Retail Litigation Center's Comments to AAA Proposed Amendments to Consumer and Employment Arbitration Rules

Addendum 3 – Select Sources

- Exhibit 1 – Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)
- Exhibit 2 – Mass Arbitration Strategy and Investment Opportunity slide deck of litigation funding pitch
- Exhibit 3 - Petition, *WarnerMedia Direct, LLC v. Zimmerman Reed,* Index No. 652500/2024 (County of New York, June 28, 2024)
- Exhibit 4 – Affirmation in Opposition to Petition for an Order Pursuant to CPLR Section § 7502 Disqualifying Counsel and for Additional Relief, *WarnerMedia Direct, LLC v. Zimmerman Reed*, Index No. 652500/2024 (County of New York, June 28, 2024)

EXHIBIT 1 TO RLC ADDENDUM 3

DECLARATION OF LD

I, LD , hereby declare and state as follows:

1. This declaration reflects information that I provided to investigators for Tubi on June 10, 2024. I have been given the chance to review and edit this declaration for accuracy before signing it. I have personal knowledge of the matters in this declaration, I am competent to testify to those matters, and I would so testify if I appeared in court as a witness at the trial of this matter.

2. I am a paralegal but have no experience with arbitrations, outside of the one I agreed to file against Tubi.

3. I agreed to file the claim against Tubi in approximately March 2024 after seeing an advertisement about the claim on social media.

4. I am not represented by counsel. I do not recall whether I was ever represented by a law firm regarding the Tubi claim I filed. I do not recall hearing or seeing the name of the law firm Keller Postman.

5. I agreed to file the claim after thinking that Tubi must have been involved in a data breach. After I agreed to file the claim, I began my own investigation and learned that the claim was not about a data breach, but instead related to Tubi advertising. Because I like Tubi and had no issue with the advertisements I saw on Tubi, I decided to not pursue my claim.

6. The first time that I learned of what was in the Demand for Arbitration (attached as EXHIBIT A) was when Tubi's investigator asked me about the form and advised of the contents. Although my name and account information are on it, the contents in the "Nature of the Dispute" do not reflect my statements, thoughts, or opinions. Specifically, I like Tubi and have never had any concerns about Tubi's advertisements or practices. I have never seen any ads on Tubi that I did not want to see. I have not bought any products after seeing ads for them on Tubi. In fact, I

do not buy products after seeing ads for them. I also have never felt there were ads I wanted to see on Tubi but did not see.

7. I am aware that Tubi has a Terms of Use but was not aware when I filed the claim that the Terms of Use included an informal dispute process with Tubi. I did not know that the Terms of Use called for me to send a notice of dispute to Tubi that provided specific facts about my claim and give Tubi the opportunity to engage in an informal resolution before I filed an arbitration claim.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Los Angeles, California, this 9th day of July, 2024 DocuSigned by: LD

DECLARATION OF MS

I, MS , hereby declare and state as follows:

1. This declaration reflects information that I provided an investigator for Tubi on June 13, 2024 and July 18, 2024. I have been given the chance to review and edit this declaration for accuracy before signing it. I have personal knowledge of the matters in this declaration, I am competent to testify to those matters, and I would so testify if I appeared in court as a witness at the trial of this matter.

2. I am not represented by counsel with respect to any claim or matter involving Tubi. I do not believe I have ever been represented by a law firm regarding the claim I filed against Tubi. I do not recall hearing or seeing the name of the law firm Keller Postman. To my knowledge, I have never been represented by that firm.

3. I learned about the claim against Tubi after seeing an ad for it while I was watching YouTube. I clicked the link because it said I could get money. Although I answered "yes" or "no" to some questions on the questionnaire, I did not read anything as I was completing my claim.

4. When I registered for Tubi, I registered my account with my email address [redacted]. Before 2022, I used to watch Tubi. I have not watched Tubi in years, however. When I saw the ad for the claim, I logged back in to Tubi using the above email address, but I did not watch anything.

5. I have never had a bad experience watching Tubi and I had no complaints about Tubi at the time I filed my claim. Before speaking with Tubi's investigator, I had no idea that my arbitration claim I agreed to file had anything to do with Tubi's advertising.

6. I have no concerns about the advertisements I received. I have never purchased any products as a result of seeing an advertisement for them on Tubi. There were no ads that I wanted to see on Tubi but did not view.

7. I have never seen the Demand for Arbitration (attached as EXHIBIT A) before being shown it today by the Tubi Investigator. I was unaware of the form's contents and statements contained within it.

8. I was aware before filing my claim that Tubi has a Terms of Use and that it had an arbitration agreement. I did not understand before filing the claim that the arbitration agreement called for me to engage in an informal dispute process with Tubi. I also did not know before filing a claim that the Terms of Use required me to send Tubi a notice of dispute, provide specific facts that give rise to the dispute, or allow Tubi the opportunity to engage in an informal resolution process.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Merced, California, this 18th day of July, 2024.

DocuSigned by:
MS

DECLARATION OF SA

I, SA , hereby declare and state as follows:

1. This declaration reflects information that I provided to investigators for Tubi on June 13, 2024, and June 30, 2024. I have been given the chance to review and edit this declaration for accuracy before signing it. I have personal knowledge of the matters in this declaration, I am competent to testify to those matters, and I would so testify if I appeared in court as a witness at the trial of this matter.

2. I am no longer represented by counsel with respect to any matter involving Tubi. I previously was represented by the law firm Keller Postman, but it no longer represents me because I have withdrawn my claim.

3. I agreed to file a claim against Tubi in approximately April 2024. I learned about the possibility of filing a claim against Tubi based on a YouTube commercial. I believe the claims related to Tubi misusing my information with respect to its ads. Before seeing the ad for the claim, I never thought about the ads Tubi showed me.

4. When I saw the ad for the claim, I thought about the ads on Tubi and felt as though Tubi did not personalize my advertising as much as I would have liked. I allow Tubi to use my personal information, including my cookies, so it can show me content and advertisements I am interested in seeing. I like to watch YuGiOh and anime, but was not seeing enough advertising about these types of shows.

5. I withdrew my claims because I really like Tubi, and because I found out that the claims process was not free. I signed up because I thought the process was free, but then learned this was not the case.

6. I had never seen the Demand for Arbitration (attached as EXHIBIT A) before signing this declaration. The first time that I learned of what was in the Demand for Arbitration was when Tubi's investigator asked me about the form. Although my name and account information are on it, the contents in the "Nature of the Dispute" do not reflect my statements, thoughts, or opinions. I did not file the claim because I felt I had been discriminated against in the ads I saw on Tubi.

7. I did not understand before filing my claim that Tubi's Terms of Use called for me to engage in an informal dispute process with Tubi. I also did not know that before filing a claim that the Terms of Use required me to send Tubi a notice of dispute, provide specific facts that give rise to the dispute, or allow Tubi the opportunity to engage in an informal resolution process.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Visalia, California, this 9th day of July, 2024. DocuSigned by: SA

DECLARATION OF DE

I, DE , hereby declare and state as follows:

1. This declaration reflects information that I provided to an investigator for Tubi on June 17, 2024 and July 5, 2024. I have been given the chance to review and edit this declaration for accuracy before signing it. I have personal knowledge of the matters in this declaration, I am competent to testify to those matters, and I would so testify if I appeared in court as a witness at the trial of this matter.

2. I am not represented by counsel with respect to any matter involving Tubi. I recalled the name Keller Postman because it was the law firm that represented me in a previous claim against T-Mobile. Keller Postman does not currently represent me. I am not aware of Keller Postman representing me in my claim against Tubi.

3. I learned about the possibility of filing a Tubi claim on Instagram, clicked the link, and filled out a questionnaire. I do not know what the claim was based on, but I feel like the ad was meant to trick people into thinking they had a valid claim and that the claim would not involve much participation.

4. The only email address I utilize is [redacted]. If I registered for a Tubi account, I would have registered it to this email address.

5. I withdrew my claim because of the effort it was taking to participate in it.

6. I never saw any ads on Tubi that were concerning. I did not purchase any products as a result of seeing ads on Tubi. I do not buy products from ads I see online or with any streaming service because I once was scammed. I cannot think of any ads that I wanted to see on Tubi but did not see.

7. I have never seen the Demand for Arbitration (attached as EXHIBIT A) before being shown it today by the Tubi Investigator. I was unaware of the form's contents and statements contained within it.

8. I did not understand before filing my claim that Tubi's Terms of Use called for users to engage in an informal dispute process with Tubi. I also did not know before filing a claim that the Terms of Use required users to send Tubi a notice of dispute, provide specific facts that give rise to the dispute, or allow Tubi the opportunity to engage in an informal resolution process.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Inglewood, California, this 9th day of July, 2024.

DE

DECLARATION OF DL

I, DL hereby declare and state as follows:

1. This declaration reflects information that I provided to investigators for Tubi on June 13, 2024. I have been given the chance to review and edit this declaration for accuracy before signing it. I have personal knowledge of the matters in this declaration, I am competent to testify to those matters, and I would so testify if I appeared in court as a witness at the trial of this matter.

2. I am not represented by counsel with respect to any matter involving Tubi. I do not recall hearing or seeing the name of the law firm Keller Postman. To my knowledge, I have never been represented by that firm.

3. I learned about the claim from an advertisement on social media, likely Facebook, but I had no idea what the claim was about. To sign up for the claim, I answered a few questions. I agreed to file the claim because I thought it that it was a way for me to get money. I do not believe my claim had anything to do with Tubi's ads.

4. I watch Tubi multiple times a week. Although I see a lot of ads, I have not seen any that upset me. I have never had any issue with Tubi ads.

5. I dismissed the claim because I was concerned that what I signed up to do was a scam. I also was concerned because I learned that I would have to pay money to proceed with my claims. I did not understand when I signed up that I would have to pay any fees related to the claim.

6. I have never seen the Demand for Arbitration (attached as EXHIBIT A) before being shown it today by the Tubi Investigator. I was unaware of the form's contents and statements contained within it.

7. I did not understand before filing my claim that Tubi's Terms of Use called for me to engage in an informal dispute process with Tubi. I also did not know before filing a claim that the Terms of Use required me to send Tubi a notice of dispute, provide specific facts that give rise to the dispute, or allow Tubi the opportunity to engage in an informal resolution process.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Fresno, California, this 17th day of July, 2024.

DL

DECLARATION OF MD

I, MD hereby declare and state as follows:

1. This declaration reflects information that I provided to an investigator for Tubi on November 18, 2024. I have been given the chance to review and edit this declaration for accuracy before signing it. I have personal knowledge of the matters in this declaration, I am competent to testify to those matters, and I would so testify if I appeared in court as a witness at the trial of this matter.

2. I am not represented by counsel regarding any claim or matter involving Tubi. I previously was represented by Keller Postman before I withdrew my claim. I learned about the claim after seeing an ad for it on Google or Facebook. My Facebook feed is always running advertisements for claims that people can join.

