Before the

AMERICAN ARBITRATION ASSOCIATION

COMMENTS OF THE NATIONAL RETAIL FEDERATION TO THE AAA'S PROPOSED CHANGES TO THE CONSUMER ARBITRATION RULES

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The National Retail Federation ("NRF") is pleased to submit these comments in response to the American Arbitration Association's Draft Amendments to its Consumer Arbitration Rules ("Consumer Rules").[1]

THE NATIONAL RETAIL FEDERATION AND ITS MEMBERS

NRF is the world's largest retail trade association, representing stores, wholesalers, chain restaurants, and internet retailers from more than 45 countries. NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. Retail is the United States' largest private-sector employer, supporting one in four U.S. jobs—approximately 52 million workers.

Through this submission, NRF proposes certain changes to the Draft Amendments to the AAA Consumer Rules and provides a perspective on how the Draft Amendments could significantly impact its members and the retail industry.

EXECUTIVE SUMMARY

NRF lauds the AAA for undertaking a thorough review of the current rules with the goal of promoting transparency, efficiency, and fairness in AAA consumer arbitrations. The AAA has made strides in the past several years to curtail abuses in the arbitration process, particularly those stemming from attempts to misuse the AAA's Consumer Rules and Fee Schedule through mass arbitration. The proposed changes have the potential to advance this important progress for the benefit of the AAA, its arbitrators, and all stakeholders. NRF appreciates this opportunity to provide comments on the proposed amendments.

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[1] These comments do not address the AAA's Draft Amendments to the Employment Arbitration Rules.

By way of background, in 2011, the Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that consumer agreements requiring individual arbitration of disputes are enforceable. In the wake of *Concepcion*, many businesses implemented arbitration agreements with consumer-friendly terms—such as provisions that the business will pay all arbitration fees for non-frivolous claims—to provide a fair and effective forum for resolving small disputes. Claimants' attorneys acted swiftly to subvert these provisions through coercive mass arbitration.

The mass arbitration playbook is simple. A counsel for claimants submits or threatens to submit thousands or even tens of thousands of identical claims "to trigger an immediate obligation" by the business "to pay millions of dollars in fees."[2] Claimants' counsel does not intend "to obtain simultaneous decisions on the merits."[3] Indeed, "the firms filing mass arbitrations appear to lack the resources to manage these large numbers of claims."[4] One such firm—Labaton Keller Sucharow LLP—tacitly acknowledged this limitation in a recent white paper.[5] Instead, "the goal appears to be to use the threat of a huge fee payment to force companies to settle the claims *en*

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[2] Andrew J. Pincus et al., U.S. Chamber of Com. Inst. for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlement*s at 18 (Feb. 2023) ("*Mass Arbitration Shakedown*"), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf.

[3] *Id*.

[4] *Id.*

[5] *See* Labaton Keller Sucharow, *Toward a Proposed Estimation Framework for the Resolution of Mass Arbitrations* (Feb. 11, 2025), *available at* https://www.labaton.com/news-insights/toward-a-proposed-estimation-framework-for-the-resolution-of-mass-arbitrations. Labaton proposed various workarounds to individualized arbitration, including bellwether proceedings, batching, and "estimation of claims," all of which are foreclosed under typical consumer arbitration agreements.

masse, regardless of the underlying merits."[6]

One mass arbitration firm recently laid bare this strategy in a slide deck prepared for a prospective litigation funder. As the firm explained, the strategy's model is to "weaponize[] consumer . . . arbitration clauses . . . by aggregating thousands of claims."[7] "Aggregating claims makes entrance fee to just defend prohibitively expensive."[8] After threatening claims, "[c]laimants' counsel will offer a settlement **slightly less than the AAA charge** . . . attempting to induce a quick resolution."[9]

The engine that drives this abusive practice is the large volume of claimants. Claimants' counsel will attract claimants through sensational social media advertisements promising payouts of hundreds or thousands of dollars. To inflate claimant counts, claimants' counsel and their agents cut corners by, for example, skipping diligence into whether their clients are actually customers of the company. Claimants' counsel frequently tout that consumers may sign up in "2-3 minutes." Claimants' counsel use misleading solicitations that lead claimants to believe that they are participating in a class action rather than bringing their own claim as a party in arbitration. And claimants' counsel use engagement letters that purport to waive the client's right to be informed of and make decisions regarding settlement.

The product of these cursory and misleading solicitation efforts and lack of client communication are mass arbitration claimant pools replete with individuals who (i) do not know they are claimants prosecuting individual arbitrations and instead believe they have signed up for

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6 *Mass Arbitration Shakedown* at 18–19.

7 (Ex. 1 at 3, *available at* https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjlawjrvr/frankel-valvevzaiger--massarbpowerpoint.pdf.)

8 (*Id.*)

9 (*Id.*)

a class action "payout"; (ii) never used the product or service that is the basis for the alleged liability; and/or (iii) have not authorized counsel to pursue claims on their behalf. Claimants are also not required to sign their demands for arbitration which may further obscure whether they are even aware of the proceedings.

To take just one example, a firm recently asserted a mass arbitration against L'Occitane, Inc., predicated on alleged privacy violations. Litigation stemming from this mass arbitration revealed that many of the purported claimants had not authorized claimants' counsel to prosecute claims on their behalf. One claimant stated: "[T]here seems to be a mistake here. . . . I never signed up for any kind of lawsuit or fight."[10] Another purported claimant stated:

> I am not a client of [claimants' counsel]. 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 predatory emails from them.[11]

A third purported claimant's son stated that his father—the purported claimant in the arbitration—"is now dead."[12] The court denied a motion to compel the claims to arbitration, holding that claimants' counsel had failed to demonstrate that any claimant visited the L'Occitane website—a foundational predicate of claimants' counsel's theory of liability.[13]

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[10] (Ex. 2 (Decl. of Andrea M. Gumushian in Support of Plaintiff's Supplemental Brief in Opposition to Defendant's Motion to Compel Arbitration ("Gumushian Decl."), Ex. A, *L'Occitane, Inc. v. Zimmerman Reed LLP*, 2:24-cv-01103 (C.D. Cal. filed Apr. 10, 2024), ECF No. 50.)

[11] (Ex. 3 (Gumushian Decl. Ex. B).)

[12] (Ex. 4 (Gumushian Decl. Ex. C).)

[13] *See L'Occitane, Inc. v. Zimmerman Reed LLP*, No. CV 24-1103, 2024 WL 2227182, at *4 (C.D. Cal. Apr. 12, 2024).

The L'Occitane example is striking but not unique. In another recent federal action in which a claimants' counsel sought to compel Samsung to arbitrate tens of thousands of claims before the AAA, the U.S. Court of Appeals for the Seventh Circuit held that the claimants' counsel had failed to provide evidence of an arbitration agreement for **any** of the almost 50,000 claimants they purported to represent. *See Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 619 (7th Cir. 2024).[14]

Even worse, businesses routinely uncover mass arbitration claimants who are deceased, fictitious, in active bankruptcy, or otherwise not legitimate claimants. In virtually every mass arbitration there are droves of claimants who are represented by one or more other law firms in connection with the same claims. In one such case the managing partner of a mass arbitration claimants' firm posed as a claimant in **two separate** mass arbitrations brought by **two other rival law firms** in an apparent attempt to surreptitiously obtain information about the business and his rivals' activities.[15]

NRF recognizes that the AAA has undertaken measures to address mass arbitration abuses. Chief among these measures is the AAA's initiative to develop the Supplementary Rules for Multiple Case Filings, in 2021. The AAA has since refined the Supplementary Rules (now

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[14] Samsung had repeatedly informed the claimants' counsel that the underlying claims were meritless and even provided a supporting declaration. (Ex. 5.) Samsung was proven right when a court later dismissed the claims with prejudice. *See G.T. v. Samsung Elecs. Am., Inc.*, --- F. Supp. 3d ---, No. 21-4976, 2024 WL 5195243 (N.D. Ill. Dec. 23, 2024). But even beyond the claims' lack of merit, Samsung's analysis revealed that the claimant pool included individuals who were dead, individuals who never resided in Illinois (and thus had no basis to bring the Illinois statutory claims asserted), and individuals also purportedly represented by other counsel pursuing the same claims against Samsung. (*See* Ex. 6 (Respondents-Appellants' Opening Br. and Short App'x at 44–45, *Wallrich v. Samsung Elecs. Am., Inc.*, No. 23-02842 (7th Cir. filed Nov. 14, 2023), ECF No. 34.).)

[15] (*See* Ex. 7 (Petition for an Order Disqualifying Counsel, *WarnerMedia Direct, LLC v. Zimmerman Reed LLP*, Index No. 652500/2024 (Sup. Ct. N.Y. Cnty. filed May 15, 2024).)

renamed as the "Mass Arbitration Supplementary Rules"), most recently in 2024 ("2024 Supplementary Rules"). The AAA also amended both the Supplementary Rules and its consumer fee schedule. As the AAA explained in a press release, these modifications were made after "listen[ing] to the needs of individuals and businesses involved in mass arbitrations" and are designed to "save time, reduce costs and foster constructive dialogue."[16] The changes included:

- Requiring each mass arbitration submission to "include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge." 2024 Supplementary Rules, MA-2. The AAA explained the "[n]ew attestation requirements" were designed to "help ensure accurate filings and pleadings, minimizing delays and unnecessary complexities."[17]
- Implementing a new *Consumer Mass Arbitration and Mediation Fee Schedule* that, among other things, significantly reduced the upfront fees that were required before a party could request the appointment of a Process Arbitrator.
- Expanding the Process Arbitrator's role so that the Process Arbitrator could "tackle[] potential hurdles early, allowing parties to focus on substantive issues."[18]

The introduction—and subsequent expansion—of the Process Arbitrator role has been a welcome development and in certain instances has helped expose abusive mass arbitration practices. For example, in one mass arbitration against a financial institution, a Process Arbitrator ordered all claimants to submit amended demands for arbitration including bank account numbers and facts sufficient to establish they met the requirements necessary to bring claims under the demands' theory of liability.[19] Claimants' counsel was unable to provide that information for the

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16 AAA® Announces Updated Mass Arbitration Supplementary Rules (January 16, 2025), *available at* https://www.prnewswire.com/news-releases/aaa-announces-updated-mass-arbitration-supplementary-rules-302035818.html.

17 *Supra* n.16.

18 *Id.*

19 (*See* Ex. 8 (Order of Process Arbitrator, *Mosley v. Wells Fargo & Co.*, No. 3:22-cv-01976 (S.D. Cal. Oct. 27, 2022), ECF No. 22-20).)

vast majority of their putative clients, and later submissions revealed that nearly half the claimants were never qualified to bring the claims they asserted.[20]

Unfortunately, there remain gaps in the current AAA rules and procedures that enable mass arbitration claimants' counsel to exploit the AAA's arbitration procedures and fee schedules. The AAA has stated that it "introduced . . . attestation requirements" to "ensure filing integrity."[21] But this rule has not had the intended effect: Claimants' counsel often submit a perfunctory affirmation that merely parrots the language of the rule. Claimant pools remain riddled with dead claimants, claimants unaware they have committed to prosecuting an arbitration, and claimants already represented by other counsel in connection with the same claims, among other defects. Although the expanded Process Arbitrator role is welcome, the Process Arbitrator, the AAA, and the respondent business are still subject to the burden and expense of investigating and defending against many claims that should never have been filed and that would result in sanctions in court proceedings. In addition, individual Process Arbitrators often interpret the contours of their role inconsistently, creating uncertainty, inconsistency across matters, and frustration among the parties.

Our members view the substantially reduced initial fees for appointment of a Process Arbitrator as a positive development. That said, our members have found themselves in situations where a Process Arbitrator fails to investigate issues raised by the respondent business, resulting

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[20] (*See* Ex. 9 (Defs.' Notice of Mot. and Mot. to Dismiss or Transfer at 1, *Penuela v. Wells Fargo Bank, N.A.*, No. 4:24-cv-00766 (N.D. Cal. filed May 28, 2024), ECF No. 19) (after the Process Arbitrator ordered the provision of additional information, claimants' counsel conceded that it "could not provide the basic information required by the Process Arbitrator for 89% of claimants, and that 41.5% of claimants never had and could never have had the claim they asserted . . . in their demands").)

[21] Kendal Enz, *AAA Enhances Arbitration with New Mass Arbitration Rules* (Jan. 30, 2024).

in thousands of frivolous claims proceeding—and a significant administrative fee burden for the business. We appreciate that "[t]he AAA-ICDR's commitment is to ensure that its fees do not interfere with its mission to resolve disputes fairly and efficiently" and recommend the AAA consider further changes in this area.[22]

In short, businesses remain subject to settlement coercion resulting from mass arbitration tactics that were the impetus for the original Supplementary Rules. As a result, our members are continuing to assess whether to choose or continue to designate the AAA as the forum for consumer disputes.

The amendments to the Consumer Rules have the potential to further curb mass arbitration abuse. NRF proposes modifications to the proposed rules (and some existing rules) as detailed below to that end and to further promote a fundamentally fair and efficient arbitration process.

NRF also suggests that the AAA solicit feedback and engage in discussions with arbitrators, judges, scholars, and other stakeholders regarding the proposed rules and their potential impact on the AAA's mission. NRF further requests the opportunity to provide reply comments in response to any initial comments submitted, consistent with the model of notice-and-comment rulemaking procedures for administrative agency rulemaking.

[22] Adam Shoneck, *Mass Arbitration - How Did We Get Here & Where Are Now?*, AAA (June 6, 2024).

DISCUSSION[23]

I. The Proposed Rules Should Specify That An Arbitrator May Issue Sanctions Against Both A Party And Its Counsel

NRF recommends that the AAA modify Proposed R-57 to clarify that an arbitrator may impose sanctions on a party **or its counsel** and to expand the grounds on which the arbitrator may issue sanctions.

Proposed R-57, entitled "Sanctions," is a new rule that provides, *inter alia*, that "[t]he arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these Rules or with an order of the arbitrator." Proposed R-57(a). NRF welcomes this expansion of the arbitrator's authority. But we propose amending Proposed R-57 to clarify that the arbitrator may award sanctions against a party **and/or** its counsel. We further propose amending Proposed R-57 to permit sanctions where a party **and/or its counsel** fails to comply with obligations under the Rules, an order of the arbitrator, governing rules of professional conduct, or the AAA-ICDR Standards. Making clear that the arbitrator may sanction counsel, and expanding the scope of sanctionable conduct, would provide the arbitrator another method of addressing improper conduct by counsel. This would be a particularly powerful tool in mass arbitration matters rife with misconduct as outlined above. We note that many arbitrators have expressed frustration that they lacked the power under the existing rules to sanction a party's counsel to address misconduct.

