the Terms & Conditions' pre-arbitration dispute-resolution process; and (iii) Kohl's is entitled to a stay of any arbitration proceedings filed with the AAA, including a stay of any requirement to pay any registration or filing fees, pending resolution of this action.

62. A determination as to whether Kohl's is entitled to the applicable pre-arbitration dispute-resolution process and the proper arbitral forum will terminate the controversies and remove any uncertainty between the parties.

63. Kohl's is entitled to the applicable pre-arbitration dispute-resolution process and the proper arbitral forum pursuant to the Terms & Conditions dated May 22, 2023.

WHEREFORE, Kohl's demands judgment against Defendants as follows:

1. a declaration that Defendants have not complied with the Terms & Conditions' pre-arbitration dispute-resolution process as set forth above;

2. a declaration that if Defendants attempt to refile their arbitration demands, they must first comply with the Terms & Conditions' pre-arbitration dispute-resolution process and, if that process is unsuccessful, must file arbitration proceedings with NAM under the Mass Filing procedures in the Terms & Conditions;

3. a declaration that Defendants are enjoined from filing arbitration proceedings against Kohl's with the AAA, and that any such arbitration proceedings, if filed, are stayed (including a stay of any requirement to pay any registration or filing fees);

4. an award of Kohl's' expenses and costs of suit, including attorneys' fees; and

5. such other and further relief as the Court deems just and proper.

Dated this 16th day of October, 2023.

GODFREY & KAHN, S.C.

By: *Electronically signed by Matthew M. Wuest*
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30101253.1Comp

Exhibit 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FAMILY DOLLAR, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Case No.** 2:20-cv-248
	§	
AMERICAN ARBITRATION ASSOCIATION, INC.,	§	
	§	
Defendant.	§	

PLAINTIFF'S COMPLAINT

Plaintiff Family Dollar, Inc. ("Family Dollar") files this Complaint against the American Arbitration Association, Inc. ("AAA"), respectfully showing as follows.

I. INTRODUCTION

1. Last year one law firm ("the Law Firm") sought to initiate nearly 2,000 arbitrations with AAA against Family Dollar. The demands purportedly were made on behalf of current and former Family Dollar employees asserting claims under the Fair Labor Standards Act and state law equivalents. Hundreds of the claimants, however, had never been employed by Family Dollar. Of those who had been employed, many had released any claims through prior settlements or bankruptcies. Many of the demands were made after the applicable limitations period. Many other claimants had signed agreements to arbitrate before JAMS in lieu of AAA. Mass arbitration demands against employers with little regard of the claims' validity is not a proper use of the arbitration system where the arbitration filing fees may far exceed the merits of the claim.

2. None of the claims proceeded to arbitration. The Law Firm unilaterally withdrew hundreds of them when Family Dollar advised the Law Firm that claimants never worked at Family Dollar, that other claimants never agreed to proceed before AAA or that any claims were released

or untimely. The Law Firm withdrew the rest pursuant to a settlement. AAA contends that Family Dollar contractually agreed to pay it over $2.5 million in "administrative fees" for the demands even though the Law Firm withdrew them and arbitration never commenced. Family Dollar seeks a judicial declaration that there is no enforceable agreement between it and AAA for those fees.

II. PARTIES

3. Family Dollar is a corporation formed under the laws of North Carolina with its principal place of business in Chesapeake, Virginia.

4. AAA is a corporation formed under the laws of New York with its principal place of business in New York, New York.

III. JURISDICTION AND VENUE

5. This Court has original jurisdiction over the subject matter of this Complaint pursuant to 28 U.S.C. § 1332 because this is a dispute between citizens of different states and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

6. This Court has personal jurisdiction over AAA pursuant to Va. Code Ann. § 8.01-328.1(A)(1) and (A)(2). AAA transacts business in the Commonwealth of Virginia, and the claims in this action arise from that business. In particular, they arise from services that AAA contends it contracted with Family Dollar to provide in Virginia.

7. Venue is proper under 28 U.S.C. § 1391(b) because AAA resides in this judicial district within the meaning of that statute and because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district. AAA seeks to collect millions of dollars from a company in this district pursuant to an alleged contract that AAA allegedly has with that company and that allegedly arose from communications AAA purposefully directed to the company in this district and that allegedly required performance in this district.

IV. FACTUAL ALLEGATIONS

A. The arbitration demands against Family Dollar

8. Family Dollar operates more than eight thousand retail stores and has tens of thousands of employees. Its employees sign arbitration agreements as a condition of their employment.