3. I did not understand my claim to have anything to do with ads on Tubi. I thought that my claim against Tubi related to my personal information being compromised and leaked by the company.

4. While I saw ads when I watched Tubi, I never saw any ads that I thought were concerning. I never had any issue with any of the ads I saw. There were no ads that I wanted to see but was unable to see.

5. I withdrew my claim because I did not understand a lot of what was being communicated to me and what my lawyers were asking me to do. Keller Postman did not communicate with me in a way that would allow me to make decisions with a clear understanding of the benefits and risks of my options.

6. Before signing this declaration, I reviewed the Demand for Arbitration attached to this declaration as Exhibit A. Although my name and information are on it, the contents in the

"Nature of the Dispute" do not reflect my statements, thoughts, or opinions. As I stated above, I had no problem with the advertising I received on Tubi.

7. I was not aware that Tubi's Terms of Use contained an arbitration agreement. I also did not understand that before filing a claim, the Terms of Use stated that I was to engage in an informal dispute process with Tubi. I did not know that before filing a claim that I needed to send a notice of dispute, provide specific facts about that dispute, and give Tubi the opportunity to engage in an informal resolution.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Monrovia, California, this 21st day of November, 2024.

MD

EXHIBIT 2 TO RLC ADDENDUM 3

Exhibit A

MASS ARBITRATION STRATEGY AND INVESTMENT OPPORTUNITY

CONFIDENTIAL
PRESENTATION

Mass Arbitration: Background

- In 2011, the Supreme Court held that contracts requiring mandatory arbitration and prohibiting class relief were permissible, provided they are not unconscionable. This ruling was reaffirmed in a 2013 decision.
- Many companies incorporated such clauses into their agreements believing it minimized exposure given the damages generally at stake for individual claimants.
- In an effort to avoid being deemed unconscionable, arbitration clauses adopted by companies seeking to avoid class actions routinely require the Company to pay all arbitration fees, limit circumstances where the Company can recover attorneys' fees, and allow the consumer to choose the manner of arbitration.
- Most arbitration providers — including the American Arbitration Association ("AAA") — charge a minimum of approximately $3,000 a case.

Use of Mass Arbitration

- Over the past few years, a handful of firms — led by Keller Lenkner (now Keller Postman) — have weaponized consumer and employer arbitration clauses with favorable terms by aggregating thousands of claims through targeted advertising campaigns.
- Aggregating claims makes entrance fee to just defend prohibitively expensive and the vast majority of such fees are non-refundable under recent precedent.
- For example, if 75,000 demands for arbitration are filed with the AAA, the Company has 30-days to pay a largely non-refundable fee of $225 million as the cost of admission.
- Claimants' counsel will offer a settlement slightly less than the AAA charge — $2,900 per claim or so — attempting to induce a quick resolution.

The Technique and Typical Results

- In a mass arbitration against Uber, Keller Postman brought ~60k claims claiming drivers were misclassified as contractors rather than employees.
- Uber's challenge to paying AAA fees was unsuccessful, requiring Uber to pay the ~$180 million upfront if it wished to defend the claims.
- With an upcoming IPO, Uber declined to engage in protracted litigation and settled the ~60k claims early for $146mm.
- Uber Eats was targeted in the past two years and sought to enjoin the AAA from requiring what it called "astronomical" fees. A New York appeals court recently denied the challenge finding that "[Uber] made the business decision to preclude class, collective, or representative claims in its arbitration agreement with consumers and AAA's fees are directly attributable to those decisions."
- In another case, Judge Breyer stated to Intuit "You knew what the rules of arbitration were. You knew all these things. And you elected to go to arbitration. . . . you are being hoisted by your own petard."

Lifecycle of Investment

- **Stage 1 - Infrastructure:** $500,000 for software development, advertising and agreement templates, ethics opinions, hardware, marketing and survey consultants, and claim identification.

- **Stage 2 - Client Recruitment:** $2 to $150 advertising cost per client to recruit. Estimated spend of $3.75 million to recruit 75,000 clients at $50 an acquisition.

- **Stage 3 - Filing Cases:** Filing cost of $25,000 plus $50.02 a case, for an estimated filing cost of $3,776,500. (Never expended if an early settlement can be reached.)

- **Stage 4 - Active Arbitration:** Zaiger LLC litigates the first 20 cases, developing templates and models for use on additional cases. $12,000 a case after that to hire contract attorneys managed by Zaiger LLC to litigate disputes using templates and strategies. Most completed arbitrations seen to-date is 160, so total cost likely less than $1.7 million

Target and Claim Identification

- **Active Approach:** Identifying 25 to 50 ripe targets, monitor news, and brainstorm claims.
  - Identifying favorable arbitration terms including guaranteed refund of $50 filing fee, use of the AAA as an arbitration provider, application of California law, and language that suggests non-mutual collateral estoppel would apply.
  - Ideal targets: (1) have valuation of ~$10 billion – high enough so they aren't judgment proof and can settle for hundreds of millions of dollars, but low enough that $200 million+ in arbitration fees creates an existential crisis forcing a quick settlement; and (2) a likely IPO or potential acquisition that will make carrying litigation risk unpalatable.
- **Automated/Passive Supplemental Approach:** Monitor court dockets for motions to compel class actions to arbitration, and copycat existing legal theories with potentially better advertising approach.

Example Target: Valve Corporation

- Valve is an $11 billion company that dominates the market for digital PC game sales. Valve has over a billion customers with accounts. Valve's arbitration is administered by the AAA and specifies all filing fees will be reimbursed for claims under $10,000.
- In April 2021, game developers and consumers filed a putative class action claiming antitrust violations against Valve in the U.S District Court for the Western District of Washington.
- On October 25, 2021, Judge John Coughenor compelled the consumer claims to arbitration while retaining the developer claims. On May 5, 2022, Judge Coughenor denied (in part) Valve's motion to dismiss the developer plaintiffs' antitrust claims.
- If the proposed infrastructure were in place, today, we could immediately begin recruiting claimants to pursue the claims a federal judge has now ruled are well plead and potentially viable but for which ***a billion*** customers have been compelled to arbitration.

New Merits-Based Approach

- The legal principles of non-mutual collateral estoppel prevent a company from relitigating a legal issue they have previously and unsuccessfully argued in another forum.
- This puts a company facing an arbitration in a situation where prevailing on the relevant legal issue is critical the first time it is argued, as a failure to prevail in that first case opens the door to preclusion in later cases.
- Rather than filing tens of thousands of cases at once, as is Keller's practice, a plaintiffs' firm could locate the strongest plaintiff from its pool, and file that case, and only that case, first.
- If that first, handpicked claim succeeds, all legal and factual issues that were inherent to the defendant should be resolved against them with respect to all other litigations, massively increasing the potential settlement value.

Potential Returns

- Based on estimated costs of bundling claims, the initial Uber case would have cost Black Diamond ~$6.5 million and returned $43.8 million in less than a year (574% ROI).
- We believe a merits-based leverage approach — which can be implemented flexibly if a particularly strong claim presents itself — increases potential for even higher returns.

Assumptions:

- There is a 50% chance of winning the first case.
- The expected win, if there is one, is for a $10,000 judgment.
- A loss results in an average of a 25% reduction in claim settlement value.

- That results in an expected settlement value of $427.7 million. Black Diamond's recovery for funding at 30% would be ~$128.3 million (1874% ROI on $6.5 million investment).

Stage 1 Infrastructure Calculations

- **Will Bucher Fixed Compensation:** $150,000/year.
- **Software Engineer:** Est. $20,000/month full-time cost for 3 months, followed by $10,000/month part-time cost thereafter. $150,000 first-year spend.
- **Ethics Opinion/Consulting:** Est. $25,000 first-year ($700/hour as needed thereafter).
- **Marketing Part-time Employee or Consultant:** Est. $50,000/year.
- **Survey Design Consulting:** Est. $25,000/year.
- **Paralegal Support:** Managing claims dockets and answering calls. Possible need to scale up and hire additional support as clients are recruited. Est. $50,000 first-year spend.
- **Hardware and Software**: Computer hardware, Bloomberg and PACER alerts, additional Westlaw seat(s). Est. $8,000/yearly, plus $2,000 in hardware expenses year-one.

Stage 2 Client Recruitment Calculations

- Most difficult to predict because it would vary per case based on the claim and how common users of the relevant product or service were.
- Present estimates are based on the following:
  - A Partner at a Bay Area law firm specializing in plaintiffs-side mass employment litigation — who has handled more than 60,000 employment arbitrations — said costs were between $2 and $150 a case, depending on the pool of plaintiffs and the case.
  - In "Bitter End" litigation, attorneys at Keller took the position that their lawyer group would be losing money if they accepted any settlement below $675 a case. Based on their retainer agreement, Troxel LLC, who was responsible for bundling the claims, received 4% of the settlement value. That implies an acquisition cost of no more than $27 a claim.
  - Facebook advertising costs around $1.00 per click. If it takes an average of two clicked-on ads to recruit a plaintiff, that's $2.00 a claim. If it takes 150 ads, that's $150.

Stage 3 Filing Calculations

- **AAA Fees:** $100 a case for the first 500 cases, than $50 a case. Functional cost of $50 a case plus $25,000.
- **Zaiger LLC Server Costs:** $0.02 a client in server expenses to maintain client database and case files.

Stage 4 Active Arbitrations Calculations

- In the "Bitter End" litigation, 160 cases were litigated to a conclusion. That is most cases ever fully litigated in a mass arbitration based on the 9 examples we are aware of. Plaintiffs' requests for fees in those arbitrations showed that Quinn Emanuel spent between 80 and 160 hours litigating each case. That litigation was surprisingly bespoke, with every briefing including one or more new, revised, or redacted arguments.
- If a Zaiger LLC target engages in a "Bitter End" strategy, the first 20 cases could be litigated by the Firm creating templates for use on additional cases. We expect a contract attorney working off Zaiger LLC prepared templates could litigate a case in 80 hours.
- We estimate that contract attorneys of sufficient caliber to arbitrate individual cases charge $100 to $125/hour. A performance bonus of $2000 for successful arbitrations could also be used to incentivize quality and results.
- Staffing with contract attorneys comes out to between $8,000 and $12,000 a case. Given the most completed arbitrations seen to date is 160, total cost is likely less than $1.7 million. There is flexibility in how we could "staff up" if needed too.

Uber Settlement Calculations

- **Costs**: $50 recruitment (assumed) and $50 filing for 60,000 claims, plus $500,000 infrastructure costs. Total costs $6.5 million
- Settlement of $146 million. Hypothetical 30% return to Black Diamond of $43.8 million. Profit of $37.3 million. (574% ROI in less than a year).
- Merits Approach Assumptions:
  - 50% chance of winning the first claim;
  - A win on the first claim increases the settlement value of each claim by $10,000;
    - For 60,000 claims, that's a $600 million increase in total settlement value.
  - A loss on the first claim reduces the settlement value of each remaining claim by 0% to 50%, depending on how the arbitrator rules and on what grounds, with an average reduction of 25%. The reduction is the result of perceptions by a defendant of likely liability, not due to the creation of precedent. Plaintiffs are not bound by outcome, so there is little, if any, formal legal risk from the loss.
- Predicted, merits based outcome: spend $6,500,000. Upon a win, settlement value would increase to $746 million. Upon a loss, the settlement value would shift to an average of $109.5 million. That results in an expected settlement value of $427.75 million.
- 30% of $427.75 million is $128.325 million. $121.825 million profit (1874% ROI).