This proposed clarification would also be consistent with the Draft Amendments to Current R-55, entitled "Declining or Ceasing Arbitration." Current R-55 states that "[t]he AAA in its sole

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[23] The comments set forth herein reflect NRF's views on the current and proposed rules as applied to individual arbitrations, including arbitrations that are part of a mass arbitration. For ease of reference, the Comments will refer to a current Consumer Rule as "Current R-__" and a proposed new Consumer Rule as "Proposed R-__."

discretion may decline to accept a Demand for Arbitration or stop the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative." The proposed revisions to Current R-55, set forth in Proposed R-10, expand the circumstances in which the AAA may cease or decline administration of an arbitration, including "where a party or the party's representative fails to abide by the American Arbitration Association-International Centre for Dispute Resolution Standards of Conduct for Parties and Representatives." Proposed R-10(a)(i). In turn, the AAA-ICDR Standards provide, *inter alia*, that "failure" by "Participants in AAA cases" (with "Participants" defined as "parties and their representatives") to comply with the AAA-ICDR Standards "may result in the AAA's declining to further administer a particular case or caseload." Thus, the AAA-ICDR Standards already contemplate that the AAA may sanction counsel for breach of the standards by way of declining to administer further cases brought by them. Proposed R-57 should provide similar authority for an arbitrator to sanction counsel.

II. The Proposed Rules Should Provide that an Arbitration Must Be Closed in Favor of Court Proceedings Where the Parties Dispute Which Agreement Controls

NRF recommends that the AAA modify Proposed R-5, "Answers and Counterclaims," to provide that the AAA will **close** an arbitration in favor of court proceedings where the parties dispute which agreement controls and the competing agreements materially conflict. The current Proposed R-5 (i) permits the AAA to administer arbitrations where the parties dispute which agreement controls and (ii) purports to vest in arbitrators the ability to resolve that dispute. This rule is unfair to respondents and would lead to wasteful proceedings because a dispute as to which agreement applies must be resolved in court.

A. The AAA Should Not Administer an Arbitration Where the Parties Dispute Which Agreement Controls

Proposed R-5 provides that, where the parties dispute which agreement applies to a claim, the AAA will administer the arbitration in accordance with the agreement invoked by the claimant. *See* Proposed R-5(d). NRF proposes that this rule be modified to provide that the AAA will **not** administer and will instead **close** arbitrations where the parties disagree as to the operative agreement and there are material differences between the disputed agreements. This modification will harmonize the rule with binding law and promote fairness and efficiency.

An arbitration cannot proceed where the parties do not have an agreement to arbitrate. *See, e.g.*, *LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distrib., Teamsters Local 63,* 849 F.2d 1236, 1241 n.3 (9th Cir. 1988) (plaintiff "entitled to injunctive relief once it established that it was no longer under a contractual duty to arbitrate"). A court must resolve a dispute as to the governing agreement. *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 145 (2024) ("[A] court needs to decide what the parties have agreed to—*i.e.*, which contract controls."). But under Proposed R-5(d), the AAA would administratively decide such a dispute in the claimant's favor by permitting administration under the agreement proffered by the claimant even where the respondent disputes which agreement controls. That is fundamentally unfair to the respondent.

Proceeding with administration as contemplated under Proposed R-5 before a court resolves a dispute as to which agreement applies would also be unfair, inefficient and a waste of resources for additional reasons. In some cases, a respondent may assert that the controlling agreement requires claims to be resolved in another arbitration forum or in court. In those cases, allowing arbitration to proceed with the AAA under the agreement invoked by the claimant would result in unnecessary effort and expense advancing an arbitration if a court ultimately holds that the parties did not agree to arbitrate with the AAA. The parties would then be required to start over

in another forum. In other cases, a respondent may assert that the controlling agreement contains a different arbitration agreement than the agreement advanced by the claimants but where both agreements designate the AAA as the arbitral forum. Administering arbitrations in these cases would also be manifestly inefficient where the agreements are materially different, such as with respect to pre-dispute notice requirements, other conditions precedent, or applicable procedures for mass filings.

By proceeding with administration as contemplated under Proposed R-5 before a court resolves a dispute as to which agreement applies, the AAA would become an outlier among alternative dispute resolution forums. JAMS, for example, closes arbitrations where the parties raise a dispute as to the controlling agreement and the forum clause in an updated agreement does not name JAMS. Indeed, in a recent matter, counsel to hundreds of claimants attempted to commence arbitrations with JAMS under an outdated version of the respondent's service agreement that designated JAMS as the forum for disputes. The respondent objected, explaining that it had updated its service agreement with customers to designate a different arbitration provider as the forum for disputes.[24] JAMS agreed and declined to administer the arbitrations.[25]

Consequently, where the parties dispute which among materially conflicting agreements control, the AAA should defer to a court to resolve that threshold dispute and decline to administer the arbitration.

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[24] (*See* Ex. 10 (Decl. of Albert Y. Pak in Support of Pet. to Compel Arbitration ("Pak. Decl."), Ex. F, *Pilon v. Discovery Commc'ns, LLC*, No. 1:24-cv-04760 (S.D.N.Y. filed June 21, 2024), ECF No. 4.)

[25] (*See* Ex. 11 (Pak. Decl., Ex. I).)

B. The Rule Should Not Provide That An Arbitrator May Resolve A Dispute As To Which Agreement Controls

Proposed R-5 also provides that where the parties dispute which arbitration agreement applies, the arbitrator will make a "final determination" on the issue. Proposed R-5(d). This proposed rule is contrary to *Coinbase*: a court, not an arbitrator, must make a final determination as to which contract controls. Although *Coinbase* governs, the conflicting Proposed Consumer Rule 5(d) may confuse arbitrators and lead some arbitrators to render unenforceable decisions on a threshold issue that a court must decide.

III. The Proposed Rules Should Retain The Monetary Threshold For Documents-Only/Desk Arbitration

NRF recommends that the AAA revert Proposed R-1(f) and Proposed R-36 to retain the current dollar threshold for documents-only/desk arbitration and to guarantee the right to a hearing upon request where either party seeks injunctive relief.

Pursuant to Proposed R-1(f) and Proposed R-29, the maximum amount for a documents-only/desk arbitration would double, from $25,000 to $50,000. This means that where no disclosed claims or counterclaims exceed $50,000, the dispute shall be resolved by the submission of documents only/desk arbitration. *See* Proposed R-1(f) and Proposed R-36; *compare* Current R-1(g), *with* Current R-28 (providing that the maximum for a documents-only/desk arbitration is $25,000). In addition, under the current rules, a hearing may be ordered even for desk arbitrations where "any party requests an in-person or telephonic hearing **or** the arbitrator decides that a hearing is necessary." Current R-29 (emphasis added). Proposed R-36 seeks to amend these provisions by stating that in desk arbitrations, a party's request for "a virtual or telephonic hearing" will only be granted where "the arbitrator decides that a hearing is necessary." Further, a party's request for "an in-person hearing" will be granted only where "the arbitrator finds that an in-person hearing is necessary for a fundamentally fair process." *Id.*

NRF believes that the $50,000 threshold is too high considering that the typical consumer arbitration involves claims of smaller monetary value. Furthermore, the right to a hearing is often of particular significance to a business, particularly where injunctive relief is sought. Accordingly, we propose that the maximum amount for a documents-only/desk arbitration remain at $25,000. We further propose that the rule guarantee the right to a hearing where the claimant seeks injunctive relief. We also propose that Proposed R-1(f) be modified to clarify—as is clear from Proposed R-36—that any party may request a hearing even where the dispute does not reach the monetary threshold set forth in Proposed R-1(f).

IV. The AAA's Determination That An Arbitration Agreement Satisfies The *Consumer Due Process Protocol* Should Be Final

NRF recommends that the AAA modify Proposed R-1(c) to provide that the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol* is final and cannot be appealed to, or reversed by, an arbitrator.

Current R-1(d) provides:

> The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Under current practice, should a party challenge the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol*, the AAA will refer the issue to an arbitrator—or, in the case of a mass arbitration, sometimes a Process Arbitrator—for a final determination.

The AAA's proposed revisions would codify this practice. The proposed rule provides that "[t]he AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the

AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*." Proposed R-1(c). It further provides:

> If the AAA proceeds with administration and a party disagrees on whether the agreement meets these Rules and the *Consumer Due Process Protocol*, they can bring the issue to an arbitrator for a final decision. If the arbitrator finds that the agreement does not comply, they have the authority to adjust the proceedings to ensure they meet the Rules, *Consumer Due Process Protocol*, and the terms of the arbitration agreement.

Id.

NRF's members have often been frustrated with this practice in AAA arbitrations. Businesses incur substantial cost and devote considerable resources in drafting, updating, and providing customers notice of terms. Those terms are reviewed by the AAA; the AAA confirms that the arbitration agreement complies with the *Consumer Due Process Protocol*; and the AAA places the arbitration agreement on its public Registry in accordance with Current R-12. At the culmination of this process, businesses and consumers have the expectation that their agreement that is publicly listed on the AAA Registry will govern their disputes. This expectation is upended when an arbitration agreement is thereafter challenged for purported non-compliance with the *Consumer Due Process Protocol*. Allowing claimants to appeal the AAA's determination serves only to delay a resolution of a consumer's dispute, whether or not the appeal is successful. This delay is exacerbated where an arbitrator reverses the AAA's determination that an agreement meets the *Consumer Due Process Protocol*. In such cases, the parties may be forced to start over again in another forum.

Moreover, the AAA should not create a new right or vehicle to challenge an arbitration agreement outside of existing law. The *Consumer Due Process Protocol* establishes procedural (not substantive) rights that only the AAA may address conclusively as an administrative matter

when the agreement is reviewed and approved by the AAA. Indeed, the AAA routinely makes final determinations affecting numerous rights enshrined in the *Consumer Due Process Protocol*, such as selecting neutrals; establishing and enforcing neutral disclosure requirements; assessing whether neutrals are independent and impartial; and making final determinations regarding disqualification requests. Assessing whether an agreement complies with the *Consumer Due Process Protocol* is likewise an administrative determination that the AAA may conclusively make without an appeal process. Enabling the AAA to do so would give consumers and businesses certainty regarding the agreement that controls their disputes and streamline arbitration proceedings, thus promoting the "fundamentally-fair ADR process" at the core of the *Consumer Due Process Protocol*.

Accordingly, NRF proposes that the AAA amend the Consumer Rules to provide that the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol* is final and **not** subject to review by an arbitrator or Process Arbitrator. This approach would have many benefits—facilitating consistency, ensuring that businesses and their customers may rely on the AAA's review, and reducing costly post-review challenges—and no drawbacks. It would also not prejudice consumers' rights: they may still challenge an arbitration agreement on other grounds available under existing law. As the AAA aptly notes, its determination that an agreement complies with the *Consumer Due Process Protocol* "cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause." Current R-12; Proposed R-12.

V. The Proposed Rules Should Require The Claimant And Claimant's Counsel To Certify That The Claimant Has Satisfied Mandatory Pre-Arbitration Dispute Resolution Requirements

NRF recommends that the AAA add to Proposed R-4 a mandate that a claimant and claimant's counsel must provide a certification that the claimant has satisfied any pre-arbitration contractual dispute resolution requirements with the filing of a demand.

Many consumer arbitration agreements contain mandatory notice and pre-arbitration informal dispute resolution procedures that the parties must undertake before commencing arbitration. In the overwhelming majority of consumer disputes, these requirements facilitate a prompt, cost-effective, and mutually beneficial outcome and enable the parties to avoid arbitration entirely. But some claimants fail to properly comply with pre-arbitration dispute resolution requirements, resulting in potentially avoidable time and expense in arbitration proceedings. This problem is particularly acute in the context of mass arbitrations. In these matters, claimants' counsel's business model is to extract settlements untethered from the merits of the claims asserted based on the threat of many arbitrations—and their attendant fees—rather than to resolve claims on terms that are satisfactory to individual claimants. It is therefore unsurprising that mass arbitration claimants' counsel routinely flout pre-arbitration dispute resolution requirements.

To ensure compliance with pre-arbitration contractual dispute resolution requirements, NRF recommends that the AAA add to Proposed R-4, entitled "Filing Requirements," under the "Information to be included with any arbitration filing" (Proposed R-4(a)(iv)), the following as a new subsection (h): "a certification from the claimant and the claimant's counsel that claimant, before submitting the demand for arbitration, has satisfied any pre-arbitration contractual dispute resolution requirements.

VI. The Proposed Rules Should Retain The Parties' Right To Agree That Another Set Of AAA Rules Applies Even Where The Underlying Dispute Is A Consumer Matter

NRF recommends that Proposed R-1(a) be revised so that the parties retain the ability—permitted under Current R-1(a)—to agree that another set of rules (for example, the Commercial Arbitration Rules ("Commercial Rules")) applies even where the underlying matter is consumer in nature.

Proposed R-1(a) states:

> The parties shall be deemed to have made the Consumer Arbitration Rules ("Rules") a part of their arbitration agreement when they have provided for arbitration by the American Arbitration Association ("AAA") or have an arbitration agreement within a consumer agreement. *If no rules are specified or there is a different set of AAA rules named in the arbitration agreement, these Rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA.* To ensure that you have the most current information, see our web site at www.adr.org.

(emphasis added).

The emphasized text indicates that parties cannot agree to the application of another set of rules aside from the Consumer Rules in consumer matters. In contrast, Current R-1(a) permits the parties to agree that another, non-consumer set of rules may apply. *See* Current R-1(a)(3) ("The parties shall have made these Consumer Arbitration Rules ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and . . . 3) the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules.").

Thus, the parties should continue to have the ability to agree upon the application of other sets of AAA rules in their agreements. In some instances, it may be preferable that another set of rules apply even if the matter is consumer in nature and in all events parties should retain the right to agree to this.

VII. The Proposed Rules Should Provide That Where A Party's Representative Fails To Comply With The AAA-ICDR Standards Of Conduct, That Representative Must Be Removed But The Arbitration May Otherwise Proceed

NRF recommends that the AAA modify Proposed R-10 such that a party may not avoid arbitration and proceed in court where the party or its counsel fails to comply with the AAA-ICDR Standards of Conduct.

NRF appreciates the proposed consolidated rule, Proposed R-10 (entitled "Declining or Ceasing Administration"), to set forth the circumstances in which the AAA will decline to

administer an arbitration or cease to administer a pending arbitration. Among the proposed scenarios in which the AAA will decline or cease to administer an arbitration under the proposed rule is where "a party **or** the party's representative" fails to comply with the AAA-ICDR Standards of Conduct. Proposed R-10(a)(i) (emphasis added). NRF agrees with the animating principle behind this rule: all parties and counsel should abide by the basic standards of conduct set forth therein.

That said, where the AAA finds that a party's representative has failed to comply with the AAA-ICDR Standards of Conduct, it would be unfair to permit that same party—potentially represented by the same counsel—to proceed with their claim in court. Accordingly, we recommend that Proposed R-10(a)(i) be amended to provide that where the AAA determines that a party's representative has failed to comply with the AAA-ICDR Standards of Conduct, that representative must be removed as counsel in the arbitration but the arbitration may then proceed. The AAA should provide the party a set amount of time to obtain new counsel or proceed without representation in the arbitration.

VIII. The Proposed Rules Should Continue To Provide For A Limited Exchange Of Information

NRF recommends that the AAA revise Proposed R-20 to retain the more limited information exchange provided for in Current R-22 as a matter of fundamental fairness and efficiency. The value of consumer arbitration is in streamlining the resolution of small-dollar disputes to the benefit of the consumer and the business. Proposed R-20 strays from this foundational purpose.