9. In July 2019, the Law Firm issued 970 arbitration demands against Family Dollar. It issued an additional 992 demands in September, for a total of 1962 demands. The demands purported to be made on behalf of present and former Family Dollar employees. The demands sought arbitration before AAA.

10. The demands did not comply with Family Dollar's arbitration agreements. The agreements require an employee to tender the demand to Family Dollar. If Family Dollar and the employee thereafter do not resolve the dispute, Family Dollar is to file the demand with a mutually agreeable arbitral tribunal. The agreements do not permit what the Law Firm did—bypass Family Dollar and directly demand arbitration before AAA.

11. The demands also did not comply with AAA's requirements for a valid demand. AAA's rules require a valid demand to include the amount of damages sought and a copy of the arbitration agreement pursuant to which the demand has been made. The demands failed to specify any amount of damages sought and did not include any arbitration agreements.

12. Many of the demands were defective in other respects as well. Numerous claimants had never been employed by Family Dollar and therefore there was no agreement to arbitrate between Family Dollar and the claimant. Others who had been employed released any claims through prior settlements or bankruptcies. Many of the demands were filed after the applicable limitations period.

13. Family Dollar told AAA the demands were not proper because of these deficiencies and AAA did not commence to arbitrate them. AAA did not provide Family Dollar claim numbers for the demands. Family Dollar did not file answers to any of the demands. AAA did not circulate strike lists of potential arbitrators. No arbitrators were ever appointed.

14. Family Dollar and the Law Firm eventually resolved the disputes without arbitration by AAA. The Law Firm unilaterally withdrew many of the demands. It withdrew the rest pursuant to a settlement with Family Dollar.

B. AAA's demand that Family Dollar owes fees for the demands

15. On May 5, 2020, months after the demands were resolved without arbitration, AAA sent Family Dollar a letter demanding payment of $2,565,200 in fees allegedly owing and overdue. The letter states that AAA will undertake to "enforce collection" of that amount unless Family Dollar pays the sum in full. A copy of the letter is attached hereto as Exhibit A.

16. AAA's letter does not include an invoice and does not explain what the fees represent. However, it appears that the sum demanded represents an administrative fee of $2,200 that AAA claims Family Dollar allegedly owes for 1,166 of the arbitration demands ($2,200 x 1,166 = $2,565,200).

17. AAA's letter does not explain the legal basis for Family Dollar's alleged liability for the administrative fees. The only potential basis for liability the letter references is an email exchange between Family Dollar and AAA that the demand letter implies created a contractual obligation on Family Dollar. The letter asserts that Family Dollar "offered" to pay $2,565,200 in an email on November 21, 2019 and that AAA "accepted" the alleged offer in an email on

December 2, 2019. Copies of the referenced emails are attached hereto as Exhibits B and C, respectively.[1]

18. The email exchange does not create a binding contract and does not otherwise obligate Family Dollar to pay $2,565,200, or any other amount. Family Dollar and AAA had been discussing which AAA fee structure would apply to the demands if they went forward. AAA maintained its fee would be $2,200 per demand. Family Dollar thought a lesser fee pursuant to a new schedule AAA implemented for mass arbitrations was appropriate. The November 21 email merely states Family Dollar's willingness to advance the higher fees if AAA agreed to refund them to the extent arbitration on the demands did not proceed to arbitration.

19. That email does not form a contract. The email is not supported by consideration. Nor did AAA accept the alleged "offer" in the email. Family Dollar's email stated that payment was conditioned on AAA's returning the administrative fees to the extent the cases did not go forward. AAA's email did not accept that condition. So even if Family Dollar's email were a contractual offer, there was no acceptance and meeting of the minds as are necessary for an enforceable contract. Further, Family Dollar would not owe any amount even if AAA had accepted the alleged "offer." None of the 1,166 cases went forward—the Law Firm withdrew them all before any proceedings occurred before AAA—so AAA would be obligated to refund all of the fees even if the November 21 email were the basis for an enforceable contract.