EXHIBIT 3 TO RLC ADDENDUM 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	:	
	:	Index No. _____
WARNERMEDIA DIRECT, LLC, AND DISCOVERY DIGITAL VENTURES, LLC,	:	Hon. _____
Petitioners,	:	**Oral Argument Requested**
v.	:	**PETITION FOR AN ORDER PURSUANT TO CPLR § 7502 DISQUALIFYING COUNSEL AND FOR ADDITIONAL RELIEF**
ZIMMERMAN REED LLP,	:	
Respondent.	:	

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioners WarnerMedia Direct, LLC ("WarnerMedia"), and Discovery Digital Ventures, LLC ("Discovery") (collectively, "Petitioners"),[1] by and through their undersigned counsel, bring this Petition For An Order Pursuant To CPLR § 7502 Disqualifying Counsel Zimmerman Reed LLP ("Zimmerman Reed") and for Additional Relief (the "Petition"), and respectfully allege as follows, upon their own knowledge as to themselves and their own books and records and otherwise on information and belief:

NATURE OF THE ACTION

1. This Petition arises in connection with a "mass arbitration" campaign that the law firm Zimmerman Reed has launched against Petitioners. Zimmerman Reed has threatened Petitioners with many substantively identical, meritless claims asserting violations of the Video Privacy Protection Act of 1988 ("VPPA"), 18 U.S.C. § 2710. Zimmerman Reed purports to

[1] Petitioners are corporate affiliates and subsidiaries of Warner Bros. Discovery, Inc. Unless the context specifies otherwise, the term "Petitioners" is used herein to refer to each of the Petitioners and to both Petitioners collectively.

assert these claims on behalf of many individuals who Zimmerman Reed claims subscribed to HBO Max or Discovery+ (the "Claimants").

2. The objective of Zimmerman Reed's mass arbitration campaign is to attempt to leverage the threat of significant arbitration administrative fees associated with arbitral proceedings to extract a massive private settlement from Petitioners that would include a massive payout to Zimmerman Reed bearing no relationship to the merits of the claims.[2]

3. To facilitate its mass arbitration scheme, Zimmerman Reed has (i) committed numerous breaches of the standards of professional conduct, and (ii) sought to improperly obtain and use Petitioners' confidential information in connection with Zimmerman Reed's mass arbitration threats against Petitioners. As such, while Petitioners do not make this application lightly, they have come to the conclusion that the only appropriate consequence under the circumstances is that Zimmerman Reed must be disqualified as counsel for the Claimants and any similarly situated individuals. As this Petition explains below, at least three Zimmerman Reed personnel have signed up as claimants in separate mass arbitration campaigns brought by **other law firms** asserting VPPA claims against Petitioners. Those campaigns are identical to the campaign pursued by Zimmerman Reed on behalf of its clients, and equally non-meritorious. By joining those mass arbitration threats pursued by other law firms as claimants, Zimmerman Reed personnel sought and were able to obtain confidential information relating to Petitioners, including Petitioners' responses to settlement demands, among other information, that it hoped to

[2] This mass arbitration tactic has been labeled by commentators as a "shakedown" that is "paved with abusive practices" and "ethical violations." Andrew J. Pincus et al., Chamber of Com. Inst. for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 3 (2023), https://instituteforlegalreform.com/research/mass-arbitration-shakedown-coercing-unjustified-settlements/. *See* Exhibit 1 to the May 15, 2024, Affirmation of Evan K. Farber (the "Farber Aff."), filed herewith. Unless otherwise specified, references herein to "Exhibit" or "Ex." are to the exhibits to the Farber Aff.

use to Petitioners' disadvantage in pursuing its own mass arbitration scheme.

4. These Zimmerman Reed personnel sought to disguise their affiliation with their law firm, and they purported to assert claims on their own behalf in two other mass arbitration campaigns separately brought against the Petitioners by Keller Postman LLC ("Keller")[3] and Labaton Keller Sucharow LLP ("Labaton").[4]

5. Petitioners have already suffered harm by virtue of Zimmerman Reed's improper tactics. If left unchecked, Zimmerman Reed will continue to use the confidential information it has obtained and will continue to obtain to the further detriment of Petitioners.

6. The Zimmerman Reed personnel who have signed up as claimants in the Keller and Labaton mass arbitration campaigns against Petitioners include:

(i) Caleb Marker, the firm's managing partner and the lead lawyer for Claimants, who pursued identical VPPA claims in **both** the Keller and the separate Labaton mass arbitration campaigns and who recently filed (with the wrong arbitration provider) an arbitration demand against Petitioner WarnerMedia;

(ii) an associate at Zimmerman Reed who is closely involved in the firm's mass arbitration campaign against Petitioners (the "Zimmerman Reed Associate"); and

(iii) a mass arbitration "data analyst" at Zimmerman Reed who is also closely involved in the Zimmerman Reed mass arbitration campaign against Petitioners

[3] Davis & Norris, LLP ("Davis & Norris") and Troxel Law LLP ("Troxel") are Keller's co-counsel in that mass arbitration matter.

[4] Although both Keller and Labaton have "Keller" in their name, these two firms are not affiliated.

(the "Zimmerman Reed Analyst").[5]

7. Keller and Labaton know Mr. Marker and Zimmerman Reed well. Keller, Labaton, and Zimmerman Reed are among a group of plaintiffs' firms actively involved in threatening and prosecuting mass arbitration matters to seek coercive settlements. These firms regularly participate at conferences together. These firms have threatened numerous companies with mass arbitration campaigns that are non-public in an effort to obtain windfall attorneys' fees without any judicial or regulatory scrutiny. Keller and Labaton have previously worked together with Mr. Marker and Zimmerman Reed on several cases. Indeed, Labaton and Mr. Marker are currently working together as co-counsel to represent numerous plaintiffs in a federal action. Mr. Marker also routinely interacts with Keller and Labaton on social media platforms.[6]

8. Labaton and Mr. Marker are currently serving as co-counsel to numerous plaintiffs in a pending federal court action. *See* Ex. 4 (Excerpt of Docket, *Garner v. Amazon.com Inc.*, No. 2:21-cv-00750-RSL (W.D. Wash.)). They also served as counsel for different plaintiffs in another federal action that has since settled. *See* Ex. 5 (Excerpt of Docket, *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prod. Liab. Litig.*, No. 15-MD-02672 (N.D. Cal.)). Labaton and Zimmerman Reed have also both served as plaintiffs' counsel in numerous other matters. *See, e.g.*, Exs. 6-10 (Excerpt of Dockets in *Borteanu v. Nikola*, No. 2:20-cv-

[5] According to the Zimmerman Reed Analyst's online biography, he "interprets data" and "serv[es] as the point person for providing quantitative and qualitative analysis."

[6] For example, Mr. Marker has "liked" several of Keller's posts on the social media platform LinkedIn, including Keller's post from October 2023 entitled "Keller Postman Asks Appeals Court To Expedite Appeal by Live Nation and Ticketmaster, To Restore Competitive Ticket Prices Without Delay." *See* Ex. 2. Likewise, Ms. Nafash of Labaton "liked" a Zimmerman Reed post from February 2024 regarding Mr. Marker entitled "Read about our new Managing Partner Caleb Marker in Los Angeles Business Journal where he talks about growing ZR's practice in LA and how he fights on behalf of gig workers." *See* Ex. 3.

01797-SPL (D. Ariz.); *In re Hard Disk Drive Suspension Assemblies Antitrust Litig.*, No. 3:19-md-02918-MMC (N.D. Cal.); *In Re Target Corp. Sec. Litig.*, No. 0:16-cv-01315 (D. Minn.); *In re Marriott Int'l Customer Data Sec. Breach Litig.*, No. 8:19-md-02879-JPB (D. Md.); *In re Resideo Tech. Inc.*, No. 19-cv-02863-WMW-BRT (D. Minn.)).

9. The Zimmerman Reed personnel who have participated as claimants in the Keller and Labaton mass arbitration threats against Petitioners do not appear to be legitimate claimants seeking relief for statutory violations.

10. Mr. Marker was a claimant in **both** the Keller and Labaton matters, purporting to assert the exact same VPPA claim in each threat. Mr. Marker served a pre-arbitration "Notice of Dispute" notifying Petitioner WarnerMedia of his purported claim and identifying Keller as his counsel.[7] *See* Ex. 13. Mr. Marker also appears on a list of claimants Labaton provided to Petitioner WarnerMedia on whose behalf Labaton is asserting identical claims. *See* Ex. 14.

11. Mr. Marker has no legitimate basis to retain separate law firms to pursue the same claim on his behalf in two separate mass arbitration campaigns, and as an attorney he must understand how improper that is. It is also likely a breach of his retainer agreements with Keller, Labaton, or both.

12. Petitioners' business records indicate that the Zimmerman Reed Analyst who signed up for the Keller mass arbitration never even had an HBO Max account under the email

[7] Petitioners' respective arbitration agreements require claimants to submit pre-arbitration Notices of Dispute before commencing any arbitrations. In a Notice of Dispute, a claimant is required to, among other things, describe his or her claim, and if represented by counsel, affirm that Petitioners are authorized to disclose the claimant's account information to claimant's counsel while seeking to resolve the claim. Petitioners' respective arbitration agreements provide that Petitioners and claimants will work to resolve issues identified in a properly completed Notice of Dispute before any arbitration may be commenced. *See* Ex. 11 at § 5.4(b); Ex. 12 at Arbitration Agreement § 2.

address provided in his notice—a fact that Keller apparently did no diligence to ascertain before it submitted a claim on his behalf. Even under Keller's, Labaton's, and Zimmerman Reed's own flawed theories of VPPA liability (which Petitioners dispute), a claimant must as a threshold matter (and as a matter of common sense) be a subscriber.[8] Because the Zimmerman Reed Analyst was not a subscriber, he could never have had any claim, even setting aside the numerous additional deficiencies in his claim and across the Keller claimant pool. The Analyst also provided an obviously fictitious address in his notice to Petitioner WarnerMedia, "123 Main Street," further demonstrating that he knew that he was not a genuine claimant but was actually engaged in improper activity. The fictitious address also reflects a further lack of basic vetting by Keller, which submitted this information and held it out as legitimate.