As the Supreme Court has explained, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," should not be "shorn away" such that "arbitration . . . wind[s] up looking like the litigation it was meant to displace." *Epic Sys. Corp. v.*

Murphy Oil USA, 584 U.S. 497, 509 (2018). Applying this principle in the context of pre-arbitration disclosure, courts have repeatedly emphasized the limited nature of discovery in arbitration. *See Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F. 3d 900, 901–02 (7th Cir. 2017) ("[N]othing in the Federal Arbitration Act requires an arbitrator to allow **any** discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate.") (emphasis added); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992) ("[P]arties who agree to arbitrate relinquish the right to liberal pretrial discovery allowed by the federal rules . . . ." (citing *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980))).

This precept is even more applicable in consumer arbitrations. *See Surkhabi v. Tesla, Inc.*, No. 22-13155, 2022 WL 19569540, at *5 (C.D. Cal. Oct. 27, 2022) (explaining that while under the Consumer Rules, "[i]f any party asks[,] . . . the arbitrator may direct specific documents [and other] information to be shared . . . [and that the consumer and business] identify [the] witnesses[,] . . . no other exchange of information is permitted unless the arbitrator determines it [is] necessary" (citation omitted)); *Gavrilovic v. T-Mobile USA, Inc.*, No. 21-12709, 2022 WL 1086136, at *6 (E.D. Mich. Mar. 25, 2022) (rejecting contention that discovery under the Consumer Rules is too limited in comparison to federal proceedings because "[d]iscovery limitations . . . are common in arbitration"), *report and recommendation adopted*, No. 21-CV-12709, 2022 WL 1085674 (E.D. Mich. Apr. 11, 2022); *see also Liu v. Equifax Info. Servs., LLC*, No. 22-cv-10638, 2024 WL 308089, at *9 n.4 (D. Mass. Jan. 26, 2024) (discussing limited discovery permitted under the Consumer Rules).

The AAA has long shared this recognition that information exchange in consumer arbitration should be narrowly tailored. The Introduction to the present Consumer Rules provides

that "[a]rbitration is usually faster and cheaper than going to court." Consistent with that understanding—and consistent with the generally small monetary value of claims that are brought in individual AAA consumer arbitrations—Current R-22, entitled "Exchange of Information between the Parties," provides that, "**keeping in mind that arbitration must remain a fast and economical process**, the arbitrator may direct (1) specific documents and other information to be shared between the consumer and business, and (2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing." Current R-22(a) (emphasis added). Beyond that, "[n]o other exchange of information . . . is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process." Current R-22(c).

The current standard provides for a limited exchange of information consistent with the goals of keeping consumer arbitration a "fast and economical process" while granting the arbitrator discretion to permit additional information exchange if needed. This standard creates a framework that allows for consumer arbitrations to proceed in an efficient and expedient fashion. Current R.22(a).

The Draft Amendments undermine that efficiency by seeking to dramatically expand the limited scope of information exchange. Proposed R-20, entitled "Exchange of Information," states:

> The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

Proposed R-20(a). Per Proposed R-20(b), the arbitrator may now, on their own initiative or at a party's request, "require the parties to exchange documents in their possession or custody on which they intend to rely" as well as requiring the parties to produce documents "in response to reasonable document requests" that are "relevant and material to the outcome of disputed issues."

Proposed R-20(b). The arbitrator may now also determine "reasonable search parameters" for ESI which should "balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them." *Id.* The proposed revisions also specify that one of the issues that "should" be discussed during the preliminary hearing is "prehearing exchange of information." Proposed R-19(b).

NRF is concerned that expanding the scope of the exchange of information in this manner would result in the type of expansive, burdensome discovery that is a feature of litigation in court and is antithetical to the objectives of consumer arbitration. Expanding the scope of information exchange would not only lead to inefficient and drawn-out proceedings, but also enable parties to demand broad discovery for improper purposes, such as discovery "fishing" expeditions; to drive up the costs of arbitration to manufacture settlement pressure; and to obtain information intended for use in proceedings other than in the arbitration in which that information is sought. Should the AAA implement Proposed R-20—which is misaligned with principles of proportionality and efficiency in individual consumer arbitrations—businesses may wish to consider alternative arbitration providers.

The amended rule would also remove many of the flexibilities and efficiencies codified in Current R-22, and thus remove one of the reasons that parties agree to arbitration in the first place. That rule appropriately provides the arbitrator discretion to determine the scope of information exchange, while generally limiting that scope given the underlying types of consumer claims at issue and to ensure that consumer arbitrations remain efficient.

IX. Subsection (c) of Proposed R-31 Should Be Removed

NRF proposes that the AAA remove subsection (c) of Proposed R-31 because it creates an unnecessary impediment to dispositive motion practice. Safeguarding the ability to present dispositive motions that may otherwise ferret out meritless claims at the early stages of arbitrations

is critical. That is all the more true given the proliferation of mass arbitrations that are often predicated on frivolous and poorly-vetted claims.

Proposed R-31 adds, in subsection (c) of the rule applicable to dispositive motions: "Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion." Proposed R-31(c). This addition to the rule makes it more difficult for a party to obtain leave to file a dispositive motion yet does not appear to further the goals of efficiency and economy animating the rule.

Under subsection (b) of Proposed R-31, the arbitrator must already determine that the movant has shown that a motion is "likely to succeed and to dispose of or narrow the issues in the case" before granting leave to file a dispositive motion. Where those standards are met, the arbitrator will necessarily have already determined that briefing and a decision on the motion will facilitate a speedier and more efficient resolution of the arbitration. If a dispositive motion is not permitted in these circumstances, the parties will be forced to proceed with information exchange (which would be more expansive under the proposed rules) and through a final merits hearing to award on issues that "likely" could have been resolved through a dispositive motion. Those efforts are necessarily more onerous than briefing a dispositive motion. In short, subsection (c) will serve only to cause arbitrators to second-guess their determination regarding the likelihood of success of the motion.[26]

[26] It is notable that the AAA proposes expanding the scope of exchange of information—thus slowing arbitrations and making them more costly to prosecute and defend—while at the same time proposing to limit the availability of dispositive motions because of the time and cost involved in briefing motions.

We therefore recommend that the AAA strike subsection (c) from Proposed R-31. Should the AAA implement subsection (c) of Proposed R-31, businesses may wish to consider alternative arbitration providers.

X. Subsection (e) of Proposed R-32 Should Be Removed

NRF proposes that the AAA remove subsection (e) of Proposed R-32 because it may be inconsistent with the Federal Arbitration Act ("FAA"), is unfair to potential witnesses, and is likely to cause confusion and lead to inefficiency.

Proposed R-32(e) implies that an arbitrator may issue an order requiring a witness to attend a hearing before the arbitrator "at a time and location where the witness is willing and able to appear voluntarily **or can legally be compelled to do so**." (emphasis added). But there may be no such place. For example, under Section 7 of the FAA, an arbitrator may legally compel a witness to attend a hearing only within a specified geographical range. 9 U.S.C. § 7; Fed. R. Civ. P. 45(c). Moreover, "Section 7 does not authorize district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via video conference." *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc*., 939 F.3d 1145, 1160 (11th Cir. 2019).

Proposed R-32(e) contemplates that an arbitrator may hold a merits hearing in multiple locations to enable the arbitrator to issue enforceable witness subpoenas. But nothing in Section 7 of the FAA or Rule 45 of the Federal Rules of Civil Procedure incorporated into Section 7 permits such a procedure. *See, e.g.*, *Campaign Registry, Inc. v. Tarone*, No. 24 Civ. 2314, 2024 WL 3105524, at *2 (S.D.N.Y. June 24, 2024) ("courts across the country have concluded 'that the arbitrator is sitting where the underlying arbitration is being administered—not the place of production" (internal quotation marks and citation omitted)); *Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc*., No. 1:11-CV-2829, 2011 WL 13319343, at *4 (N.D. Ga. Oct. 7, 2011)

("[T]his Court has no authority to expand its jurisdiction to enforce arbitration subpoenas when the arbitrators are sitting outside this judicial district, and this Court concludes that there is no evidence in this case that the arbitrators, or a majority of them, are sitting in this district."), *report and recommendation adopted*, 2011 WL 13319422 (N.D. Ga. Oct. 28, 2011). Nor would a split hearing location be efficient or fair to the parties or a potential witness.

In addition, Proposed R-32(e) is unfair because it provides that a party need only "represent[]" that a witness is "essential," without more, to seek an order compelling testimony. Although Proposed R-32(e) should be removed for the reason set forth above, if it is not, NRF proposes that the AAA modify the proposed rule to clarify that (i) a party must make a **showing** that the witness is essential and (ii) the opposing party must have an opportunity to rebut that contention.

XI. NRF Proposes A Rule That AAA Will Hold An Administrative Conference With Claimant Where Responding Party Has Reasonable Belief That Claimant Is Unaware Of Or Has Not Authorized Proceedings

NRF proposes that the AAA implement a new rule permitting a respondent to request an administrative conference to be attended by a claimant where the respondent has a reasonable belief that claimants' counsel is proceeding without authorization. Such a rule would help to curb abuse of the AAA arbitration process that has become a hallmark of mass arbitration.

As noted above, in mass arbitration matters businesses routinely uncover claimants who are dead, fictitious, in active bankruptcy, or otherwise not legitimate. In addition, in many mass arbitration matters, purported claimants have confirmed to the business that they had not authorized filings or did not even know any arbitration had been filed on their behalf. Because claimants' counsel recruit clients through online marketing and sign-up forms that counsel and lead generators tout take only "two minutes" to complete, many claimants are confused about the

nature of a mass arbitration. Indeed, claimants often believe they are signing up to receive a portion of a class action settlement rather than to prosecute an individual arbitration.

NRF proposes a rule to address issues of apparent lack of claimant authorization, whether that issue surfaces at the inception of an arbitration or at any subsequent point during the proceedings. Specifically, NRF proposes a rule providing:

In circumstances where the Respondent has a reasonable belief that the Claimant is unaware of the arbitration or has not authorized the prosecution of an arbitration on the Claimant's behalf, and to ensure the integrity of the arbitration process, the Respondent may request that the Claimant personally attend either (i) the initial administrative conference with the AAA or (ii) a separate administrative conference with the AAA should the initial administrative conference have already taken place, in either case (with the arbitrator present if one has been appointed). The conference may be telephonic or virtual.

XII. The Proposed Rules Should Clarify That An Arbitrator Continues To Have Discretion To Award Fees And Expenses Against A Party

Current R-44 provides that "[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case." Current R-44(a). The rule further allows the arbitrator to assess costs in any interim award "as the arbitrator decides is appropriate." *Id.* And the rule provides that (i) the arbitrator may also allocate costs "to any party upon the arbitrator's determination that the party's claim or counterclaim was filed for purposes of harassment or is patently frivolous," Current R-44(c), and (ii) "[i]n the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-4, R-5, and R-7 in favor of any party, subject to the provisions and limitations contained in the Costs of Arbitration section," Current R-44(d).

Proposed R-46 retains the arbitrator's authority to award any relief "that the parties could have received in court, including awards of attorney's fees and costs." Proposed R-46(a). It also preserves the arbitrator's authority to award "administrative fees, arbitrator compensation or expenses to a business . . . upon the arbitrator's determination that a claim or counterclaim against the business was filed for purposes of harassment or is patently frivolous." Proposed R-46(c). However, the proposed rule otherwise limits the arbitrator's ability to award costs to the business only where such an award "may be required by applicable law." Proposed R-46(c).

It is not clear why the AAA proposes adding this restriction. NRF objects to any change to Current R-44 that would constrain the arbitrator's authority to issue an award of costs in favor of the business. We therefore suggest that the AAA revert Proposed R-46 to the language of Current R-44.

XIII. The Proposed Rules Should Be Revised To Remove The AAA's Automatic Right To Publish Awards

NRF proposes that the AAA amend Proposed R-42 to preclude the AAA from publishing awards without the consent of the parties. This proposed amendment would preserve the confidentiality of AAA arbitration proceedings—a core feature distinguishing arbitration from court proceedings.

Proposed R-42(c) retains Current R-43(c)'s provision that "[t]he AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published." NRF objects to this rule permitting the AAA to publish an arbitral award (even in redacted form) without both parties' consent. Even where the names of the parties are redacted, the identity of the parties is often apparent or can readily be ascertained from data the AAA separately publishes about arbitrations.

Moreover, the purpose of permitting the AAA to publish arbitration awards is unclear. As noted, the AAA already publishes data about arbitrations that would allow stakeholders to glean important information without reviewing underlying arbitral awards. And many arbitration agreements provide that fully satisfied awards cannot be entered in court. The AAA should not subvert these contractual guarantees by publishing awards without the consent of the parties.

XIV. The Proposed Rules Should Be Clarified To Provide That The Small Claims Court Determines Its Own Jurisdiction

The AAA has proposed revisions to R-9, entitled "Small Claims Option for the Parties." NRF suggests several changes to Proposed R-9.

As an initial matter, if either party contests a small claims court's jurisdiction, that court—and not the AAA or an arbitrator—should decide its own jurisdiction. Under the existing practice, a party contesting small claims court jurisdiction may merely assert that the claims at issue exceed the court's monetary jurisdiction. The AAA and/or the arbitrator will then deny the request to close the arbitration without further investigation. We recommend recognizing that the small claims court can and should make that determination. This modification would be in line with *Consumer Due Process Protocol*, Principle 5, which provides that "[c]onsumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."

As such, we propose the following amendments to R-9:

Proposed R-9(a) states if a claim falls "within the jurisdictional limit of the appropriate small claims court," either party "may elect to waive arbitration and proceed in small claims court." This proposed rule should be amended to specify that the small claims court will decide whether the claim falls within its jurisdictional limit.

Proposed R-9(b) states that where a party commences arbitration, that same party can thereafter decide to proceed to small claims court and the AAA will close the arbitration. *See* Proposed R-9(b) ("If a claim is filed by a party with the AAA and that same party then notifies the AAA and the opposing party that they would prefer to proceed in small claims court, the AAA will administratively close the claim."). This is a change from the current R-9(b), which states that **either** party can make this request. But it is unclear from this proposed revision what happens if an arbitrator has already been appointed—*i.e.*, whether the AAA will still close the arbitration or whether it will refer the issue to the arbitrator. It is also unclear what happens if the other party contests small claims court jurisdiction. Proposed R-9(b) should clarify what happens in such circumstances: if the respondent contests whether the small claims court has jurisdiction, the arbitration should still be closed by the AAA—irrespective of whether an arbitrator has been appointed—and the respondent may argue before the small claims court whether that court has jurisdiction.

Finally, Proposed R-9(c) states that if the respondent requests that the claims be decided in small claims court, then "the AAA shall make an initial, administrative determination whether the case should remain in arbitration, subject to a final determination by the arbitrator." This rule should be revised to provide that, in such circumstances, the arbitration should be closed by the AAA—irrespective of whether an arbitrator has been appointed—and if the claimant contests the small claims court's jurisdiction then the claimant may do so before that court.

We further suggest that the Supplementary Rules be similarly amended to provide that, at a party's request, a Process Arbitrator will close the cases in favor of small claims court. Presently, those rules state that a Process Arbitrator has the authority only to determine "[w]hether the cases

should be closed and the parties proceed in small claims court." 2024 Supplementary Rules, MA-6(c)(vii)(a).

XV. The Proposed Rules Should Provide That Either Party May Request An In-Person Hearing

NRF recommends that the AAA modify Proposed R-22 to ensure that a party is guaranteed the right to an in-person hearing absent hardship of the other party as a matter of fundamental fairness.