20. Rather than accept Family Dollar's alleged "offer," AAA's December 2, 2019 email said that it would proceed with administration of the 1,166 cases only upon receipt of the $2,565,200. That sum was never paid and AAA did not proceed with administration of any of the 1,166 cases. The position in the December 2nd email is contrary to that asserted in AAA's demand

[1] Personal identification information of the claimants and the Law Firm have been redacted in these and the other exhibits.

letter. Contrary to the demand letter, AAA's December 2 email does not maintain AAA is legally entitled to $2,565,200 or any other sum. The email states merely that AAA will not administer the arbitrations unless and until it receives $2,565,200. It other words, AAA was stating its price to be the arbitral tribunal. A price quote does not legally bind a prospective customer.

21. AAA subsequently confirmed that it did not expect to receive the administrative fees for cases that did not go forward. The Law Firm notified AAA shortly after its December 2 email that it was withdrawing an additional two of the 1,166 cases because they were filed after the applicable statute of limitations. In response, in an email dated December 12, 2019, AAA acknowledged that it would administer the remaining 1,164 claims upon payment of the reduced sum of $2,560,800. This reduced amount reflected the elimination of $4,400 in administrative fees for the two withdrawn cases. A copy of AAA's December 12, 2019 email is attached hereto as Exhibit D.

22. Family Dollar told AAA by email later that month that a further 29 claims were withdrawn as settled, which reduced the number of demands to 1,135. It told AAA that additional claims would be expected to be withdrawn shortly. A copy of Family Dollar's email is attached hereto as Exhibit E.

23. AAA responded in an email on December 30, 2019. AAA's response did not maintain that it is entitled to the $2,565,200 claimed in AAA's demand letter, or the reduced fees mentioned in AAA's December 12 email, or any fees at all. Instead, AAA asked the parties to inform it when they had a list of cases and were ready to proceed. A copy of AAA's December 30, 2019 email is attached hereto as Exhibit F.

24. None of the remaining cases moved forward with arbitration after December 30, 2019. Family Dollar and the Law Firm resolved them without arbitration. The Law Firm informed

AAA of this by letter dated January 28, 2020 and instructed AAA to take no action with respect to those cases. A copy of the January 28, 2020 letter is attached hereto as Exhibit G.

25. A month later, on February 21, 2020, AAA sent an invoice for $681,000 to Family Dollar's outside counsel. The invoice says the amount represents AAA's "Initial Administrative Filing Fees" for 1,135 claimants. The invoice was sent after AAA knew no administrative work was needed; as more than three weeks before AAA sent the invoice the Law Firm had notified AAA that the parties had reached a settlement in principle and that no action should be taken with respect to the arbitration demands. A copy of the invoice is attached hereto as Exhibit H.

26. AAA's demand letter says the invoice was an "offer[] to reduce AAA's entitlement" to $681,000. The invoice does not support the demand letter's spin. Neither the invoice sent by AAA nor its cover email indicated that AAA was offering any kind of accommodation or compromise. The invoice merely described the charge as, "Respondent's Initial Administrative Filing Fees." The invoice says nothing about Family Dollar owing fees for 1,166 claims as the demand letter asserts. It does not say AAA is entitled to $2,565,200 and makes no mention of an offer to reduce AAA's "entitlement." AAA's demand letter is revisionist history to try to disguise that AAA is not legally entitled to the $2,565,200, or any other sum, and has fabricated its demand out of whole cloth.

V. CAUSE OF ACTION

27. Family Dollar realleges and incorporates the preceding paragraphs as if fully set forth herein.

28. An actual controversy exists between Family Dollar and AAA. AAA contends that Family Dollar entered a contract with it which obligated Family Dollar to pay $2,565,200. Family Dollar disputes that it is contractually obligated to AAA and maintains that it does not owe AAA

any sums for the arbitration demands. Family Dollar seeks relief from the uncertainty and insecurity attendant upon this controversy over its legal rights and obligations.

29. To resolve that controversy Family Dollar seeks a judicial declaration of its rights and obligations to AAA under 28 U.S.C. § 2201.

30. Family Dollar seeks a declaratory judgment that it has no contract with AAA and that it has no obligation, by contract or on any other grounds, to AAA to pay any portion of the $2,565,200 AAA demands.

VI. REQUEST FOR RELIEF

31. Family Dollar respectfully requests that the Court award relief as follows:

(a) A declaratory judgment that Family Dollar has no contract with AAA and has no obligation to pay any portion of the $2,565,200 demanded by AAA;

(b) Its costs incurred in bringing this action; and

(c) All other relief to which it is entitled.

TRIAL BY JURY IS REQUESTED.

Respectfully submitted,

/s/ Michael R. Shebelskie

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