13. Less than two months after Mr. Marker submitted a Notice of Dispute to Petitioner WarnerMedia through Keller, Mr. Marker and the Zimmerman Reed Associate led a Zimmerman Reed team in threatening identical VPPA claims through a mass arbitration against Petitioner WarnerMedia. The Notices of Dispute Zimmerman Reed submitted on behalf of its clients track almost verbatim the Notice of Dispute submitted by Keller to Petitioners on his behalf. *See* Exs. 13, 15 (Mr. Marker's Notice of Dispute and an exemplar redacted Zimmerman Reed Notice of Dispute); *see also infra* ¶ 51 (comparing Keller and redacted Zimmerman Reed Notices of Dispute). Zimmerman Reed would not have had access to the Keller Notices of Dispute—which Zimmerman Reed copied wholesale in preparing its own notices—had Mr. Marker and Zimmerman Reed personnel not signed up to be claimants in the Keller mass arbitration matter.

[8] The VPPA requires plaintiffs to establish that they are "consumer[s]" of a "video tape service provider." 18 U.S.C. § 2710(b)(1). The VPPA defines a "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." 18 U.S.C. § 2710(a)(1).

14. In the ordinary course of their representation of mass arbitration claimants, Keller and Labaton would have conveyed confidential information to those claimants, including Petitioners' responses to their settlement demands, among other information. Mr. Marker and Zimmerman Reed then turned around and sought to use this improperly-obtained information to further their own mass arbitration threat.

15. For instance, because Zimmerman Reed had improper insight into the Keller and Labaton matters, Zimmerman Reed was able to see firsthand how Petitioners responded to certain non-public threats levied by those firms, how Petitioners countered those threats, and how Petitioners responded to settlement overtures. Using that confidential information, Zimmerman Reed was then able to craft its own campaign accordingly—by copying what it perceived to be effective from the Keller and Labaton campaigns, while avoiding what it perceived to be ineffective—effectively giving Zimmerman Reed a second bite at the apple.

16. On April 12, 2024, Labaton filed a demand for arbitration with the American Arbitration Association (the "AAA") on Mr. Marker's behalf. *See* Ex. 16. Labaton also filed demands for arbitration with the AAA on behalf of other claimants at the same time. Petitioner WarnerMedia's operative arbitration clause designates National Arbitration and Mediation ("NAM"), not the AAA, as the company's arbitral provider.[9] *See* Ex. 11 at § 5.4(c).

17. On April 19, 2024, Labaton submitted a letter to the AAA withdrawing two of the arbitration demands it filed on April 12, 2024—but not Mr. Marker's demand. In that letter,

[9] Labaton improperly filed these demands with the AAA—the wrong arbitral forum—in order to weaponize the AAA's more expensive fee schedule and procedures, to the detriment of Petitioner WarnerMedia, its consumers, and the AAA. Petitioner WarnerMedia had advised Labaton months earlier that WarnerMedia's operative arbitration clause did not designate the AAA as the arbitration administrator. *See* Ex. 11. Rather, WarnerMedia's operative arbitration clause designated NAM as the arbitration administrator. *See* Ex. 11 at § 5.4(c). On April 30, 2024, the AAA formally declined to administer Labaton's improperly filed arbitrations.

Labaton reaffirmed that it "continues to represent" all other claimants who had brought demands, including Mr. Marker.

18. Zimmerman Reed did not self-disclose to Petitioners the dual role of its personnel: pursuing mass arbitration claims on behalf of clients while enrolling as claimants in two other mass arbitrations brought by other firms. Nor did Keller or Labaton. Petitioners discovered this dual role from their own review of the claimant pool in the Keller and Labaton matters.

19. By participating in other mass arbitration threats and making misstatements and omissions about its conduct, Zimmerman Reed violated numerous ethical rules. These ethical breaches mandate Zimmerman Reed's disqualification from representing Claimants or any other individuals asserting similar claims against Petitioners or its affiliates.

20. The ethical rules provide that an attorney may not, among other things:

(i) engage in misconduct, including conduct that is prejudicial to the administration of justice;

(ii) make knowing or reckless false statements or omissions of material fact to a third person (including an adversary) or engage in other conduct that involves dishonesty or deceit;

(iii) acquiesce in or fail to prevent an ethical breach by a nonlawyer; or

(iv) improperly obtain information about an adversary that is protected by an expectation of confidentiality.

21. Zimmerman Reed violated each of these bedrock ethical mandates in connection with the mass arbitration campaigns discussed herein. This is separate and distinct from the ethical issues that mass arbitration tactics more generally might implicate. *See* Ex. 1 at 30-40.

22. Zimmerman Reed personnel submitted arbitration claims against Petitioners through Keller and Labaton not as bona fide claimants seeking recovery for meritorious claims, but instead to aid their efforts to prosecute claims on behalf of their clients. That conduct is plainly prejudicial to the administration of justice and the administration of the bar. It is also deceit, pure and simple.

23. Further, it appears that Zimmerman Reed engaged—and is continuing to engage—in this misconduct for the purpose of improperly obtaining information about other mass arbitration campaigns against Petitioners, including Petitioners' responses to settlement demands in the Keller and Labaton matters.

24. These ethical breaches are imputed to Zimmerman Reed's entire firm and warrant disqualification of the firm and all of its attorneys.

25. Absent disqualification, Zimmerman Reed will continue to be able to use the confidential information it improperly obtained—and continues to obtain—from Petitioners regarding Petitioners' reactions and responses to various non-public aspects of the Keller and Labaton matters. Zimmerman Reed will use that confidential information to advance its own mass arbitration campaign against Petitioners, to Petitioners' detriment.

26. Accordingly, Petitioners respectfully request an order disqualifying Zimmerman Reed from representing Claimants or any other individuals asserting similar claims against Petitioners or their affiliates, and for the additional relief set forth herein.

THE PARTIES

27. Petitioner WarnerMedia is a limited liability company headquartered in New York, New York.

28. Petitioner Discovery is a limited liability company headquartered in New York, New York.

29. Respondent Zimmerman Reed is a law firm that purports to represent clients in "federal and state courts across the country" and regularly conducts business in New York.[10]

JURISDICTION AND VENUE

30. This Court has jurisdiction over this Petition pursuant to CPLR § 7502(c), which provides that this Court may entertain a special proceeding "in connection with an arbitration . . . that is to be commenced inside or outside this state."

31. This Court has jurisdiction over Zimmerman Reed pursuant to CPLR § 301 because the courts of New York County are specified in the applicable arbitration agreements pursuant to which (i) Zimmerman Reed has threatened arbitration claims on behalf of the Claimants against Petitioners and (ii) Zimmerman Reed personnel have threatened arbitration claims against Petitioners. *See* Ex. 11 (HBO Max and Max Terms of Use); Ex. 12 (Discovery+ Visitor Agreement).

32. This court also has jurisdiction over Zimmerman Reed pursuant to CPLR § 302(a) because, among other things, Zimmerman Reed conducts substantial business in New York; has directed solicitations for a mass arbitration campaign against Petitioners to New York residents; is pursuing mass arbitration claims against Petitioners on behalf of New York residents, among

[10] Zimmerman Reed LLP, https://www.zimmreed.com/ (last visited May 9, 2024). *See* Ex. 17.

others; and has engaged and is continuing to engage in misconduct directed to New York and that caused injury to Petitioners in New York.

33. Venue is proper in this Court because this is the "court and county specified" in the applicable arbitration agreements pursuant to which Zimmerman Reed has threatened to arbitrate claims against Petitioners and because Petitioners reside and do business in New York County. *See* Ex. 11 (HBO Max and Max Terms of Use); Ex. 12 (Discovery+ Visitor Agreement). *See* CPLR § 7502(a)(i).

SUMMARY OF FACTS

A. Mass Arbitration and Zimmerman Reed

34. In a typical mass arbitration campaign, a law firm will "file simultaneously tens of thousands of essentially-identical arbitration demands, triggering an immediate, massive bill to businesses for arbitration fees—often totaling hundreds of millions of dollars." Ex. 1 at 2. The objective of that mass filing is to "force companies to settle the claims *en masse*, regardless of the underlying merits." *Id.* at 19.

35. Zimmerman Reed's website reflects that the firm comprises 27 attorneys and 20 professional staff. *See* Ex. 18 (*The Team*, Zimmerman Reed LLP, https://www.zimmreed.com/people/ (last visited May 9, 2024)).

36. In recent years, Zimmerman Reed has expanded its mass arbitration practice, pursuing campaigns against numerous businesses wherein Zimmerman Reed purports to represent tens of thousands of individual clients.

37. In January 2024, Caleb Marker—who "paved the way for [Zimmerman Reed's] mass arbitration practice"—was named managing partner of the firm. Ex. 19 (Zane Hill, *Marker Now Managing Partner at Zimmerman Reed*, L.A. Bus. J. (Jan. 22, 2024), https://labusinessjournal.com/law/law-5/).

38. Zimmerman Reed has recently been accused in federal court of "manufacturing frivolous arbitration claims" in connection with a mass arbitration Zimmerman Reed asserted on behalf of thousands of putative claimants against L'Occitane, Inc. ("L'Occitane") for purported violations of privacy statutes. *See* Ex. 20 at 2 (Complaint for Declaratory Judgment and Injunctive Relief, *L'Occitane, Inc. v. Zimmerman Reed LLP*, No. 2:24-cv-01103 (C.D. Cal. Feb. 8, 2024)).

39. In its complaint in the U.S. District Court for the Central District of California, L'Occitane asserted claims against both Zimmerman Reed and the purported claimants in the Zimmerman Reed mass arbitration against the company. To effect service of process on the purported claimants, L'Occitane reached out to the individuals to request waivers of service. This outreach revealed that many of Zimmerman Reed's purported claimants were apparently not represented by Zimmerman Reed.

40. Indeed, "numerous" purported claimants "began responding" to L'Occitane "almost immediately that Zimmerman Reed does not represent them at all." Ex. 21 at 7 (Plaintiff's Supplemental Brief in Opposition to Defendant's Motion to Compel Arbitration, *L'Occitane, Inc. v. Zimmerman Reed LLP*, 2:24-cv-01103 (C.D. Cal. filed Apr. 10, 2024) (ECF No. 50)). By way of example:

(i) One purported claimant stated: "[T]here seems to be a mistake here. I'm not sure how [Zimmerman Reed] or you obtained any of my personal information but I never signed up for any kind of lawsuit or fight." Ex. 21, Ex. A.

(ii) Another purported claimant stated: "I am not a client of Zimmerman Reed. I never made a claim with them. All I did was click on an ad I saw on Instagram, which made a predatory claim. . . . I never filled out any paperwork[.] . . . I

actually unsubscribed from them shortly after I realized they were probably a scam and I didn't want to get any more predatory emails from them." Ex. 21, Ex. B.

(iii) Another purported claimant's son stated that his father, who was listed on the arbitration demand, "is now dead." Ex. 21, Ex. C.