Proposed R-22 provides that "[t]he hearing shall be held virtually or by other means as approved by the arbitrator unless the parties agree otherwise or the arbitrator determines that an in-person hearing is necessary for a fundamentally fair process." We submit that the proposed default of a virtual hearing is unfair and inconsistent both with the concept of due process and with the *Consumer Due Process Protocol*. *See Consumer Due Process Protocol*, Principle 1 (providing that "[a]ll parties are entitled to a fundamentally-fair ADR process"); *id.*, Principle 12 ("All parties are entitled to a fundamentally-fair arbitration hearing.").[27] Proposed R-22 should be amended to remove the default to virtual hearings (while still allowing for virtual hearings if all parties agree), and to further provide that an arbitrator should grant a party's request for an in-person hearing absent a finding that there would be actual hardship to the party opposing the in-person hearing.

[27] NRF objects to the current language of Supplementary Rule, MA-5, for similar reasons. *See* Supplementary Rule, MA-5 ("Virtual hearings are the preferred method of evidentiary hearings for cases subject to these Supplementary Rules. However, where in-person hearings are required, and in the absence of party agreement, the AAA-ICDR will identify one or more locales where hearings may take place. In any such determination, the AAA-ICDR will consider the positions of the parties; relative ability of the parties to travel; and factors such as the location of performance of the agreement, the location of witnesses and documents, relative costs, and the location of any prior court proceedings, among other factors presented by the parties.").

XVI. The Proposed Rules Should Clarify That Mediation Is Not Mandatory And Any Party Has The Right To Opt Out

Proposed R-11, entitled "Mediation," provides that "[d]uring the AAA's administration of the arbitration or at any time while the arbitration is pending, the AAA may refer the parties to mediation, or the parties may request mediation." It is not clear whether mediation is mandatory in circumstances where the AAA "refer[s] the parties to mediation."

NRF objects to any rule that would impose mandatory mediation on the parties. We therefore recommend that the AAA amend Proposed R-11 to clarify that it does not impose mandatory mediation. Any mediation should proceed only with consent of all the parties, and any party may choose to opt out of mediation. This modification would bring Proposed R-11 in line with Supplementary Rule, MA-9 (providing, *inter alia*, that "[w]ithin 120 calendar days from the established due date for the Answer, the parties shall initiate a global mediation of the Mass Arbitration pursuant to the applicable AAA-ICDR mediation procedures or as otherwise agreed to by the parties," but "[a]ny party may unilaterally opt out of mediation upon written notification to the AAA-ICDR and the other parties to the arbitration").

XVII. The Proposed Rules Should Clarify that Arbitrators May Grant a Stay

NRF recommends that the AAA modify Current R-23 to expressly state that an arbitrator may grant a stay of proceedings for good cause shown. Current R-23 provides that "[t]he arbitrator may issue any orders necessary to . . . achieve a fair, efficient, and economical resolution of the case." We believe the correct reading of this broad rule is that it empowers arbitrators to enter a discretionary stay of proceedings where warranted. Many arbitrators agree but some do not. To eliminate any doubt on this question, we propose modifying the rule to expressly state that the arbitrator may grant a stay.

XVIII. The Proposed Rules Should Clarify That In the Event Of A Potential Disqualification The Parties May Provide Input Before Any Decision

NRF proposes that the AAA modify Proposed R-17 to clarify that all parties are to be afforded the right to be heard on a potential arbitrator removal. Current R-19 provides that, where a party objects to an arbitrator or the AAA raises whether an arbitrator should continue to serve of its own accord, the AAA will decide the issue "[a]fter gathering the opinions of the parties." Current R-19(b). Proposed R-17 no longer provides that the AAA will gather the opinions of the parties. NRF proposes reincorporating this language.

XIX. The Proposed Rules Should Permit A Party To Object To Continuing The Arbitration When There Is A Vacancy On The Arbitral Panel

Proposed R-18(b) provides: "In the event of a vacancy in a panel of neutral arbitrators, after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise." NRF is concerned that this change could result in arbitrations proceeding with incomplete panels and in circumstances where a party's party-appointed arbitrator is no longer serving on the panel.

Therefore, we propose that the AAA clarify the proposed rule to provide that in the event of a vacancy in the panel prior to a merits hearing, a substitute arbitrator shall be appointed unless all the parties agree otherwise. We further propose that the AAA modify the proposed rule to provide that in the event of a vacancy after a merits hearing has commenced, the hearing is to be postponed until a substitute arbitrator is appointed unless all parties agree to proceed before the remaining panel members.

XX. Parties Should Be Required To Disclose Litigation Funding And Arbitrators Should Be Required To Disclose Any Connections To Litigation Funders

Proposed R-16(a) provides that the arbitrator "shall disclose to the AAA . . . any past or present relationship with the parties or their representatives." NRF recommends that the AAA

supplement this proposed rule to provide that (i) the parties must disclose any litigation financing received and the persons or entities providing litigation funding in connection with the arbitration and (ii) the arbitrator must disclose to the AAA any past or present relationships with any identified litigation funder. A funder effectively "invests" in an arbitration, paying money in exchange for an interest in any proceeds the arbitration may produce. Thus, the funder is essentially a "real party in interest" adverse to the respondent.[28]

XXI. The Proposed Rules Should Clarify That Deadlines Are To Be On Business Days

NRF recommends that the AAA modify Proposed R-28 to clarify that deadlines are to fall on business days. The Consumer Rules set time periods for certain deadlines measured in calendar days. *See, e.g.*, Current R-2(c) (answers due 14 calendar days after the date the AAA notifies the parties that the Demand for Arbitration was received and all filing requirements were met); Current R-47 (request for correction of award due 20 calendar days after award transmitted and response due 10 calendar days thereafter). Arbitrators likewise routinely set time periods for deadlines measured in calendar days.

NRF recommends that the AAA modify Proposed R-28 to clarify that, where a time period for a deadline is set under the Consumer Rules or by an arbitrator measured in calendar days, where the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. This proposal would bring the Consumer Rules in line with comparable court rules, *see, e.g.*, Fed. R. Civ. P. 6(a), and would avoid burdening parties, arbitrators, and the AAA with de minimis requests for extensions of time and the prospect of work over weekends and holidays.

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[28] Indeed, in some matters the funder is able to exercise control over the litigation, including with respect to settlement.

CONCLUSION

NRF appreciates the opportunity to submit, and the AAA's consideration of, these comments. We recommend that the AAA solicit additional input from stakeholders and thought leaders before making any changes to the consumer rules. The AAA should make all comments that they have received available to the public and provide an opportunity for reply to those comments to allow for a transparent process. The undersigned are available to meet and discuss these comments or any questions the AAA may have.

Dated: February 28, 2025

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Exhibit 1

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 2

From: Madison Genovese
To: Crawford, Roderick; Crawford, Roderick
Subject: Re: Complete with DocuSign: Notice of Lawsuit and Request to Waive Service of Summons
Date: Sunday, April 7, 2024 7:53:30 PM

You don't often get email from [redacted] Learn why this is important

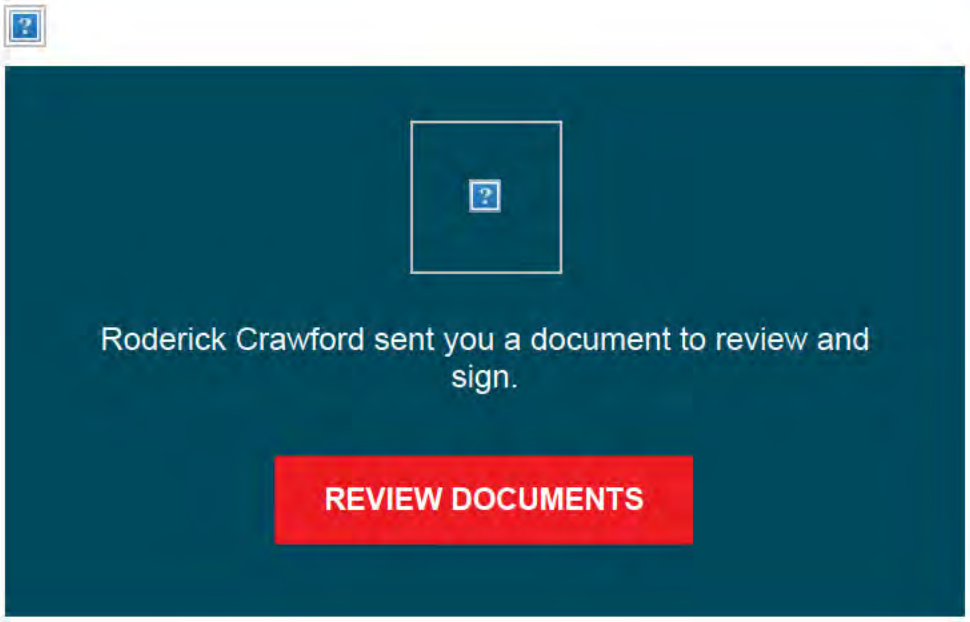
Hi there,

I've contacted Zimmerman Reed but there seems to be a mistake here. I'm not sure how they or you obtained any of my personal information but I never signed up for any kind of lawsuit or fight against either companies and I'm very confused why I'm receiving this information.

I'm not sure if this is a scam, but if my information can please be taken off your contact list or I can stop being included in these emails, that would be appreciated.

Thanks,
Madison

On Apr 5, 2024, at 3:49 PM, Roderick Crawford via DocuSign <dse_NA3@docusign.net> wrote:



Roderick Crawford
[redacted]

You are receiving this email and the attachments because a lawsuit has been filed against you by our client, L'Occitane, Inc. in the United States District Court for the Central District of California. This letter is meant to

inform you of the Complaint pending against you, and the consequences of waiving and not waiving service.

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Exhibit 3

From: Anna Bryant
To: Refe, Mark
Subject: Not a client
Date: Friday, April 5, 2024 6:19:02 PM

You don't often get email from [redacted] Learn why this is important

Hello mark,

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. All I did was give them my email. I don't think that is a crime and that doesn't make me a client. I never filled out any paperwork or paid them any money. 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. Please remove me from this list.

Thank you,

Anna Bryant

Exhibit 4

From: Kevin G. Davis
To: Sanchez, Ana Reyes
Subject: Re: Notice of Lawsuit and Request to Waive Service of Summons
Date: Saturday, April 6, 2024 9:20:21 PM

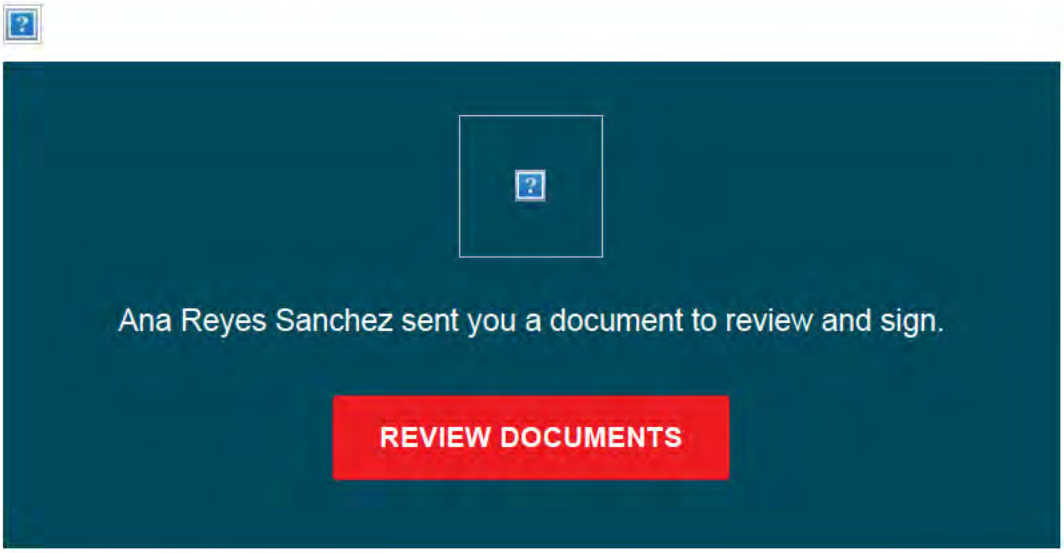
You don't often get email from [redacted] Learn why this is important

Ana: Please advise your clients that you have the wrong Kevin Davis, and while I doubt my father was party to this (he was a retired lawyer) he is now dead and it's his address in your document.

Please remove me (and presumably him) from your lawsuit.

Best of luck.

On Sat, Apr 6, 2024 at 5:40 PM Ana Reyes Sanchez via DocuSign <dse_NA3@docusign.net> wrote:



Ana Reyes Sanchez
[redacted]

You are receiving this email and the attachments because a lawsuit has been filed against you by our client, L'Occitane, Inc. in the United States District Court for the Central District of California. This letter is meant to inform you of the Complaint pending against you, and the consequences of waiving and not waiving service.

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Exhibit 5

O'Melveny

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File Number:

September 6, 2022

Randall W. Edwards
D: +1 415 984 8716
redwards@omm.com

VIA ELECTRONIC MAIL

Jonathan Gardner
Melissa Nafash
Shannon Tully
Labaton Sucharow
140 Broadway
New York, NY 10005

Re: ***Samsung – Threatened Mass Arbitration Claims***

Counsel:

I write regarding Labaton Sucharow's threat to proceed with the coordinated filing of tens of thousands of individual arbitration demands against Samsung Electronics America, Inc. and Samsung Electronics Co., Ltd. (collectively, "Samsung"). As described in your March 21, 2022 letter, these threatened demands challenge a feature of the Gallery App on Samsung Galaxy devices under the Illinois Biometric Information Privacy Act ("BIPA"). Most recently, you have threatened to initiate 50,000 BIPA claims as early as tomorrow, you claim to have over 70,000 existing clients, and we are aware that you are actively attempting to recruit more, using false, misleading, and disparaging statements.

BIPA applies only to entities who are "in possession" of or who "collect, capture, purchase, receive . . . or otherwise obtain" biometric identifiers and biometric information. 740 ILCS 14/15(a)-(e). The face clustering data in use in Samsung Galaxy devices is neither a biometric identifier or biometric information as those terms are defined in the statute. More fundamentally, as Samsung already has explained in writing and in discussions, Samsung cannot have violated BIPA because Samsung does not "collect, capture, purchase, receive," or "otherwise obtain," nor is it "in possession of," the face clustering data the users' devices generate. Companies that do not and cannot have access to allegedly biometric identifiers and biometric information cannot be liable under BIPA. The fact that Samsung sells to users a device that is capable of generating and storing that data on users' devices does not create liability for Samsung when Samsung cannot access the data at all. *Heard v. Becton, Dickinson & Co.*, 440 F. Supp. 3d 960 (N.D. Ill. Feb. 24, 2020) (dismissing BIPA claim absent allegation of active steps by the defendant to acquire the data at issue); *Jacobs v. Hanwha Techwin Am., Inc.*, 2021 WL 3172967 (N.D. Ill. July 27, 2021) (similar); *see also Hazlitt v. Apple Inc.*, 500 F. Supp. 3d 738 (S.D. Ill. 2020) (denying motion to dismiss where allegation included that defendant could access information). It is the users that are in possession and control of the device with the data.

I attach a sworn declaration of Youngil Shin, Staff Engineer for the Visual Software R&D Group within Samsung Electronics Co., Ltd.'s Mobile Experience Business. This declaration provides additional evidentiary confirmation that Samsung does not have access to or control any of the supposed biometric identifiers or biometric information at issue in your clients' threatened claims. The declaration further confirms that no basis in fact or law exists for the threatened claims.

We have tried to discuss the actual operation of the Gallery App and related face clustering functionality and the substantive problems with the threatened claims. But you have been unwilling to engage in those discussions, instead insisting that you will file thousands of arbitration claims regardless. Despite this, we provide a detailed declaration from a knowledgeable engineer so that there can be no doubt as to the lack of merit of any BIPA claim against Samsung. Proceeding with any BIPA claims against Samsung as threatened would be frivolous and can only be understood to be for the improper purpose of attempting to coerce Samsung to pay tens or hundreds of millions of dollars to avoid the expense of defending baseless claims. This conduct would expose both your firm and your clients to liability to pay for Samsung's fees and costs under the governing Arbitration Agreement, AAA rules, and the law.

Samsung will defend itself rigorously and will pursue its rights, including claims and counterclaims, against all appropriate parties.

Sincerely,

/s/ Randall W. Edwards

Randall W. Edwards
Partner
of O'MELVENY & MYERS LLP

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Attorneys for Defendants Samsung Electronics America, Inc.

DECLARATION OF YOUNGIL SHIN

I, Youngil Shin, declare as follows:

1. I am a Staff Engineer for the Visual Software R&D Group within Samsung Electronics Co., Ltd.'s ("SEC") Mobile Experience Business. In my current role, I am responsible for the research and development of software used in Samsung smart phones and tablets. I have been employed by SEC since August 4, 2011, and have been in my current role since then. Through my various positions with SEC, I have become very familiar with Samsung's image recognition and facial clustering technology used in Samsung Galaxy devices. The statements I make below are based on my personal knowledge, my years of experience working as an employee of SEC, and on information provided to me by others working parallel to me.

2. Samsung's Galaxy devices (including smartphones and tablets) incorporate technology that allows users to take, store and view digital photographs. The devices include a "Face Clustering" capability that applies to photographs stored on the device. This capability on the user's device automatically groups faces from photographs based on identified similarities among data scanned from each photograph, which can then be searched and viewed in convenient groups through the Gallery App installed on the phone. I explain the details of how the face clustering capability operates below.

3. As described in more detail below, the entire Face Clustering process takes place locally on each user's device, and none of the Face Clustering data generated locally on each user's device is stored by Samsung or able to be accessed by Samsung.

The Face Clustering Process

4. When Galaxy owners use their Samsung Galaxy devices to take, download, or otherwise transfer photographs onto the device, those photographs are stored in the device's local memory (either in internal storage or, if the customer has chosen to install one, on external memory devices such as microSD cards).

5. After those photographs are stored in the device's local memory, they are automatically sent to an application on the device known as the "Media Scanner." Upon receipt, the Media Scanner scans the files to identify the file type. If the file is identified as a picture, the Media Scanner forwards notice to a separate application on the device known as the "Customized

Media Provider."

6. The Customized Media Provider is an application on the device that manages all types of media files stored on the device. By design, the Customized Media Provider, and files stored within it, is not accessible to Samsung, either remotely or via direct physical access. Each time the Customized Media Provider receives a notice from the Media Scanner that a new photograph or photographs have been loaded to the Galaxy device, it automatically sends notice to the Content Management Hub for the photograph to be processed.

7. The Content Management Hub is a specialized processing application that is stored locally on the device. By design, the Content Management Hub, and data stored within it, is not accessible to Samsung, either remotely or via direct physical access.

8. When the Content Management Hub receives a photograph from the Customized Media Provider, it prepares the photograph for Face Clustering analysis by uncompressing the file –*i.e.*, rendering the file to its native format. That process allows the Content Management Hub to identify the particular color code of each pixel within the photograph.

9. Once the photograph has been uncompressed and the values for each pixel are identified, the Content Management Hub transfers the photograph to the Face Clustering Image Analysis Engine ("Clustering Engine"), another specialized system application that runs locally on the device. Like the Customized Media Provider and Content Management Hub, the Clustering Engine and the data stored within it are not accessible to Samsung, either remotely or via direct physical access.

10. After receiving the pre-processed photos from the Content Management Hub, the Clustering Engine analyzes the data values to determine, in the first instance, whether the picture contains a human face. If so, the Clustering Engine crops the image to focus on the face and, using what is known as a "convolution neural network" or "CNN," analyzes multiple facial landmarks to align (i.e., straighten) the facial image so that it can be compared at the same angle against other images that are stored locally on the device.

11. Once the face has been aligned, the Clustering Engine converts the consolidated landmark data (i.e., approximately 10,000 RGB values) to "vectors" that are assigned a numerical

value, which is a fraction between 0 and 1 (e.g., 0.01045906) (i.e., vector analysis data).

12. The Clustering Engine then analyzes the vectors to determine if the vector values between the analyzed image and other images stored locally on the device are high enough to "cluster" photographs that are likely to include the same face.

13. The vector values may vary across different images of the same individual. As a result, the data created by the Clustering Engine cannot be used to reconstruct a specific face, and the Clustering Engine cannot recognize specific individuals; the Clustering Engine merely suggests faces that may be grouped based on similar vector values.

14. Once the Clustering Engine has completed its analysis, it forwards the end result (with the vector analysis data removed) of the photograph analysis to the Content Management Hub. This includes location data of each individual face (the location information of each face within an image) and grouping data (that is, which other faces stored locally on the phone each face should be clustered with) (collectively, the Face Clustering data). The Content Management Hub stores the above data locally on the device.

15. The Content Management Hub then forwards the above Face Clustering data of the photograph analysis to the Customized Media Provider.

16. The Gallery App then obtains the above Face Clustering data from the Customized Media Provider.

Users, Not Samsung, Control the Face Clustering Data

17. As noted above, the entire Face Clustering process occurs solely on the user's local device. Face Clustering data and vector analysis data is generated only on the user's device. Samsung has no access to or control over the generation of vector analysis and Face Clustering data on any device. Samsung does not create or engage in the vector analysis of an image or Face Clustering of images, nor does Samsung upload, possess, control, or store that vector analysis or Face Clustering information from users' devices.

18. The Face Clustering engine on the user's local device only compares vector analysis data to that of other images stored locally on that user's device. The comparison process occurs exclusively on the user's device and does not involve any contact with Samsung or any other

outside server or platform. Samsung does not conduct the vector image analysis or Face Clustering, on its servers or otherwise.

19. Vector analysis and Face Clustering data is stored exclusively on the user's local device. Samsung never receives or have access to that data on the user's device. Samsung has designed its devices so that neither Samsung nor third-party app providers can access the vector analysis and Face Clustering data.

20. Galaxy owners may upload images stored on their device to cloud storage outside of the device itself, but any image uploaded to cloud storage does not contain the vector analysis or Face Clustering data.

21. Galaxy owners can delete the Facial Clustering data stored on their phones at any time, either by clearing the cache in their system settings or by resetting the phone to its factory setting.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 5, 2022 in Suwon, Republic of Korea.

신영일

Youngil Shin

Exhibit 6

No. 23-2842

In the
United States Court of Appeals
for the Seventh Circuit

PAULA WALLRICH, ET AL.,

Petitioners-Appellees,

v.

SAMSUNG ELECTRONICS AMERICA, INC., ET AL.,

Respondents-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Case No. 1:22-cv-5506, Hon. Harry D. Leinenweber, *United States District Judge*

RESPONDENTS-APPELLANTS' OPENING BRIEF AND REQUIRED SHORT APPENDIX

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2842

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

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

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Samsung Electronics America, Inc. ("SEA")

Samsung Electronics Co., Ltd. ("SEC")

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Skadden, Arps, Slate, Meagher & Flom LLP; O'Melveny & Myers LLP; Donohue Brown Mathewson & Smyth LLC;

Kopecky Schumahcer Rosenburg LLC

(3) If the party, amicus or intervenor is a corporation:

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

SEA is a wholly owned subsidiary of parent SEC. SEC has no parent corporation.

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

No other public company owns 10% or more of SEA. No publicly held company owns 10% or more of SEC.

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

N/A

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

N/A

Attorney's Signature: /s/ Shay Dvoretzky Date: 11/14/2023

Attorney's Printed Name: Shay Dvoretzky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 1440 New York Avenue, NW

Washington, DC 20005

Phone Number: (202) 371-7370 Fax Number: (202) 661-2370

E-Mail Address: shay.dvoretzky@skadden.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2842

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

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☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Samsung Electronics America, Inc. ("SEA")

Samsung Electronics Co., Ltd. ("SEC")

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Skadden, Arps, Slate, Meagher & Flom LLP; O'Melveny & Myers LLP; Donohue Brown Mathewson & Smyth LLC;

Kopecky Schumahcer Rosenburg LLC

(3) If the party, amicus or intervenor is a corporation:

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

SEA is a wholly owned subsidiary of parent SEC. SEC has no parent corporation.

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

No other public company owns 10% or more of SEA. No publicly held company owns 10% or more of SEC.

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

N/A

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

N/A

Attorney's Signature: /s/ Parker Rider-Longmaid Date: 11/14/2023

Attorney's Printed Name: Parker Rider-Longmaid

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Phone Number: (202) 371-7061 Fax Number: (202) 661-4061

E-Mail Address: parker.rider-longmaid@skadden.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2842

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

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Samsung Electronics Co., Ltd. ("SEC")

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

N/A

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

N/A

Attorney's Signature: /s/ Kyser Blakely Date: 11/14/2023

Attorney's Printed Name: Kyser Blakely

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2842

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

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Attorney's Signature: /s/ Michael W. McTigue Jr. Date: 11/14/2023

Attorney's Printed Name: Michael W. McTigue Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Meredith C. Slawe Date: 11/14/2023

Attorney's Printed Name: Meredith C. Slawe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Kurt Wm. Hemr Date: 11/14/2023

Attorney's Printed Name: Kurt Wm. Hemr

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Colm P. McInerney Date: 11/14/2023

Attorney's Printed Name: Colm P. McInerney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Jeremy Patashnik Date: 11/14/2023

Attorney's Printed Name: Jeremy Patashnik

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: One Manhattan West

New York, NY 10001

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E-Mail Address: jeremy.patashnik@skadden.com

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Attorney's Signature: /s/ Randall W. Edwards Date: 11/14/2023

Attorney's Printed Name: Randall W. Edwards

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Matthew D. Powers Date: 11/14/2023

Attorney's Printed Name: Matthew D. Powers

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Jonathan D. Hacker Date: 11/14/2023

Attorney's Printed Name: Jonathan D. Hacker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Ashley M. Pavel Date: 11/14/2023

Attorney's Printed Name: Ashley M. Pavel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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REQUEST FOR ORAL ARGUMENT

In accordance with Federal Rule of Appellate Procedure 34(a) and Circuit Rule 34(f), Respondents-Appellants Samsung Electronics America, Inc., and Samsung Electronics Co., Ltd. (collectively, Samsung), respectfully request oral argument. This appeal involves important questions arising in the novel mass-arbitration context, and Appellees' counsel's conduct and the district court's order threaten to impose massive nonrefundable and unrecoverable arbitration costs on Samsung with no benefit to any party. The petition to compel arbitration is an effort to extort a settlement benefitting Appellees' lawyers. Oral argument would substantially aid the Court in its resolution of this case.

INTRODUCTION

This appeal arises from Labaton Sucharow's ongoing attempt to shake down Samsung Electronics America, Inc., and Samsung Electronics Co., Ltd. (collectively, Samsung), and a district court order that committed legal error by permitting those abusive tactics. Labaton initiated 50,000 identical arbitration demands against Samsung on behalf of alleged owners of unspecified Samsung devices. And although the claims are frivolous, premised on demonstrably false assertions about how Samsung devices work, that was beside the point, because the claims were tools of extortion, not attempts to win on the merits. If Labaton could convince the American Arbitration Association (AAA) to go along, Labaton could threaten Samsung with more than $100 million in nonrefundable, likely unrecoverable arbitration fees. Then Labaton could demand $50 million or more as a settlement to line its lawyers' pockets to make the claims go away. Perhaps that is why Labaton did no diligence, instead filing arbitration demands on behalf of numerous individuals with threshold deficiencies, like being deceased or represented by separate counsel.

Unfortunately for Labaton, both Samsung and the AAA refused to go along with the lawyers' extortion attempt. Samsung pointed out the

deficiencies to the AAA and declined to pay the filing fees. The AAA responded, consistent with its rules, by giving Labaton the opportunity to advance the fees and proceed with the arbitrations or instead have the arbitrations dismissed so Appellees could pursue their claims in court. Of course, Labaton had no intention of proceeding on the merits in *any* forum, because its goal was simply to trigger extortionate filing fees to leverage a massive settlement for the lawyers' benefit. Indeed, when given the opportunity to proceed with arbitration for the 14 California claimants for whom Samsung paid the fees (given an onerous California law), Labaton *declined*. Actually *pursuing* claims to resolution—claims it knows lack merit—was never part of Labaton's scheme.

In response to Labaton's tactics, Samsung played by the rules the parties agreed to—assuming Appellees are all real, living Samsung-device owners (more on that dubious premise below). The arbitration agreements incorporated the AAA's rules. Those rules, in turn, give the AAA complete discretion over every administrative detail, like the payment of filing fees. Importantly, the rules address the scenario where counsel bring multiple, coordinated arbitration demands and one party chooses (for whatever reason) not to pay arbitral fees. In that event, the AAA gives the other party the

opportunity to advance payment if it wants to proceed with arbitration. If that party does not advance payment, then the AAA can decline to administer the arbitration. If that happens, then either party is free to litigate their claims in court.

Samsung followed those rules. Samsung stood ready to arbitrate if Labaton or their clients were willing to advance the administrative filing fees. But when the AAA offered Labaton that opportunity—the opportunity to arbitrate—Labaton refused. (Again, actually arbitrating was not part of the plan.) So the AAA exercised its discretion and closed the arbitrations, letting Appellees pursue their claims in court, where Samsung was willing to fight on the merits (or lack thereof) without the extortionate threat of nonrefundable mass-arbitration fees.

Labaton refused to accept the AAA's exercise of its discretion under its rules not to require Samsung to pay the fees and to close the arbitrations. Instead, Labaton asked the district court to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 4, and to require Samsung to pay those fees. The district court went along for the 35,651 claimants that had sued in the proper venue. Of course, a court can compel arbitration only when the movant proves the parties have *in fact* agreed to arbitrate, meaning

the movant must *produce some evidence* of that agreement, as this Court's precedent makes clear. But the district court took as sufficient the unverified, unsworn word of Labaton's petition on behalf of tens of thousands of claimants. The court then decided that Samsung needed to arbitrate, and it compounded the error by concluding that *it* could decide the fee question the AAA rules expressly committed to the AAA.

That was error twice over. This Court should reverse.