41. In a recent decision, the court tacitly agreed with L'Occitane that Zimmerman Reed's arbitrations were frivolous. The court denied a motion to compel arbitration filed by Zimmerman Reed on behalf of its purported clients, holding that Zimmerman Reed had failed to demonstrate which if any of its purported clients had even visited the L'Occitane website. *See* Ex. 22 at 5-7 (*L'Occitane, Inc. v. Zimmerman Reed LLP*, No. 2:24-cv-01103, slip op. (C.D. Cal. Apr. 12, 2024) (ECF No. 52)). On April 25, 2024, the court dismissed L'Occitane's claim for declaratory relief as moot. *See* Ex. 23 at 6-7 (*L'Occitane, Inc. v. Zimmerman Reed LLP*, No. 2:24-cv-01103, slip op. (C.D. Cal. Apr. 25, 2024) (ECF No. 62)).

B. In January 2023, Zimmerman Reed's Now Managing Partner, Caleb Marker, Asserted a Claim in a Mass Arbitration Campaign Against Petitioners Brought by Keller

42. On January 5, 2023, Petitioners received many substantively identical Pre-Arbitration Notices of Dispute sent by Keller asserting VPPA claims against Petitioners in connection with Petitioner WarnerMedia's HBO Max streaming service.

43. Among the Notices of Dispute was a notice on behalf of and purportedly signed by Mr. Marker, Zimmerman Reed's now-managing partner. *See* Ex. 13.

44. In his one-page Notice of Dispute, Mr. Marker stated that he had VPPA claims against Petitioner WarnerMedia and that he had "retained Keller Postman LLC, Troxel Law LLP, and Davis & Norris, LLP to investigate and pursue claims against [Petitioners] on my behalf." *Id.* Mr. Marker further instructed Petitioner WarnerMedia to "contact my attorneys at

Keller Postman to discuss resolving my dispute." *Id.* Mr. Marker's Notice of Dispute appears to include his electronic signature and personal email address. *Id.*

45. Keller knows Mr. Marker and Zimmerman Reed well. Mr. Marker and Keller have represented different clients in the same actions. *See, e.g.*, Ex. 24 (Proof of Service, *Marciano v. Doordash, Inc.*, No. CGC18567869 (Cal. Super. Ct. filed Jan. 23, 2020)). Keller has attested in court filings that it has communicated with Zimmerman Reed regarding litigation in which they are both involved.

46. For example, Warren Postman, a managing partner at Keller, stated in a declaration filed in May 2020, in *In re CenturyLink Sales Practice and Securities Litigation*, No. 0:17-md-02795, that he met and conferred with Zimmerman Reed regarding the process by which Keller obtained authorization to opt its clients out of a proposed settlement in order to proceed with a mass arbitration. *See* Ex. 25 at 12-13 (Declaration of Warren Postman in Opposition to Century Link's Motion to Disqualify Counsel and Require Corrective Notice, *In re CenturyLink Sales Practice & Sec. Litig.*, No. 0:17-md-02795 (D. Minn. May 15, 2020), ECF No. 715).

47. Keller proceeded to pursue a claim on behalf of a claimant who Keller knows is a fellow mass arbitration plaintiffs' attorney.

48. Petitioners have engaged in confidential communications with Keller in connection with the mass arbitration campaign that Mr. Marker joined, including communications reflecting Petitioners' responses to settlement demands.

49. In the ordinary course of its representation of claimants, Keller would have communicated these confidential communications to Mr. Marker as a claimant in the Keller mass arbitration threat.

C. In February 2023, Zimmerman Reed Launched Its Own Mass Arbitration Campaign Against Petitioners

50. In February 2023, just a month after Petitioners received Mr. Marker's Notice of Dispute, Zimmerman Reed began sending VPPA Notices of Dispute to Petitioner WarnerMedia on behalf of its purported clients. *See, e.g.*, Ex. 26 (Redacted Exemplar Email from Zimmerman Reed to Petitioner WarnerMedia).

51. The Zimmerman Reed Notices of Dispute are nearly verbatim copies of the Notices of Dispute submitted by Keller on behalf of Keller's purported clients, including Mr. Marker:

Keller Notice of Dispute	Zimmerman Reed Notice of Dispute
I made a profile with HBO's online video platform so I could stream HBO videos, and I watched videos through HBO's platform.	I subscribed to and made a profile with your video platform so I could stream videos, and I watched videos through your platform.
HBO should have data showing exactly how many videos I watched.	You should have data showing exactly how many videos I watched.
HBO never asked for my consent to disclose to other companies the specific videos I watched on its platform.	You never asked for my consent to disclose to other companies the specific videos I watched on your platform.
And HBO never sent me a form dedicated to obtaining that informed consent. I recently learned HBO may have shared the videos I watched and my identity with Meta and possibly other third parties.	And you never sent me a form dedicated to obtaining that informed consent. I recently learned you may have shared the videos I watched and my identity with Meta / Facebook and possibly other third parties.
HBO disclosed my personal information using software called the Meta Pixel and it may have also used other, similar software.	You disclosed my personal information using software called the Meta Pixel and it [sic][11] may have also used other, similar software.

[11] The typographical errors in Zimmerman Reed's Notices of Disputes appear to further demonstrate that Zimmerman Reed's Notices of Dispute were directly copied from Keller's, which refer to Petitioners as "it," while Zimmerman Reed's Notices of Dispute otherwise refer to Petitioners as "you."

Keller Notice of Dispute	Zimmerman Reed Notice of Dispute
When HBO sent third parties my specific video watching history, it violated the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. The VPPA prohibits HBO from knowingly disclosing to any person, without informed written consent, information which identifies an individual user as having requested or obtained specific video materials.	When you sent third parties my specific video watching history, it [sic] violated the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. The VPPA prohibits streaming companies like you from knowingly disclosing to any person, without informed written consent, information which identifies an individual user as having requested or obtained specific video materials.
An individual who has been aggrieved by a VPPA violation may sue for injunctive relief, a statutory penalty of $2,500 per violation, punitive damages, and attorney fees.	An individual who has been aggrieved by a VPPA violation may sue for injunctive relief, a statutory penalty of $2,500 per violation, punitive damages, and attorney fees.
I have retained Keller Postman LLC, Troxel Law LLP, and Davis & Norris, LLP to investigate and pursue claims against HBO on my behalf under the VPPA and state law.	I have retained Zimmerman Reed, LLP to investigate and pursue claims against you on my behalf under the VPPA and state law.
I have authorized my attorneys to seek at least $2,500—the minimum statutory penalty under the VPPA—and an additional $2,500 for every time HBO sent a third party information about a particular video I watched on its platform.	I have authorized my attorneys to seek at least $2,500—the minimum statutory penalty under the VPPA—and an additional $2,500 for every time you sent a third-party information about a particular video I watched on your platform.
I have also authorized my attorneys to seek injunctive relief to prevent HBO from disclosing my personal information to third parties going forward.	I have also authorized my attorneys to seek punitive damages; reasonable attorneys' fees and other litigation costs reasonably incurred; and equitable relief in the form of the cessation of your disclosure of my PII and video watching history to third parties including but not limited to Meta / Facebook.
Finally, I authorize HBO to disclose my HBO account details, including confidential information, to my attorneys if my attorneys believe those details are helpful to resolve my claim.	Finally, I authorize you to disclose my account details, including confidential information, to my attorneys if my attorneys believe those details are helpful to resolve my claim.

52. The Zimmerman Reed Associate sent to Petitioner WarnerMedia Zimmerman Reed's initial Notices of Dispute. *See* Ex. 26 (Redacted Exemplar Email from Zimmerman Reed to Petitioner WarnerMedia).

53. Beginning in February 2023, Mr. Marker began communicating with Petitioners regarding the claims Zimmerman Reed submitted to Petitioners on behalf of its purported clients.

54. In those communications, Mr. Marker did not disclose that he was a claimant in the separate, concurrent VPPA dispute brought by Keller. Mr. Marker also did not withdraw his claim from Keller's campaign after Zimmerman Reed began its own campaign. Neither Mr. Marker nor anyone else at Zimmerman Reed disclosed to Petitioners that Mr. Marker was a claimant in the Keller mass arbitration campaign.

55. Mr. Marker was simultaneously pursuing identical VPPA claims against Petitioners on multiple fronts: (i) as a claimant in Keller's campaign, through which he would have been privy to confidential information regarding that matter, and (ii) as an attorney on behalf of the Claimants, where he represented Claimants with distinct interests from the Keller claimants.

56. On October 13, 2023, Zimmerman Reed threatened a separate mass arbitration campaign against Petitioner Discovery. *See* Ex. 27 (Redacted Letter dated Oct. 13, 2023). To commence this threat, Zimmerman Reed sent Petitioner Discovery a list of more than 70,000 claimants on whose behalf Zimmerman Reed asserted purported violations of the VPPA. *See id.*

57. Petitioner Discovery spent months and considerable resources reviewing these more than 70,000 claimants and evaluating their threatened claims.

58. Zimmerman Reed then abandoned the vast majority of these threatened claims without explanation.

59. Specifically, on January 25, 2024, Zimmerman Reed sent Petitioner Discovery a letter asking Petitioner Discovery to "disregard" the list of more than 70,000 claimants due to "a data error in the list." In the same correspondence, Zimmerman Reed attached "an updated list" containing just 12,208 putative claimants.[12] Zimmerman Reed did not explain the source of this "data error" that caused the firm to erroneously threaten claims on behalf of more than 50,000 individuals. To this day, Zimmerman Reed has not explained how this seismic "data error" occurred.

60. Viewing the circumstances most charitably to Zimmerman Reed, the firm sent the original list without conducting even a minimal amount of diligence into the list or the claimants—an "error" (or sequence of errors) that came at Petitioners' significant expense.

D. Petitioners Discovered Additional Mass Arbitration Claims by Zimmerman Reed Personnel Against Petitioners Asserted by Zimmerman Reed and Other Law Firms

61. In the course of reviewing the VPPA mass arbitration Notices of Dispute and claimant lists submitted to Petitioners by various law firms, Petitioners identified additional claims threatened by Mr. Marker and other Zimmerman Reed personnel against Petitioners.

(i) Caleb Marker, Zimmerman Reed's Managing Partner

62. Petitioners discovered that Mr. Marker was listed as a claimant in **yet another** mass arbitration campaign against Petitioners—this one brought by Labaton, which asserts VPPA claims identical to those asserted in the Keller and Zimmerman Reed campaigns.

63. Specifically, on December 9, 2022, Labaton sent Petitioner WarnerMedia a list of claimants on whose behalf Labaton threatened arbitrations asserting purported violations of the

[12] Incredibly, the new list of 12,208 claimants included individuals ***not*** on the original list of more than 70,000 claimants.

VPPA in connection with Petitioner WarnerMedia's HBO Max video streaming service. *See* Ex. 14. Mr. Marker was among the listed Labaton claimants. *Id.*

64. The Labaton campaign was ongoing throughout 2023, including while Mr. Marker simultaneously pursued identical VPPA claims against Petitioners as a claimant in Keller's campaign and as an attorney on behalf of the Zimmerman Reed Claimants.

65. Neither Mr. Marker nor anyone else at Zimmerman Reed alerted Petitioners that Mr. Marker was also a claimant in the separate, concurrent matter brought by Labaton. Mr. Marker also did not withdraw his claim from Labaton's campaign after Zimmerman Reed began its own campaign.

66. In fact, Mr. Marker is continuing to participate in Labaton's campaign. On April 12, 2024, Mr. Marker filed (with the wrong arbitration provider) an arbitration demand against Petitioner WarnerMedia through Labaton. *See* Ex. 16 (Caleb Marker Arbitration Demand).

67. Mr. Marker likely breached his retainer agreement with Labaton by signing up for the Keller mass arbitration matter, breached his retainer agreement with Keller, Troxel, and Davis & Norris by signing up for the Labaton mass arbitration matter, or breached both retainer agreements. Typical mass arbitration engagement letters require clients to represent that they have not signed an agreement with any other lawyers to pursue claims against the company that is the subject of a mass arbitration campaign. Indeed, based on a publicly available Keller and Troxel mass arbitration retainer agreement in another matter, Keller and Troxel require clients to "represent . . . that you have not signed an agreement with another law firm to pursue any claims against the Company for you and that you do not recall signing such an agreement." *See* Ex. 28 § 16 (CenturyLink Retainer Agreement). The Davis & Norris mass arbitration retainer agreement

likely contains similar provisions. By signing agreements with both (i) Labaton and (ii) Keller, Troxel, and Davis & Norris to pursue the same claims against Petitioners, Mr. Marker likely breached his retainer agreements with those firms.

68. Labaton proceeded to pursue a claim on behalf of a claimant who Labaton knows is a fellow mass arbitration plaintiffs' attorney.

69. Petitioners have engaged in confidential communications with Labaton in connection with the mass arbitration campaign that Mr. Marker joined, including communications reflecting Petitioners' responses to settlement demands.

70. In the ordinary course of its representation of claimants, Labaton would have communicated these confidential settlement communications to Mr. Marker as a claimant in the Labaton mass arbitration threat.

(ii) Zimmerman Reed Associate

71. Petitioners also discovered that the Zimmerman Reed Associate who had sent Zimmerman Reed's Notices of Dispute to Petitioners in February 2023 had submitted a Notice of Dispute to Petitioners in January 2023 as part of the Keller VPPA campaign. *See* Ex. 29 (Zimmerman Reed Associate Notice of Dispute).

72. As with Mr. Marker, this Associate's participation in the Keller campaign overlapped in time with his work representing the Zimmerman Reed Claimants who were asserting claims identical to those the Associate asserted personally in the Keller action.

73. Neither the Zimmerman Reed Associate nor anyone else at Zimmerman Reed alerted Petitioners that the Associate was also a claimant in the separate, concurrent matter brought by Keller. The Associate also did not withdraw his claim from Keller's campaign after Zimmerman Reed began its own campaign.

74. As noted above, Petitioners have engaged in confidential communications with Keller in connection with the mass arbitration campaign that the Associate joined, including communications reflecting Petitioners' responses to settlement demands.

75. In the ordinary course of its representation of claimants, Keller would have communicated these confidential communications to the Zimmerman Reed Associate as a claimant in the Keller mass arbitration threat.

76. Petitioners further discovered that the Zimmerman Reed Associate who signed up for the Keller mass arbitration was also listed as a claimant in Zimmerman Reed's **own** arbitration campaign. After Petitioners brought this fact to Zimmerman Reed's attention, Zimmerman Reed claimed that this was an administrative error.

77. In addition to the Zimmerman Reed Associate, **thousands** of other Zimmerman Reed Claimants are also claimants in identical mass arbitration threats brought by Keller, Labaton, or both. In other words, these Claimants purportedly retained different law firms to simultaneously pursue the exact same claims on their behalf in separate proceedings. Many of these individuals are claimants in **all three** mass arbitration threats—those asserted by Zimmerman Reed, Keller, **and** Labaton.

(iii) Zimmerman Reed Analyst

78. Petitioners discovered that a data analyst at Zimmerman Reed who is involved in the firm's mass arbitration matters had **also** submitted a Notice of Dispute to Petitioners in January 2023 as part of the Keller VPPA campaign. *See* Ex. 30 (Zimmerman Reed Analyst Notice of Dispute).

79. The Zimmerman Reed Analyst is closely involved in Zimmerman Reed's mass arbitration campaign against Petitioners.

80. Neither the Analyst nor anyone else at Zimmerman Reed alerted Petitioners that the Analyst was also a claimant in the separate, concurrent matter brought by Keller. The Analyst also did not withdraw his claim from Keller's campaign after Zimmerman Reed began its own campaign.

81. As noted above, Petitioners have engaged in confidential communications with Keller in connection with the mass arbitration campaign that the Analyst joined, including communications reflecting Petitioners' responses to settlement demands.

82. In the ordinary course of its representation of claimants, Keller would have communicated these confidential communications to the Zimmerman Reed Analyst as a claimant in the Keller mass arbitration threat.

83. Petitioners' review further found that the Zimmerman Reed Analyst's Notice of Dispute in the Keller campaign lists a fictitious address. The address listed as belonging to the Analyst is "123 Main St" in El Segundo, California (the city where Zimmerman Reed's California office was previously located), *id.*, but that address belongs to a restaurant and bar. *See* The Tavern On Main, https://www.thetavernonmain.com/. To the extent Keller knew this information was false—as would have been evident based on rudimentary due diligence into the Analyst's claim—Keller never notified Petitioners of this fact.

84. Petitioners' review of their internal records also revealed that the Zimmerman Reed Analyst was never even an HBO Max subscriber based on the email address he provided in his Notice of Dispute. Thus, the Analyst's attestation in his Notice of Dispute that he "made a profile with HBO's online video platform so [he] could stream HBO videos" appears to be false. *See* Ex. 30 (Zimmerman Reed Analyst Notice of Dispute). The Analyst thus did not meet the threshold requirements to bring a claim under the VPPA even under Keller's own flawed theory

of liability.[13] Again, to the extent Keller knew this information was false—as would have been evident based on rudimentary due diligence into the Analyst's claim—Keller never notified Petitioners of this fact.

85. Zimmerman Reed never disclosed any of the foregoing facts to Petitioners. Instead, Petitioners discovered those facts themselves, at their own expense, through Petitioners' own review of mass arbitration claimant lists, Notices of Dispute, and their business records.

E. Neither Keller Nor Labaton Have Informed Petitioners that the Zimmerman Reed Personnel Have Withdrawn from the Keller and Labaton Mass Arbitrations

86. To date, neither Keller nor Labaton have informed Petitioners that the claims of Mr. Marker, the Zimmerman Reed Associate, or the Zimmerman Reed Analyst have been withdrawn.

87. Zimmerman Reed remains to this day privy to confidential information regarding the Keller and Labaton mass arbitration matters against Petitioners, while Zimmerman Reed continues to represent Claimants in connection with identical claims.

F. Labaton Filed an Arbitration Against Petitioners on Behalf of Mr. Marker

88. On April 12, 2024, Labaton filed arbitration demands against Petitioner WarnerMedia with the AAA (the wrong arbitration provider) as part of Labaton's mass arbitration campaign against Petitioner WarnerMedia.

[13] The Zimmerman Reed Analyst is not unique in this regard. Petitioners' review further found that of the claims submitted by Zimmerman Reed, more than 30% of the Zimmerman Reed Claimants do not appear to have HBO Max accounts based on the information provided. More than 30% of the Claimants who do have accounts do not appear to have accessed HBO Max through the HBO Max website—a predicate to a claim under Zimmerman Reed's theory of liability—within the applicable statute of limitations period. While Petitioners contest that any Zimmerman Reed Claimants have meritorious VPPA claims, these findings demonstrate that most of the Zimmerman Reed Claimants do not meet the threshold criteria for asserting such claims even under Zimmerman Reed's own flawed theory.

89. One of the demands that Labaton filed was submitted by Labaton on behalf of Mr. Marker. *See* Ex. 16 (Caleb Marker Arbitration Demand).

90. Mr. Marker's demand purports to bring an action for damages and other legal and equitable remedies resulting from HBO's purported violations of the Video Privacy Protection Act and California Civil Code section 1799.3. Ex. 16 (Caleb Marker Arbitration Demand).

91. On April 19, 2024, Labaton informed the AAA that two of its purported claimants who filed demands on April 12, 2024, had withdrawn their demands against Petitioners, and that Labaton "continues to represent" the remaining claimants.

92. Mr. Marker was not one of the two claimants Labaton identified who had withdrawn their demands. Mr. Marker was one of the remaining claimants who Labaton affirmed that it "continues to represent."

G. Zimmerman Reed's Conduct Violated Multiple Ethical Rules, Warranting the Firm's Disqualification as Counsel for Any Current or Future Claimants Against Petitioners

93. Zimmerman Reed's conduct has violated the firm's ethical obligations, and as a result, Zimmerman Reed should be disqualified from representing the Claimants and other individuals in mass arbitration proceedings or other actions against Petitioners or their affiliates.

94. CPLR § 7502(c) provides that this Court may entertain a special proceeding "in connection with an arbitration . . . that is to be commenced inside or outside this state."

95. Pursuant to CPLR § 7502, this Court may issue an order disqualifying arbitration counsel. *See, e.g.*, *Herrick, Feinstein LLP v. Windsor Sec., LLC*, No. 652124/2020, 2020 N.Y. Slip Op. 33746(U), at *7-8 (Sup. Ct. N.Y. Cnty. Nov. 10, 2020) (disqualifying arbitration counsel); *Wiener v. Braunstein*, No. 650853/19, 2019 NYLJ LEXIS 1900, at *9 (Sup. Ct. N.Y. Cnty. Apr. 22, 2019) (same). Relief may be granted under CPLR § 7502 regarding threatened arbitrations, even if no arbitration has been formally filed. *See Johnson City Pro. Fire Fighters*

Loc. 921 v. Village of Johnson City, 27 Misc. 3d 1217(A), 2010 N.Y. Slip Op. 50785(U), at *3 (Sup. Ct. Broome Cnty. 2010) (dismissing affirmative defense that the "court lacks subject matter jurisdiction as there is no Demand for Arbitration pending" because "CPLR § 7502(c) permits a party to an arbitration agreement to seek relief '[i]n connection with an arbitration that is pending *or that is to be commenced* inside or outside this state'" (alteration in original)).

96. A law firm must be disqualified where it commits ethical breaches that infect the litigation and impact the adverse party's interest in a just and lawful determination of the dispute. *See Lee v. Cintron*, 25 Misc. 3d 1210(A), 2009 N.Y. Slip Op. 52023(U), at *2 (Sup. Ct. Queens Cnty. 2009) ("When faced with a disqualification motion, the court's function is to take such action as is necessary to insure the proper representation of the parties and fairness in the conduct of the litigation." (citation omitted)); *Kennedy v. Eldridge*, 135 Cal. Rptr. 3d 545, 550 (Ct. App. 2011) (disqualification required "'where the ethical breach is "manifest and glaring"' and so 'infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of [his or] her claims'" (alteration in original) (citation omitted)).