1. The district court erred in ruling—based on no evidence—that Appellees met their evidentiary burden of establishing that each of them had a valid arbitration agreement with Samsung. As the party seeking to compel arbitration, Appellees had the initial burden to proffer *evidence* showing that they each agreed to arbitrate with Samsung. *See Carroll v. Lynch*, 698 F.3d 561, 564 (7th Cir. 2012); *Kass v. PayPal Inc.*, 75 F.4th 693, 703 (7th Cir. 2023). But they submitted *no* evidence to carry that burden, relying instead only on the bare allegations in their petition. The district court erred in shifting the burden to Samsung and compelling arbitration.

2. The district court erred in compelling arbitration and ordering Samsung to pay filing fees.

a. All versions of the arbitration agreements (assuming solely for sake of argument that any Appellee actually entered into one) provide that administrative fees "shall be determined according to AAA rules" or equivalent language. That means only the AAA can decide whether the parties owe administrative fees and, if so, how much they owe and when payment is due. But the district court rewrote these "clear and unmistakable" terms, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019), giving *itself* the authority to determine whether and when Samsung must pay administrative filing fees. In other words, the court rewrote the contracts. That was error.

b. The district court erred in ordering Samsung to pay filing fees after the AAA had decided *not* to do so. The AAA acted well within its authority when it decided (a) not to order or otherwise require Samsung to pay the filing fees; (b) to give Appellees the option to advance the unpaid fees; and (c) to close the cases, thus triggering the right of either party to litigate the claims in court. The district court, by ordering Samsung to pay the filing fees, usurped the AAA's authority and overrode its discretionary decision.

c. Even if the parties had not expressly agreed that the AAA would resolve administrative fee issues, those issues would *still* be committed to the AAA, *not* the courts, because they are procedural matters reserved exclusively for arbitral bodies and arbitrators, as the Fifth Circuit and other courts have recognized. *See, e.g.*, *Dealer Computer Services, Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 887 (5th Cir. 2009). The district court's reasons for rejecting those decisions fail, and this Court should not create a circuit split.

JURISDICTIONAL STATEMENT

A. The district court had subject matter jurisdiction under Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 203.

The district court had jurisdiction under Chapter 2 of the FAA, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention). *See* 9 U.S.C. §§ 201–203; RSA11-14; Doc. 27.*

1. Section 203 of the FAA provides "an independent grant of federal subject matter jurisdiction." *Certain Underwriters at Lloyd's London v. Argonaut Insurance Co.*, 500 F.3d 571, 581 n.9 (7th Cir. 2007). Specifically, "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," and a district court has

* "RSA" is the Required Short Appendix. "_-SA" refers to the Supplemental Appendix by volume.

"jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203; *see also id.* § 201; *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir. 1995). An arbitration agreement "falls under the Convention" if the agreement "is considered as commercial" and is not "entirely between citizens of the United States." 9 U.S.C. § 202. "Commercial" refers to § 2 of the FAA, meaning it reaches "to the full extent of [Congress'] commerce power." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001). And "a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States." 9 U.S.C. § 202.

2. Accepting as true only for jurisdictional purposes Appellees' allegations that they have arbitration agreements with Samsung, *but see infra* pp. 38-46, this action falls under the Convention and thus triggers jurisdiction under § 203, because the arbitration agreements are indisputably "commercial" and not "entirely between citizens of the United States." 9 U.S.C. § 202. Appellees allege that they are U.S. citizens, and Appellant Samsung Electronics Co., Ltd. (SEC), is a South Korean citizen because it is a South Korean company incorporated in Korea, with its principal place of business in Korea. *See* Doc. 27, at 4-7. Jurisdiction still exists even if SEC is deemed a partnership, limited liability company, or other unincorporated

entity with the citizenship of all its members, because SEC has Korean-citizen shareholders. *See* Doc. 27, at 7-8. Thus, the Court "need not decide" whether SEC is in fact a foreign corporation. *White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc.*, 647 F.3d 684, 687 (7th Cir. 2011).

The Court's November 8, 2023, order requests briefing on *Vaden v. Discover Bank*, 556 U.S. 49 (2009). *Vaden* confirms the analysis above, explaining that Chapter 2 of the FAA "expressly grant[s] federal courts jurisdiction to hear actions seeking to enforce an agreement or award falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards." *Id.* at 59 n.9. *Vaden* otherwise has little relevance. *Vaden* held that under § 4 of the FAA, a district court has jurisdiction over a petition to compel arbitration only if the court would otherwise have jurisdiction over the underlying lawsuit—that is, neither § 4 nor the FAA generally confers subject matter jurisdiction. *Id.* at 58-59, 70. As the Court stressed, however, *Vaden* itself did "not implicate[]" Chapter 2 of the FAA, which "does expressly grant federal courts jurisdiction." *Id.* at 59 n.9. This Court's precedent reflects "no doubt" about that principle. *Employers Insurance of Wausau v. El Banco de Seguros del Estado*, 357 F.3d 666, 668 (7th Cir. 2004); *see International Insurance Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 396 (7th Cir. 2002).

B. This Court has appellate jurisdiction under the FAA, 9 U.S.C. § 16(a)(3).

This Court has appellate jurisdiction under the FAA, 9 U.S.C. § 16(a)(3), because the district court's order compelling arbitration resolved the only issue in the case and is thus a "final decision" under that statute. The Supreme Court's, this Court's, and other courts of appeals' precedent is clear on that rule. *See* Docs. 17, 19.

1. Section 16(a)(3) confers appellate jurisdiction to review orders compelling arbitration that resolve the dispute before the district court.

Section 16(a)(3) provides that an "appeal may be taken from … a final decision with respect to an arbitration that is subject to" the FAA. 9 U.S.C. § 16(a)(3). In *American International Specialty Lines Insurance Co. v. Electronic Data Systems Corp.*, 347 F.3d 665, 668 (7th Cir. 2003), this Court reaffirmed that an order compelling arbitration is a "final decision" under 9 U.S.C. § 16(a)(3), and therefore appealable, when the sole issue before the district court was a claim for arbitration under the FAA. That is true even if the district court stays rather than dismisses the action. *Id.* The rule, without exception, is that § 16(a)(3) confers appellate jurisdiction over an order

compelling arbitration "issued in a case brought to obtain that relief and nothing else." *Id.* at 667-68.

Other courts of appeals agree. Start with the Ninth Circuit: "When the only matter before a district court is a petition to compel arbitration and the district court grants the petition, appellate jurisdiction may attach regardless of whether the district court issues a stay." *International Alliance of Theatrical Stage Employee & Moving Picture Technicians, Artists, & Allied Crafts of the United States v. InSync Show Productions, Inc.*, 801 F.3d 1033, 1040 (9th Cir. 2015). Succinctly put, "a district court presented with a petition to compel arbitration and no other claims cannot prevent appellate review of an order compelling arbitration by issuing a stay." *Id.* at 1041.

The Eleventh Circuit applies the same rule: "an order compelling arbitration triggered by a complaint seeking solely such an order is generally considered final and appealable because it 'resolves the only issue before the district court.'" *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union v. Wise Alloys, LLC*, 807 F.3d 1258, 1266-67 (11th Cir. 2015). A stay rather than dismissal following such an order does not make the order interlocutory for the simple reason that "there [is] nothing to stay." *Id.* at 1268.

The Fifth Circuit, too, holds that when "the sole remedy sought" is arbitration, and the district court issues an "order compelling arbitration," the order is "a final appealable decision under 9 U.S.C. § 16(a)(3)" because there is "nothing left for the court to do." *Brown v. Pacific Life Insurance Co.*, 462 F.3d 384, 391 (5th Cir. 2006). A stay accompanying the order compelling arbitration is "of no moment" because "there [is] nothing left for the district court to stay." *Id.* at 391-92.

2. *Green Tree* supports this Court's and other courts of appeals' rule.

a. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), supports the clear rule set out above. *Green Tree* held that where a district court "has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of § 16(a)(3), and therefore appealable." *Id.* at 89. *Green Tree* did not call into question the longstanding precedent—from this Court and others—that an order compelling arbitration is final in a case "in which a request to order arbitration is the sole issue before the court." *Id.* at 88. That is because the Court interpreted "final decision" in § 16(a)(3) to carry its "well-established meaning"—a decision that "ends the litigation on the merits." *Id.* at 86.

Given *Green Tree*'s narrow holding, multiple courts of appeals—including this Court—have concluded that their longstanding precedent, holding that an order compelling arbitration is final when arbitration is the only issue, "remains good law." *International Alliance*, 801 F.3d at 1040; *see American International*, 347 F.3d at 667-68; *United Steel*, 807 F.3d at 1266-67; *Brown*, 462 F.3d at 391-92.

b. To be sure, *Green Tree* clarified how finality principles work under § 16(a)(3). But its effect was to *expand* the scope of "final decisions" under § 16(a)(3) to include orders compelling arbitration where the court also resolved other requests for relief. As this Court recognized, *Green Tree* explained that an order compelling arbitration, "even if entered in a case in which other relief besides the order was sought," is final if it "plainly disposed of the entire case on the merits." *American International*, 347 F.3d at 668 (quoting *Green Tree,* 531 U.S. at 86-87). *Green Tree* thus rejected the notion that an order compelling arbitration "is never final and appealable in a case in which other relief is sought." *American International*, 347 F.3d at 668. In other words, *Green Tree* clarified that the scope of "final decision" under § 16(a)(3) is *broader* than the lower courts had thought, and it rooted that understanding in "a consistent and longstanding interpretation" of the term

"final decision." 531 U.S. at 88. The Court thus held that even orders compelling arbitration in "embedded" proceedings could be final under § 16(a)(3), depending on the circumstances. *Id.* at 88-89. So, while *Green Tree* overruled certain aspects of prior decisions that had construed § 16(a)(3) *too narrowly*, *e.g.*, *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998), it did "not disturb" the rule that "[w]hen the only matter before a district court is a petition to compel arbitration and the district court grants the petition, appellate jurisdiction may attach regardless of whether the district court issues a stay," *International Alliance*, 801 F.3d at 1040; *see id.* at 1040 n.4 (favorably quoting *American International*, 347 F.3d at 668); *accord United Steel*, 807 F.3d at 1267; *Brown*, 462 F.3d at 391.

Footnote 2 of *Green Tree* does not change that analysis. Footnote 2 observed that the particular order at issue "would not [have been] appealable" under § 16(a)(3) had the court "entered a stay instead of a dismissal." *Green Tree*, 531 U.S. at 87 n.2. But as the Ninth and Eleventh Circuits have explained, that footnote must be read in the context of *Green Tree* itself. *See International Alliance*, 801 F.3d at 1040-41; *United Steel*, 807 F.3d at 1269-70.

Green Tree involved substantive claims *in addition to* the request for arbitration. 531 U.S. at 82-83. "In *Green Tree*, the plaintiff brought claims

under the Equal Opportunity Credit Act and the Truth in Lending Act." *United Steel*, 807 F.3d at 1270. "Simply ordering the case to arbitration," the Eleventh Circuit explained, "did not technically dispose of the substantive claims that the plaintiff had brought, requiring the court to proceed with parallel litigation, stay the claims, or possibly dismiss the case." *Id.* Had the district court "entered a stay instead of dismissing the plaintiff's claims," those "claims would have remained pending, rendering the district court's order compelling arbitration interlocutory instead of final." *Id.* But that scenario differs from a case where an "order compelling arbitration resolved the merits of the only claim for relief advanced by any party to the action." *Id.* In the latter scenario, "nothing remain[s] for the district court to stay," meaning "the order [is] final" no matter whether the court entered a stay. *Id.*; *see also International Alliance*, 801 F.3d at 1040; *Brown*, 462 F.3d at 391-92.

3. This Court has jurisdiction to review the district court's order under 9 U.S.C. § 16(a)(3).

a. As the foregoing caselaw makes clear, the Court has jurisdiction to review the order under § 16(a)(3). Appellees filed a petition (and motion) to compel arbitration under § 4 of the FAA. They sought just one thing—an order requiring Samsung to arbitrate—and they did not raise their

underlying state-law claims before the district court. *See* 1-SA21. The district court, in turn, understood that Appellees had raised only one claim for relief, and it "order[ed] the parties to arbitrate." RSA36. The court's resolution of that lone claim left nothing else for it to do. The order is "final" under § 16(a)(3), and the court's entry of a stay does not change that. *See* Doc. 17, at 3-4; Doc. 19, at 17.

b. This Court has jurisdiction under § 16(a)(3) despite the absence of a "separate document," *Wisconsin Central Limited v. TiEnergy, LLC*, 894 F.3d 851, 854 (7th Cir. 2018), memorializing the fact that "the judgment really is final," *Borrero v. City of Chicago*, 456 F.3d 698, 699-700 (7th Cir. 2006). Again, there is nothing left for the district court to do. The order compelling arbitration "makes it clear that the district court was finished with the case," "so [this Court] may proceed." *Levy v. West Coast Life Insurance Co.*, 44 F.4th 621, 625 (7th Cir. 2022). *See generally* Doc. 17.

C. Samsung timely appealed.

On September 12, 2023, the district court granted Appellees' motion to compel arbitration and ordered Samsung to pay filing fees. RSA36. On September 15, 2023, Samsung timely filed its notice of appeal. 9-SA2417.

STATEMENT OF ISSUES

1. Whether the district court erred in ruling, based on no evidence, that Appellees met their evidentiary burden to establish that they each had a valid arbitration agreement with Samsung.

2. Whether the district court erred in resolving the administrative-fee dispute given that (a) the parties expressly agreed that administrative fees "shall be determined according to AAA rules," 5-SA1162; (b) the AAA exercised its discretion over administrative fees by declining to order or otherwise require Samsung to pay the filing fees and instead closing the arbitrations, thus freeing the parties to litigate in court; and (c) administrative fees are core procedural matters for arbitral bodies and arbitrators to decide, as the Fifth Circuit and other courts have held.

STATEMENT OF THE CASE

A. Legal background

"Arbitration is a matter of contract," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011), and the FAA "requires courts to place arbitration agreements 'on equal footing with all other contracts,'" *Kindred Nursing Centers L. P. v. Clark*, 581 U.S. 246, 248 (2017). This equal-footing principle is key: Congress enacted the FAA "to make 'arbitration agreements as enforceable

as other contracts, but not more so.'" *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* Therefore, "a court may not devise novel rules to favor arbitration over litigation." *Id.*

Courts must enforce provisions in arbitration agreements according to their terms, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415-16 (2019), especially terms delegating issues to an arbitral body, *Henry Schein*, 139 S. Ct. at 527. For instance, although a court must always decide "the contract-formation issue," parties "may delegate *all other issues* … to the arbitrator," *K.F.C. v. Snap Inc.*, 29 F.4th 835, 837 (7th Cir. 2022) (emphasis added), and "a court possesses no power" to "override the contract," *Henry Schein*, 139 S. Ct. at 529. Nor may a court second-guess an arbitral determination when it is the arbitral body's decisionmaking that the parties "bargained for." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

B. Factual and procedural background

Appellees invoke arbitration agreements that they claim (without evidence) they entered into with Samsung. Solely for purposes of this appeal, Samsung assumes that, *if* Appellees have arbitration agreements with

Samsung, *but see infra* pp. 38-46, the agreements are those attached to Appellees' petition. *See, e.g.*, 5-SA1161-63.