97. Courts also recognize the "longstanding principle" that "the court may disqualify an attorney or firm not only for acting improperly, but also to avoid the appearance of impropriety." *Caravousanos v. Kings Cnty. Hosp.*, 27 Misc. 3d 237, 245 (Sup. Ct. Kings Cnty. 2010) (citation omitted); *see also Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 618 (1999) ("[E]ven the appearance of impropriety must be eliminated[.]"); *Narel Apparel Ltd. v. Am. Utex Int'l*, 92 A.D.2d 913, 914 (2d Dep't 1983) ("The standards of professional ethics dictate that a party 'and indeed the public at large, are entitled to protection against the

appearance of impropriety and the risk of prejudice attendant on abuse of confidence, however slight.'" (citation omitted)).

98. Here, Zimmerman Reed's conduct has violated numerous Rules of Professional Conduct, infecting Zimmerman Reed's mass arbitration campaign and negatively affecting Petitioners' interest in a just and lawful determination of the claims. Zimmerman Reed's ongoing representation of the Claimants or others in mass arbitration threats against Petitioners also threatens future violations of those same Rules.

99. "[W]here an attorney working in a law firm is disqualified . . . all the attorneys in that firm are likewise precluded from such representation." *Kassis*, 93 N.Y.2d at 616 (citations omitted); *see also George Co. v. IAC/Interactive Corp.*, No. 651304/2016, 2017 NY Slip Op. 30676(U), at *12 (Sup. Ct. N.Y. Cnty. Mar. 3, 2017) ("[I]f one attorney in a firm is disqualified from representing a client, then all attorneys in the firm are disqualified."); *CDM Smith v. Mut. Redevelopment Houses, Inc.*, 54 Misc. 3d 1211(A), 2017 N.Y. Slip Op. 50093(U), at *4-5 (Sup. Ct. N.Y. Cnty. 2017) (disqualifying 20 attorney firm upon § 7502 petition due to imputed conflicts). This rule extends to nonlawyer employees of law firms: if a nonlawyer employee acts in a manner warranting disqualification, the entire firm must be disqualified. *See Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc*., 129 A.D.2d 678, 679 (2d Dep't 1987).

(i) Zimmerman Reed Engaged in Misconduct

100. New York Rule of Professional Conduct 8.4 prohibits "misconduct." The rule provides that a "lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "engage in conduct that is prejudicial to the administration of justice."

101. The Rules of Professional Conduct of other states, including California and Minnesota, incorporate substantively identical mandates.[14] *See* Cal. Rules of Prof'l Conduct R. 8.4 (2018); Minn. Rules of Prof'l Conduct R. 8.4 (2022).

102. Zimmerman Reed violated New York Rule of Professional Conduct 8.4 and analogous rules of other states.

103. Mr. Marker engaged in misconduct as defined by the Rules of Professional Conduct by signing up for not one, but two other mass arbitration campaigns brought by other law firms to pursue identical VPPA claims against Petitioners. Mr. Marker had no legitimate basis to pursue duplicative claims with different law firms. The only plausible reason for Mr. Marker to do so was to surreptitiously gain access to information in pursuit of Zimmerman Reed's own mass arbitration campaign against Petitioners.

104. This misconduct appears to involve dishonesty and deceit, and is prejudicial to the administration of justice and to the bar.

105. In an analogous case, a court held that a plaintiffs' attorney violated California's Rule of Professional Conduct 8.4 where he filed an action on behalf of a client in federal court

[14] Mr. Marker and the Zimmerman Reed Analyst are based in Zimmerman Reed's California office. Mr. Marker is licensed to practice law in the State of California. The Zimmerman Reed Associate is based in Zimmerman Reed's Minnesota office and is licensed to practice law in the State of Minnesota.

and then filed an identical action on behalf of himself in state court. *Spikes v. Arabo*, No. 19-CV-1594 W (MDD), 2020 WL 12762597, at *2 (S.D. Cal. Apr. 28, 2020). The court found the attorney filed his own action "not because he is a bona fide customer" seeking recovery for a meritorious claim, but instead to, among other things, aid his efforts "to perform his duty to investigate his client's allegations." *Id.* The court held that the attorney's actions were "prejudicial to the administration of justice and the integrity of the bar" and disqualified him. *Id.* The same is true here and a comparable outcome should follow.

106. Zimmerman Reed also engaged in misconduct as defined by the Rules through the participation of the Zimmerman Reed Associate and the Zimmerman Reed Analyst as claimants in the Keller mass arbitration threat.

107. These claimants apparently signed up for the Keller mass arbitration campaign not as legitimate claimants, but to gain access to information in pursuit of Zimmerman Reed's own mass arbitration threat against Petitioners.

108. Indeed, Petitioners' business records indicate that the Zimmerman Reed Analyst never even had an account with the email address listed in his Notice of Dispute. He therefore could not possibly have a VPPA claim under the theory advanced.

109. This misconduct appears to involve dishonesty and deceit; moreover, it creates the appearance of impropriety, impacts Petitioners' interest in a just and lawful determination of Claimants' claims, and is prejudicial to the administration of justice and to the bar.

(ii) Zimmerman Reed Acquiesced in or Failed To Prevent Ethical Breaches of a Nonlawyer Employee of the Firm

110. New York Rule of Professional Conduct 5.3(b), governing a "Lawyer's Responsibility for Conduct of Nonlawyers," provides that a lawyer "shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a

violation of these Rules if engaged in by a lawyer" where, among other things, a managing lawyer (i) with knowledge ratifies the conduct, (ii) with knowledge fails to take remedial action to prevent the conduct, or (iii) "should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated."

111. The Rules of Professional Conduct of other states, including California and Minnesota, incorporate substantively identical mandates. *See* Cal. Rules of Prof'l Conduct R. 5.3 (2018); Minn. Rules of Prof'l Conduct R. 5.3 (2022).

112. Zimmerman Reed violated New York Rule of Professional Conduct 5.3 and analogous rules of other states by authorizing, acquiescing in, or failing to prevent the Zimmerman Reed Analyst from participating as a claimant in the Keller mass arbitration campaign and making false representations in connection with his participation.

113. This ethical breach creates the appearance of impropriety, impacts Petitioners' interest in a just and lawful determination of Claimants' claims, and is prejudicial to the administration of justice and to the bar.

(iii) Zimmerman Reed Made Misstatements and Omissions of Material Fact to Petitioners

114. New York Rule of Professional Conduct 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," including opposing counsel. *See, e.g.*, *In re Filosa*, 976 F. Supp. 2d 460, 465 (S.D.N.Y. 2013) (attorney violated Rule 4.1 where he sent an expert report to opposing counsel that he knew rested on a key false assumption and relied on the report during settlement negotiations); *Sherman v. Eisenberg*, 267 A.D.2d 29, 32 (1st Dep't 1999) ("We reject the suggestion that there are no ramifications for inclusion of a falsehood in a letter to opposing

counsel.").

115. The Rules of Professional Conduct of other states, including California and Minnesota, incorporate substantively identical mandates. *See* Cal. Rules of Prof'l Conduct R. 4.1 (2018); Minn. Rules of Prof'l Conduct R. 4.1 (2022).

116. Zimmerman Reed's conduct violated New York Rule of Professional Conduct 4.1, New York Rule of Professional Conduct 8.4, and analogous rules of other states.

117. The Zimmerman Reed Analyst falsely stated in his signed Notice of Dispute that he was a resident of "123 Main St" in El Segundo, California, and that he was a HBO Max subscriber. "123 Main St" is a fictitious residential address, which was in actuality the address of a restaurant and bar, and Petitioners' business records indicate that the Analyst was never an HBO Max subscriber from the email address provided in his Notice of Dispute.

118. A firm may also violate New York Rule of Professional Conduct 4.1, New York Rule of Professional Conduct 8.4, and analogous rules of other states through misleading omissions. *See* N.Y. State Bar Ass'n, *New York Rules of Professional Conduct* Rule 4.1 cmt. (2022), https://nysba.org/app/uploads/2022/07/Rules-of-Professional-Conduct-as-amended-6.10.2022-20220701.pdf ("Misrepresentations can also occur by partially true but misleading statements or **omissions that are the equivalent of affirmative false statements**." (emphasis added)); *see also Field Turf USA, Inc. v. Sports Constr. Grp., LLC*, No. 1:06 CV 2624, 2007 WL 4412855, at *5-6 (N.D. Ohio Dec. 12, 2007) (disqualifying attorney for making untrue statements to opposing counsel and violating duty of candor).

119. Zimmerman Reed violated Rule 4.1 and Rule 8.4 and analogous rules of other states by failing to disclose that while the firm pursued its own VPPA mass arbitration campaign against Petitioners, its personnel—including its lead lawyer and managing partner, an associate,

and a mass arbitration analyst—were simultaneously claimants in other mass arbitration campaigns brought by Keller and Labaton against Petitioners.

120. Mr. Marker leads Zimmerman Reed's mass arbitration threat against Petitioners. The Zimmerman Reed Associate and the Zimmerman Reed Analyst are also closely involved in Zimmerman Reed's mass arbitration threat against Petitioners.

121. These ethical breaches create the appearance of impropriety, negatively affect Petitioners' interest in a just and lawful determination of Claimants' claims, and are prejudicial to the administration of justice and to the bar.

122. Petitioners bring this Petition in view of their interest in Zimmerman Reed's conduct as an opposing party and under Petitioners' duties to raise ethical issues to the court, including with respect to violations of ethical rules that may injure others. *See, e.g.*, *Herrick*, 2020 N.Y. Slip Op. 33746(U), at *10 (rejecting challenge to standing in context of disqualification petition brought under Article 75 by opposing party and noting that "guidelines for disqualification of counsel are . . . not limited to scenarios involving former clients, but rather must 'adequately address[] the need to ensure to both clients and the general public that lawyers will act within the bounds of ethical conduct'" (citation omitted)); *Booth v. Cont'l Ins. Co.*, 167 Misc. 2d 429, 434 (Sup. Ct. Westchester Cnty. 1995) ("It has been held that 'since an attorney has the authority and obligation to bring a possible ethical violation to the attention of the court . . . the adverse party may properly move to disqualify the attorney for an opposite party on the ground of conflict of interest.'" (alteration in original) (citation omitted)).

H. Zimmerman Reed Engaged in Misconduct To Improperly Obtain Confidential Information, Independently Warranting Disqualification

123. In addition to the above misconduct, Zimmerman Reed appears to have also improperly obtained or attempted to obtain Petitioners' confidential information through

participation in the Keller and Labaton mass arbitrations. Disqualification is warranted on this independent ground. *See In re Beiny*, 132 A.D.2d 190, 208-09 (1st Dep't 1987) (disqualifying law firm that obtained confidential materials outside of discovery process, noting that: "To have imposed a sanction short of disqualification in this case would have sent a very dangerous message to the Bar. We would in effect have said, you may ignore the rules of discovery and the ethical precepts governing attorney conduct, and thereby, elicit the disclosure of confidential material highly relevant to your case[.]").

124. "[I]f one attorney in a firm is disqualified from representing a client, then all attorneys in the firm are disqualified." *George Co.*, 2017 NY Slip Op. 30676(U), at *12. This rule extends to nonlawyer employees of law firms. *See Glover*, 129 A.D.2d at 679.

125. Attorneys should be disqualified when they improperly obtain information protected by an expectation of confidentiality, including through subverting the proper mechanisms of discovery.

126. Even "[c]onduct that merely **suggests** that one side might enjoy the disclosure of confidential information may warrant disqualification." *Nesenoff v. Dinerstein & Lesser P C*, No. 0005717/5717, 2003 N.Y. Slip Op. 30062(U), at *3 (Sup. Ct. Suffolk Cnty. June 19, 2003) (emphasis added), *rev'd on other grounds*, 12 A.D.3d 427 (2d Dep't 2004).

127. Here, it appears that Petitioners engaged in confidential discussions with Keller and Labaton in connection with their mass arbitration threats against Petitioners, including communications reflecting Petitioners' responses to settlement demands.

128. Zimmerman Reed has willfully attempted to gain, and has gained, access to these confidential disclosures by participating as claimants in Keller's and Labaton's mass arbitration threats.

129. Zimmerman Reed's mass arbitration campaign has benefitted, and in the future would stand to benefit, from confidential information the firm's personnel improperly obtained by virtue of their participation in the Keller and Labaton campaigns. That information would have been provided by Keller and Labaton to Zimmerman Reed personnel in their capacity as claimants, not attorneys, and was provided on the basis that such information would not be used outside the Keller and Labaton matters. As noted above, this gives Zimmerman Reed an unfair tactical advantage over Petitioners because, among other things, it can take a second bite at the apple with the benefit of already knowing how Petitioners are likely to respond.

130. This ethical breach creates the appearance of impropriety, negatively affects Petitioners' interest in a just and lawful determination of Claimants' claims, and is prejudicial to the administration of justice and to the bar.

131. Absent disqualification, Zimmerman Reed will continue to be able to use the confidential information it improperly obtained—and will continue to improperly obtain—from Petitioners regarding Petitioners' reactions and responses to various non-public aspects of the Keller and Labaton matters.

132. Unless the firm is disqualified, Zimmerman Reed will use that wrongly obtained information to advance its mass arbitration campaign against Petitioners, to Petitioners' detriment.

RELIEF SOUGHT

WHEREFORE, Petitioners respectfully request an order and judgment (i) disqualifying Zimmerman Reed from representing the Claimants or any other individuals in any action, arbitration, threatened arbitration, or related proceeding against Petitioners or their affiliates; (ii) enjoining Zimmerman Reed from asserting any arbitration or action, including any action to

compel arbitration, against Petitioners or their affiliates; (iii) compelling Zimmerman Reed to provide to Petitioners any confidential information of Petitioners that Zimmerman Reed has obtained through the conduct set forth herein; (iv) granting Petitioners disclosure under Article 31 of the CPLR in connection with this Petition; (v) awarding Petitioners attorneys' fees incurred in connection with Zimmerman Reed's mass arbitration campaign; (vi) awarding Petitioners reasonable costs and expenses, including attorneys' fees, incurred in connection with this Petition; and (vii) granting such other and further relief in favor of Petitioners as may be just and proper.

Dated: New York, New York
May 15, 2024

Respectfully submitted,

By: /s/ *Evan K. Farber*

Jay K. Musoff
Evan K. Farber
Alexander Loh
LOEB & LOEB LLP
345 Park Avenue
New York, New York 10154
Telephone: 212-407-4000

Attorneys for Petitioners WarnerMedia Direct, LLC, and Discovery Digital Ventures, LLC

General Information

Case Name	WARNERMEDIA DIRECT, LLC ET AL vs. ZIMMERMAN REED LLP
Court	New York Supreme Court
Date Filed	Wed May 15 00:00:00 EDT 2024
Docket Number	652500/2024
Parties	ZIMMERMAN REED LLP; WARNERMEDIA DIRECT, LLC ET AL

EXHIBIT 4 TO RLC ADDENDUM 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

In the Matter of the Application of
WARNERMEDIA DIRECT, LLC, and
DISCOVERY DIGITAL VENTURES, LLC

Petitioner,

v.

ZIMMERMAN REED LLP,

Respondent.

Index No. 652500 / 2024

AFFIRMATION IN OPPOSITION TO PETITION FOR AN ORDER PURSUANT TO CPLR § 7502 DISQUALIFYING COUNSEL AND FOR ADDITIONAL RELIEF

----------x

I, CALEB L. MARKER, hereby affirm the following under penalty of perjury, pursuant to CPLR § 2106:

1. I am a managing partner at the law firm of Zimmerman Reed LLP ("Zimmerman Reed"), Respondent in the above-captioned action. I am personally familiar with the pleadings and proceedings in this case and the matters set forth herein. I respectfully submit this Affirmation in opposition to the Petition for an Order Pursuant to CPLR § 7502 Disqualifying Counsel and for Additional Relief.

2. In October 2022, I personally retained the law firm, Labaton Keller Sucharow LLP ("Labaton") to pursue my claims against Hulu and HBO under the Video Privacy Protection Act of 1988 ("VPPA"), in response to an online advertisement. In January 2023, I personally retained the law firm, Keller Postman LLC ("Keller Postman") to pursue VPPA claims against Showtime and HBO, in response to a different advertisement.

3. In February 2023, Zimmerman Reed sent notices of dispute to Petitioner, WarnerMedia Direct, LLC ("WarnerMedia"), on behalf of claimants represented by Zimmerman Reed in connection with VPPA violations. Warner Media is represented by the law firm, Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden Arps").

4. A mediation was scheduled for August 1, 2023, between Skadden Arps on behalf of WarnerMedia and Zimmerman Reed on behalf of the claimants. On July 25, 2023, Skadden Arps acknowledged that I signed up as a claimant against WarnerMedia through Keller Postman, and later informed me that an associate at Zimmerman Reed was also listed as a Keller Postman claimant.

5. Attorney, Michael W. McTigue Jr., of Skadden Arps advised me that WarnerMedia would not go forward with mediation if I was a claimant. As a result, on August 1, 2023, I terminated the representation of Keller Postman in order for the mediation to move forward. I also terminated the representation of Labaton on August 1, 2023. *See* emails annexed as Exhibit "A."[1] Additionally, I directed Killian J. Commers, a former associate at Zimmerman Reed, to terminate his representation of Keller Postman and he did so on August 1, 2023. *See* email annexed as Exhibit "B." That same day, I forwarded the termination emails to Mr. McTigue and to the JAMS mediator. *See* email annexed as Exhibit "C".

6. The August 1, 2023 mediation was prematurely ended by Skadden Arps. Thereafter, the mediation was rescheduled to October 9, 2023, but did not go forward due to a family matter involving Mr. McTigue. The mediation was again rescheduled to November 27, 2023, but did not go forward on that date either at the request of WarnerMedia. After communicating back and forth with Mr. McTigue to reschedule the mediation a fourth time, it was finally rescheduled to February 26, 2024. However, on February 2, 2024, Mr. McTigue advised that WarnerMedia would not go forward with the mediation on that date. Despite my repeated efforts, a new mediation date was never scheduled.

7. Instead, Petitioners commenced the instant special proceeding to disqualify

[1] All exhibits referenced herein are annexed to the accompanying Affirmation of David S. Wilck, Esq. dated June 28, 2024.

Zimmerman Reed from ever representing any individuals in any action, arbitration or threatened arbitration against Petitioners for VPPA violations. As explained by my attorneys in the accompanying Memorandum of Law, Petitioners' request for disqualification is clearly a tactical attempt to further delay the mediation and derail the entire arbitration process.

8. I never received any confidential information about WarnerMedia from Keller Postman or Labaton relating to my VPPA claims, including any information about WarnerMedia's responses to any settlement demands. Mr. Commers, who is no longer employed at Zimmerman Reed, did not receive any such confidential information either. Nor did he provide any such information to myself or anyone else at my firm.

9. While I terminated Labaton on August 1, 2023, Labaton apparently filed a demand for arbitration with the American Arbitration Association ("AAA") on my behalf on April 12, 2024, which I did not learn about until I read the Petition in this proceeding. The demand for arbitration was likely filed as an administrative error. I contacted Labaton and forwarded them the prior email terminating their representation on August 1, 2023. On May 21, 2024, I received an email from Labaton memorializing the termination of representation. *See* email annexed as Exhibit "D". However, I was informed by Labaton that the AAA closed the matter on April 30, 2024 because WarnerMedia refused to pay the required AAA arbitration clause registration fees. *See* April 30, 2024 letter from the AAA to Labaton and Mr. McTigue annexed as Exhibit "I".

10. I also learned from reading the Petition that James T. Cho, a data analyst at Zimmerman Reed, previously retained Keller Postman to purse a VPPA claim on his behalf against WarnerMedia. When I learned of the representation, I instructed Mr. Cho to terminate Keller Postman's representation and withdraw his claim, and he did so on May 21, 2024, as he explains in his Affirmation. Neither I nor the other attorneys at Zimmerman Reed knew that Mr. Cho

retained Keller Postman to pursue a VPPA claim against WarnerMedia. Had I previously known, I would have instructed him to terminate the representation and withdraw his claim in August 2023, as I did with Mr. Commers.

11. As Mr. Cho further establishes in his Affirmation, he had a valid subscription with HBO Max when he retained Keller Postman to pursue his VPPA claims against WarnerMedia, and he never received any confidential information pertaining to WarnerMedia.

I affirm this 27th day of June, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: Los Angeles, California
June 27, 2024

Caleb L. Marker

4881-0723-3737, v. 2

Certification of Word Count Compliance

Pursuant to Rule 202.8-b(a) of the Uniform Civil Rules for the Supreme Court, affirmations in chief are limited to 7,000 words. The undersigned counsel for Respondent, Zimmerman Reed LLP, hereby certifies that the within Affirmation of Caleb L. Marker in opposition to the Petition for an Order Pursuant to CPLR § 7502 Disqualifying Counsel and for Additional Relief contains 962 words (excluding the caption and signature block).

By: */s/ Carol A. Lastorino*
Carol A. Lastorino

4866-3299-1436, v. 1

General Information

Case Name	WARNERMEDIA DIRECT, LLC ET AL vs. ZIMMERMAN REED LLP
Court	New York Supreme Court
Date Filed	Wed May 15 00:00:00 EDT 2024
Docket Number	652500/2024
Parties	ZIMMERMAN REED LLP; WARNERMEDIA DIRECT, LLC ET AL