1. Samsung's arbitration agreement provides that the arbitration process is governed by the AAA Rules.

"Samsung designs, manufactures, and sells devices, including smartphones and tablets." RSA3. Under the arbitration agreements attached to the petition, when an individual purchases or uses a Samsung device, they agree to arbitrate "all disputes" with "Samsung relating in any way to or arising in any way from the Standard Limited Warranty or the sale, condition or performance of the Product." 5-SA1162. Samsung device owners also agree not to join a "class action" or any other "combined or consolidated" dispute. *Id.*; *see also* RSA4.

The arbitration agreements attached to the petition specify that every arbitration "shall be conducted according to [AAA rules]." 5-SA1162. The agreements give the arbitrator the authority to "decide all issues of interpretation and application of [the arbitration agreement]." *Id.* They also specify when certain fees and costs, like attorneys' fees and expert witness fees, may be awarded. *Id.* "Administrative … and arbitrator fees," on the other hand,

"shall be determined according to AAA rules" when the "total damage claims … exceed $5,000.00." *Id.*

2. The AAA has complete discretion over the arbitration process, including administrative fees.

In certain consumer arbitrations, including the arbitrations underlying this case, *see* 5-SA1266, the AAA applies the Consumer Arbitration Rules, *see* 5-SA1164-1212, and the Supplementary Rules for Multiple Case Filings, *see* 5-SA1254-64 (collectively, the AAA Rules). The Supplementary Rules, now known as the "Mass Arbitration Supplementary Rules," reflect "the AAA's commitment to addressing the unique challenges and complexities associated with handling mass arbitrations"—Labaton's tactic here—"and demonstrate[] the organization's dedication to staying current and adapting to the ever-changing landscape of alternative dispute resolution." AAA, *What We Do: Mass Arbitration*, https://www.adr.org/mass-arbitration (last visited November 14, 2023). The AAA "developed" the mass arbitration rules "to streamline the administration of large volume filings" and "provide parties and their representatives with an efficient and economical path toward the resolution of multiple individual disputes." 5-SA1257. As explained in detail below (at 20-21), the rules contain a protocol for when one

party declines to pay fees: the other party can advance the fees, but if they choose not to, then the AAA may suspend or terminate the arbitrations. 5-SA1263. Should the AAA close the arbitrations, then, under the Consumer Arbitration Rules, either side may proceed on the merits in court. 5-SA1263.

The AAA Rules make clear that "[t]he AAA has the discretion to apply or not to apply the [AAA Rules]." 5-SA1170; *see also* 5-SA1258. That "discretion" extends to "all AAA administrative fees," like "filing fees, case management fees and hearing fees." 5-SA1198. For example, "the AAA retains the discretion to interpret and apply [the] fee schedule to a particular case or cases." *Id.* It may "defer or reduce the consumer's administrative fees." 5-SA1177. And the "AAA, in its sole discretion, may consider an alternative payment process for multiple case filings." 5-SA1200. ("Multiple case filings" are when, as here, the same or coordinated counsel files 25 or more similar demands against the same respondents. *See* 5-SA1258.) In short, the AAA Rules give "the AAA"—including the "Case Administrator … assigned to handle the administrative aspects of the case"—full discretion over "administrative fees." 5-SA1198, 5-SA1208.

Discretion aside, the default AAA rules governing administrative fees are simple. Take filing fees: each party has certain pre-determined filing-fee

obligations and those fees are nonrefundable. 5-SA1197-1201. "Filing fees are non-refundable," the AAA Rules explain, even if "the cases are closed due to settlement or withdrawal." 5-SA1200.

Sometimes, parties do not pay the filing fees (or other administrative fees). But the AAA Rules address that scenario, too, specifically in the context of multiple case filings. In the event of nonpayment, "the AAA may notify the parties in order that one party may advance the required payment within the time specified by the AAA." 5-SA1263. If another party advances payment, the arbitration will proceed and the advancing party, if successful in arbitration, may recover the fees from the other party in the final arbitration award. *See* 5-SA1192. But if the fees are not paid—by any party—before an arbitrator is appointed, "the AAA may suspend or terminate those proceedings." 5-SA1263; *see* 5-SA1196. "Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution." 5-SA1174.

3. Appellees' counsel file 50,000 identical arbitration demands against Samsung.

Appellees' counsel, Labaton, simultaneously filed 50,000 individual claims with the AAA as part of a scheme to extract a massive settlement from

Samsung. *See* RSA6; Dist. Ct. Doc. 27, at 6-13. After an unsuccessful mediation, Labaton "immediately threatened … to file 50,000 demands for arbitration with the AAA absent an offer from Samsung to pay Labaton Sucharow at least $50 million. Samsung refused to acquiesce," Doc. 27-11 at 2, so Labaton followed through. It filed 50,000 arbitration demands to trigger escalating nonrefundable arbitration fees that could top $100 million. *See* Doc. 28, at 12 (calculation). It sought "to bury Samsung under the weight of hundreds of millions of dollars in arbitration fees" and use that financial "leverage" to "pressure" Samsung into settling for $50 million or more. Dist. Ct. Doc. 26, at 1.

Each demand was identical, alleging the same state-law violations and seeking "at least $15,000" in "statutory damages." 5-SA1246. While each claimant parroted the same allegation that they were a Samsung device owner, *see, e.g.*, 5-SA1214 ¶ 1, not one provided evidence for that assertion. Instead, Labaton simply provided the AAA with a spreadsheet containing each claimant's name, address, and contact information. *See* 5-SA1267; RSA7-8. Labaton also made demands on behalf of individuals with threshold issues concerning their ability to obtain relief, such as being deceased or being represented by different counsel. *See* Dist. Ct. Doc. 27, at 14 (listing

various deficiencies); *see also* Dist. Ct. Doc. 65, at 14 n.8 (providing examples of the dual-representation issue). Other claimants submitted duplicate claims. *See* 2-SA445 (three Deonta Daniels from Chicago Heights); 4-SA1064 (two Charlean Garrisons from Joliet); 4-SA1134 (two Mark D'Arienzos from Skokie). Still other claimants appeared to be fictitious, uninvestigated, or otherwise erroneously entered. *See, e.g.*, 1-SA96 (Bluff Master); 1-SA80 (Vain Exp); 1-SA33 (Lornabridges Bridges); 4-SA1153 (Gl Williams).

Based on a sampling of the data that Labaton submitted to the AAA, Samsung told the AAA that it had "serious concerns about the accuracy and integrity" of the 50,000 arbitration demands and flagged several issues. 5-SA1251. The AAA, like Samsung, identified "inaccurate and/or incomplete information" in the claimants' filing materials. 5-SA1266. Such information included incomplete addresses and names that appeared to be fake, like "Full Chck." 5-SA1267. "There [were] numerous additional cases with the same or similar inaccurate/incomplete information." 5-SA1266. The AAA thus ordered the claimants to either correct the defects or withdraw their claims. *Id.* Labaton submitted a revised spreadsheet, but still did not provide any evidence that each claimant was a Samsung device owner subject to a valid arbitration agreement with Samsung. *See* RSA8 (citing 5-SA1279).

Those issues did not prevent the AAA from determining that the claimants had "met the AAA's administrative filing requirements," 5-SA1269, for the simple but important reason that the AAA does not require claimants to prove with evidence *at filing* that they are bound by a valid arbitration agreement. The AAA instead requires claimants to simply attach an arbitration agreement to their demand *without proof* that they are bound by it. Thus, when the AAA decided that the claimants "had satisfied the requisite filing requirements," it "did not speak to whether a valid arbitration agreement existed between the parties." *Chase Bank USA, N.A. v. Swanson,* No. 10-cv-06972, 2011 WL 529487, at *2 n.2 (N.D. Ill. Feb. 4, 2011).

4. The AAA, applying its discretionary rules governing filing fees, closes the cases given the nonpayment of the outstanding fees *by either party*.

Labaton paid the claimants' portion of the filing fees. *See* RSA6-7. Samsung paid the filing fees for the California residents' claims given unique obligations under California law. RSA7. But Samsung elected not to pay the nonrefundable filing fees for the other claimants, which totaled more than $4 million, because (i) the AAA Rules anticipate and address nonpayment in multiple case filings and (ii) the demands were frivolous because they rested on demonstrably false claims about how Samsung devices operate, like

whether Samsung possesses or collects biometric data from the Gallery App (an application storing photos and videos), *see* 5-SA1232—it does not. *See* 5-SA1251-53; 5-SA1272-73. Samsung made clear, however, that it "will participate" in arbitration should the claimants advance the unpaid fees, consistent with the AAA Rules. 5-SA1253; 5-SA1272-73. Samsung also stood ready to defend against the claims in court—where other counsel already have filed a putative class action on identical issues. *See G.T. v. Samsung Electronics America, Inc.*, No. 1:21-cv-4976 (N.D. Ill.).

Labaton responded just a day later, purportedly on behalf of each of the 50,000 claimants. It "decline[d] Samsung's invitation" and instead asked the AAA to "issue an invoice to Samsung or, if the AAA believes Samsung's statement is sufficient regarding its refusal to pay the business fees," to "close the cases so Claimants can proceed to court." Dist. Ct. Doc. 1-16, at 2.

The AAA noted that Samsung invoked the AAA Rules and opted not to pay the outstanding filing fees. *See* 5-SA1275. But the AAA did not *order* or otherwise *require* Samsung to pay those fees. It instead recognized that the claimants could advance "Samsung's portion of the filing fees so that the matters may proceed." *Id.* While the AAA acknowledged that the claimants had declined to advance the fees, it gave them one last opportunity to do

so—*i.e.*, to pursue arbitration. *Id.* Labaton again declined, instead asking the AAA to stay the arbitrations while they sought an order from a federal court compelling Samsung to arbitrate and pay the filing fees. *See* 5-SA1278. The AAA rejected the stay request and exercised its discretion to close the 49,986 non-California claims, *see* RSA8-9, triggering the right of "either party" to "submit its dispute to the appropriate court for resolution," 5-SA1275.

5. Appellees move to compel arbitration, and the district court compels arbitration and the payment of fees.

a. Labaton filed a joint petition and motion to compel arbitration under 9 U.S.C. § 4 for Appellees. They asked the district court to order Samsung to arbitrate and pay the filing fees. *See* 1-SA12-22; Dist. Ct. Doc. 2. Mirroring their filings with the AAA, Appellees failed to provide the district court with any evidence supporting the allegation that they each were a Samsung device owner subject to a valid arbitration agreement with Samsung. Labaton instead attached "a discrete list" with alleged personal information for each claimant. RSA23; *see* 1-SA23–4SA-1160. And although Labaton labeled the petition "verified," 1-SA12, it was not. No Appellee swore under penalty of perjury that the petition's allegations (or its attachments) were true. Appellees thus failed to convert anything in the petition

into evidentiary material under Federal Rule of Civil Procedure 56. *See James v. Hale*, 959 F.3d 307, 314 (7th Cir. 2020).

Notably, other law firms subsequently filed a petition to compel arbitration of the same claims against Samsung on behalf of hundreds of the same petitioners. *See Hoeg v. Samsung Electronics America*, 1:23-cv-1951 (N.D. Ill.). Samsung noted the issue before the district court here, explaining that at least 241 of the 1,028 *Hoeg* petitioners (23%) were also *Wallrich* petitioners. Dist. Ct. Doc. 40, at 3. Petitioner overlap also appears to be an issue in *Allen and 4,128 Other Individuals v. Motorola Mobility, LLC*, 2023-CH-09116 (Ill. Cir. Ct., Cook County), a case Labaton has just filed raising similar merits claims on behalf of alleged users of Motorola phones—many of whom also (and improbably) appear to be Appellees here claiming to use Samsung phones (based on first- and last-name comparison of petitioner lists, 890 of the 4,130 *Motorola* petitioners (21.5%) appear to be *Wallrich* petitioners).

Samsung argued, as relevant here, that (a) each Appellee failed to carry their evidentiary burden of showing that they had a valid arbitration agreement with Samsung; and (b) the district court cannot order Samsung to pay the filing fees because the arbitration agreements commit that issue to the AAA; the issue is a procedural matter for arbitral bodies, not courts,

to decide; and the AAA did not require Samsung to pay the fees. *See* Dist. Ct. Docs. 26-27.

b. After dismissing 14,335 petitioners' claims for lack of venue, *see* RSA14-19, the district court ordered Samsung to arbitrate the remaining 35,651 disputes and pay the filing fees, *see* RSA2, RSA36.

As relevant here, the court first ruled that Appellees met their burden of showing that they each had an arbitration agreement with Samsung. *See* RSA22-24. The court did not cite *any* evidence supporting that ruling. It instead accepted as true the petition's unverified and unattested "word of over 30,000 individuals, some of whom may have been recruited to this action by obscure social media ads." RSA23. The court also relied on (i) the "discrete list of named [claimants]" attached to the petition; (ii) the AAA's determination that Appellees had met the *administrative* filing requirements; and (iii) Samsung's acknowledgement—in a different case involving different individuals—that real Samsung device owners who do in fact use their devices are bound by an arbitration agreement. *Id.* Lastly, the court (mistakenly) thought that "Samsung [had] a customer list" that it could use to determine whether each Appellee was in fact bound by an arbitration agreement; for

support, the court merely said that Samsung had previously "raised concerns about specific names to the AAA." *Id.*

Proceeding to the merits, the district court concluded that Samsung breached the arbitration agreements by invoking the AAA Rules and not paying the filing fees. *See* RSA26-30. The court also ruled that *it* could order Samsung to pay the filing fees, reasoning that fee disputes are "issues of substantive arbitrability … for a court to decide," not "issues of procedural arbitrability" for an arbitrator to decide. RSA31. The court acknowledged that its ruling on the fee issue is contrary to decisions from within and outside this Circuit, including the Fifth Circuit. *See* RSA32-33.

c. On September 26, 2023, soon after the district court compelled arbitration, Labaton filed arbitration demands on behalf of 35,610 Appellees. (For reasons unknown to Samsung, Labaton did not file arbitration demands for the other 41 Appellees.) On October 5, 2023, Samsung sought a stay pending appeal in the district court, *see* Dist. Ct. Doc. 61, which the court denied on October 18, 2023, *see* 9-SA2433. On October 25, 2023, Samsung moved this Court to stay the order pending appeal and to expedite the appeal. Doc. 21. The Court granted both requests on November 8, 2023, *see* Doc. 29.

STANDARD OF REVIEW

This Court reviews an order compelling arbitration, like a summary judgment ruling, de novo, reviewing any factual findings (if making factual findings is proper, *but see infra* pp. 39-41) for clear error. *Lumbermens Mutual Casualty Co. v. Broadspire Management Services, Inc.*, 623 F.3d 476, 480-81 (7th Cir. 2010); *Carroll*, 698 F.3d at 563-64.

SUMMARY OF ARGUMENT

I. The district court erred in ruling—based on no evidence—that Appellees had met their evidentiary burden to establish that they each had a valid arbitration agreement with Samsung.

A. Whether the parties have agreed to arbitrate is an evidentiary question under the FAA, 9 U.S.C. § 4, and this Court's clear caselaw. The burden of proffering evidence starts with the party seeking to compel arbitration—here, Appellees—and shifts to the nonmoving party—*i.e.*, Samsung—only after the moving party "puts forth *evidence* showing the absence of a genuine dispute of material fact." *Carroll*, 698 F.3d at 564 (emphasis added); *see Kass*, 75 F.4th at 703.

B. **1.** Appellees failed to meet their evidentiary burden of showing that they each agreed to arbitrate with Samsung. They did not submit

any evidence. Instead, they rested on the bare allegations in the petition. Not a single Appellee provided a sworn statement stating who they were and what Samsung device they supposedly used. Given the burden of proof, no court may blindly accept as true Appellees' unsubstantiated allegations, which are not evidence. But that is exactly what the district court did, *see* RSA23, so this Court should reverse.

2. The district court gave several reasons for its evidence-free ruling. Each fails. For example, because the AAA does not require claimants to prove *at filing* that they are bound by an arbitration agreement, the AAA's determination that Appellees had met the administrative *filing* requirements says nothing about whether the parties agreed to arbitrate. Additionally, the district court erroneously believed that Samsung had an exhaustive list of device owners that it could use to determine whether each Appellee had in fact agreed to arbitrate. It does not. But whether that is true is irrelevant because, again, *Appellees* bore the initial burden of proof and they did nothing to carry it. In other words, the district court excused Appellees from satisfying their burden and demanded that Samsung respond to a record devoid of evidence. What is more, the district court cited *nothing* for its belief that Samsung had a full list of device owners. And there is nothing to cite,

because no such list exists. Individuals typically purchase Samsung devices from third parties, like mobile carriers or retailers, and because device owners are not required to register their devices with Samsung, Samsung does not have a comprehensive list of every device owner.

II. The district court also erred in compelling arbitration and ordering Samsung to pay filing fees because administrative-fee issues are for the arbitral body, not a court, to decide—as the arbitration agreements and caselaw confirm. The AAA declined to require Samsung to pay the fees, instead closing the arbitrations after giving claimants an opportunity to advance the fees—an opportunity Labaton refused.

A. The arbitration agreements—assuming Appellees have shown that they each agreed to arbitrate (and they have not)—expressly commit the filing-fee issue to the AAA and no court may rewrite those terms. A court reversibly errs when it rewrites an arbitration agreement. *See Henry Schein*, 139 S. Ct. at 529. Here, the alleged contracts provide that administrative fees "shall be determined according to AAA rules." 5-SA1162. The district court rewrote those clear and unmistakable terms, ruling that *it* had the authority to decide whether and when Samsung had to pay administrative fees. That was error. The arbitration agreements pick the rules governing

administrative fees—contractually choosing the AAA Rules, not judge-made rules—and those Rules give the AAA full discretion over every aspect of administrative fees. No court may "override" that bargained-for commitment of administrative-fee issues to the AAA. *Henry Schein*, 139 S. Ct. at 529.

B. The AAA did not decide that Samsung was required to pay fees. It instead closed the cases and let them proceed on the merits in court given the nonpayment by either party. Specifically, the AAA decided (a) not to order or require Samsung to pay the filing fees; (b) to give Appellees the option to advance the unpaid fees; and (c) to close the cases, rather than stay them, thus triggering the right of either party to sue in the appropriate court for resolution. Under the plain language of the AAA Rules incorporated into the contracts, the AAA acted "well within [its] discretion" in reaching that conclusion, and the district court was required to respect it. *Lifescan, Inc. v. Premier Diabetic Services, Inc.*, 363 F.3d 1010, 1013 (9th Cir. 2004). In ruling that Samsung *had* to pay fees, the district court ignored the AAA's discretionary decision. That was error because no court may second-guess an arbitral determination when it is the arbitral body's decisionmaking that the parties "bargained for." *Oxford Health Plans*, 569 U.S. at 569.

C. Even if the contracts were silent on the administrative-fee issue, the district court's ruling that it could decide the fee question would still be incorrect, because administrative fees are core procedural matters for arbitral bodies and arbitrators to decide, as the Fifth Circuit and other courts have held.

1. When a contract is silent, courts presume that "procedural" questions are for arbitral bodies and "substantive" questions are for courts. *Lumbermens*, 623 F.3d at 480-81. Procedural arbitrability questions include "the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 35 (2014) (quotation marks omitted). Substantive arbitrability questions, by contrast, tend to concern "*whether* there is a contractual duty to arbitrate at all." *Id.; see id.* at 34.

2. Administrative fees are conditions precedent to arbitration, meaning they are committed to arbitral bodies, not courts. Such fees present issues that must be addressed before the arbitral proceedings begin or proceed. They are thus "conditions precedent to an obligation to arbitrate," which courts may not address. *BG Group,* 572 U.S. at 35. Here, that means

only the AAA may decide the fee issue, like whether the parties owe them and, if so, how much is owed and when payment is due.

Appellate courts agree on this issue. In *Dealer Computer Services*, which likewise involved AAA rules, the Fifth Circuit broadly held that "[p]ayment of fees is a procedural condition precedent that the trial court should not review." 588 F.3d at 887. This Court has cited *Dealer Computer Services* with approval, specifically its holding that administrative fees are procedural matters for arbitral bodies to decide. *See Lumbermens*, 623 F.3d at 482. The Third Circuit has similarly recognized, specifically with respect to the AAA, that administrative arbitral fees are "basic procedural issues that … 'the parties would likely expect the arbitrator to decide.'" *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762 (3d Cir. 2016).

3. These principles make clear that fee issues would be for the AAA even if the arbitration agreements did not say so. Because the AAA did not require Samsung to pay fees and instead closed the arbitrations after Labaton refused to advance payment, the district court had no power to compel arbitration and payment of fees.

D. The district court's reasons for deciding the fee issue and Appellees' likely counterarguments lack merit.

1. The district court wrongly concluded that it could decide whether Samsung must pay fees despite recognizing (as Samsung argued) that the contracts incorporated rules committing fee issues to the AAA. The court simply asserted, without grappling with the AAA Rules' language, that it could decide the issue itself.

2. The district court concluded, and Appellees contend, that the AAA required Samsung to pay the fees, so the district court was just enforcing that judgment. That is incorrect. The AAA exercised its discretion by deciding (a) not to order or otherwise require Samsung to pay the filing fees; (b) to give Appellees the option to advance the unpaid fees if they really wanted to arbitrate; and (c) to close the cases, triggering the right of either party to submit the underlying merits dispute to the appropriate court for resolution.

3. The district court and Appellees treat the contracts as unconditional agreements to arbitrate. That is wrong. The agreements make clear that arbitration must proceed *pursuant to the AAA Rules*, which can put the parties back in court if the fees go unpaid. That is precisely how the AAA interpreted and applied the AAA Rules. Appellees may dislike how the

AAA exercised its discretion. But as *Dealer Computer Services* explained, their "remedy lies with the [AAA]," not the courts. 588 at 888.

4. The district court concluded that Samsung's position created "a Catch 22" leaving Appellees nowhere to pursue their claims. 9-SA2432. That, too, is wrong. The result the parties got is the one they bargained for: Labaton failed to advance the fees for Appellees when given the opportunity, and the AAA sent them back to court, where they can pursue their claims (as other individuals are currently doing in another lawsuit).

5. The district court's ruling—that administrative fees are substantive matters for courts to decide—is wrong and incompatible with *Dealer Computer Services*, *Lumbermens*, and *Chesapeake Appalachia*.

First, the district court incorrectly reasoned that administrative fees must be substantive given their role in arbitration. The court itself recognized that administrative fees "start" the arbitration process and that arbitration was "conditioned on the payment of the AAA's assessed fees." RSA27, RSA35. Those are hallmark characteristics of "a procedural condition precedent to arbitration"—determining "*when* the contractual duty to arbitrate arises, not *whether* there is [one]." *BG Group*, 572 U.S. at 35.

Second, the district court overlooked the fact that the AAA has total discretion over administrative fees, including whether, when, and how much fees are due. This discretion highlights a critical flaw in the court's logic. If administrative fees are substantive, as the court stated, then the AAA should not decide them. *Lumbermens,* 623 F.3d at 481. But the district court's reasoning produces the "strange" outcome of dividing the same issue (administrative arbitral fees) "between the court and the arbitrator," *id.*, because the court did not suggest that it would determine *the amount* due (clearly a procedural question for the AAA). The court offered no reason to treat the timing of fees as substantive and their amount as procedural.

Lastly, the district court's reasons for departing from established caselaw fail. *Dealer Computer Services* did not turn on liquidity to pay or chapter headings in AAA rules. The district court suggested no reason this Court should not follow the Fifth Circuit.

ARGUMENT

I. Appellees failed to meet their evidentiary burden of showing that they had a valid arbitration agreement with Samsung.

Appellees bore the burden of showing that they each had a valid arbitration agreement with Samsung. But they submitted *no evidence*. The

district court nevertheless found a valid arbitration agreement between Samsung and every Appellee. That ruling cannot stand.

A. The party seeking to compel arbitration has the initial burden of showing, with evidence, that the parties agreed to arbitrate.

To compel arbitration, a court must find "an agreement to arbitrate," *Zurich American Insurance Co. v. Watts Industries, Inc.*, 466 F.3d 577, 580 (7th Cir. 2006), and "the party seeking to compel arbitration … ha[s] the burden of showing" that the parties have in fact agreed to arbitrate, *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1063 (7th Cir. 2018). That is because whether the parties agreed to arbitrate is a question of fact, meaning that if there is a material dispute, the question is for a jury. *See* 9 U.S.C. § 4. Accordingly, pretrial disputes about the existence of an arbitration agreement are governed by the same standard governing summary judgment. *Tinder v. Pinkerton Security*, 305 F.3d 728, 735 (7th Cir. 2002). Thus, the party seeking to compel arbitration—here, Appellees—must identify "sufficient evidence" that the parties agreed to arbitrate. *Fisher v. University of Texas at Austin*, 570 U.S. 297, 314 (2013) (summary judgment); *Kass*, 75 F.4th at 703 (arbitration). In assessing that showing, a court must draw all "reasonable inferences" from "the evidence" "in favor of the nonmoving party"—here, Samsung. *Tolan v.*

Cotton, 572 U.S. 650, 660 (2014) (summary judgment); *see also Kass*, 75 F.4th at 700 (arbitration).

Just as in summary judgment proceedings, the party moving to compel arbitration bears the initial burden of proof: "Once the moving party puts forth *evidence* showing the absence of a genuine dispute of material fact, the burden shifts to the non-moving party to provide *evidence* of specific facts creating a genuine dispute." *Carroll*, 698 F.3d at 564 (emphases added); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) (recognizing that the moving party carries the initial burden of proof under Federal Rule of Civil Procedure 56); *Scherer v. Rockwell International Corp.*, 975 F.2d 356, 360 (7th Cir. 1992) (same). Whether the parties are bound by a valid arbitration agreement is thus an *evidentiary* question—the burden of proffering evidence starts with the party seeking to compel arbitration and shifts to the nonmoving party only after the moving party carries its evidentiary burden.

This well-established order of operations is critical because it puts in context the statement that "a party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests." *Tinder*, 305 F.3d at 735. The moving party does not trigger that second-level

standard unless it "puts forth *evidence* showing the absence of a genuine dispute of material fact." *Carroll*, 698 F.3d at 564 (emphasis added).

B. Appellees failed to carry their evidentiary burden, and the district court's evidence-free ruling is wrong.

1. The district court erred in compelling arbitration because Appellees offered no evidence that they agreed to arbitrate with Samsung.

Appellees put forth *no evidence*—no affidavit, declaration, or other proof—showing that each of them is a Samsung device owner bound by an arbitration agreement with Samsung. Because Appellees failed entirely to carry their evidentiary burden, the district court erred in finding, based on no evidence, "a valid agreement to arbitrate." RSA24. The court thus erred in compelling arbitration and ordering Samsung to pay fees.

2. The district court's reasoning, which failed to apply the clear evidentiary standard, is incorrect.

The district court gave several reasons for its evidence-free finding. Each lacks merit.

a. The district court thought that it "must accept" the unverified and unattested "word of over 30,000 individuals." RSA23. But a motion to compel arbitration is akin to a motion for summary judgment, not a motion to dismiss. *Tinder*, 305 F.3d at 735. The court therefore erred in accepting

Appellees' allegations as true, *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), rather than determining whether Appellees proffered "sufficient evidence" to support those allegations, *Fisher*, 570 U.S. at 314; *see Kass*, 75 F.4th at 703. And *allegations* are all that Appellees have. Appellees' counsel labeled the petition "verified," 1-SA12, but no *Appellee* swore under penalty of perjury that the petition's allegations or its attachments were true. That is unsurprising given that some claimants, like "Full Chck," *see* 5-SA1266, are likely fictitious (showing that Labaton did not investigate its allegations), and others (possibly without their knowledge) were simultaneously being represented by other counsel in *Hoeg*, a separate action seeking to compel arbitration against Samsung on the same underlying claims. *Supra* p. 27. Appellees thus failed to convert the petition and its attachments into evidence. *See James,* 959 F.3d at 314.

The district court also relied on "a discrete list of named [claimants]," RSA23, attached to the petition, *see* 1-SA23. But that list is not evidence because, again, no Appellee swore under penalty of perjury that they are a real person with a Samsung device and a valid arbitration agreement. *See James,* 959 F.3d at 314. And the list could not carry Appellees' burden even if it *were* evidence, because it simply contains each claimant's purported personal

information (*i.e.*, name and city of residence). Information about one's identity is not evidence that one agreed to arbitrate, much less with Samsung about a particular device.

b. The district court also relied on the AAA's determination that Appellees had met the administrative filing requirements. RSA23. But as explained, *supra* p. 24, the AAA's filing-requirement determination says nothing about whether the parties agreed to arbitrate, because the AAA does not require claimants to establish *at filing* that they are bound by an arbitration agreement. It instead requires claimants to simply attach an arbitration agreement to their demand *without proof* that they are bound by it. *See, e.g.*, *Chase Bank USA*, 2011 WL 529487, at *2 n.2 (explaining that the AAA's filing-requirement determination says nothing about "whether a valid arbitration agreement existed between the parties"). What is more, the question whether the parties agreed to arbitrate at all is a question for the court (and, if necessary, a jury), not the arbitrator. 9 U.S.C. § 4; *see Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010).

c. The district court relied on Samsung's acknowledgement—in a different case involving different individuals—that an owner of a particular Samsung device is bound by an arbitration agreement. RSA23. The alleged

Samsung device owner in a *different* case has nothing to do with the alleged Samsung device owners in *this* case. Moreover, the fundamental problem with the district court's reliance on this assertion is that it assumes the answer to the evidentiary question whether each Appellee *is* a Samsung device owner. Again, Appellees have not submitted any evidence that each one of them owns a Samsung device. Arguing that device owners are subject to arbitration agreements does not establish that Appellees *are* device owners.

d. The district court thought that "Samsung [had] a customer list" that it could use to determine whether each Appellee was bound by an arbitration agreement. To support that notion, the court said that Samsung had previously "raised concerns about specific names to the AAA." RSA23. That was error for three reasons.

First, whether Samsung had a complete device-owner list is irrelevant because *Appellees* bore the initial burden of proof, which they did not carry. The district court prematurely (and wrongly) shifted the evidentiary burden to Samsung.

Second, Samsung did not raise concerns about *specific claimants* to the AAA. It instead flagged several *issues* that plagued the arbitration demands. *See* 5-SA1252. And there were several. Just to name a few, Labaton submitted

(a) duplicate claims for the same claimants, (b) claims on behalf of fictitious or deceased individuals, and (c) claims on behalf of individuals already represented by other counsel. *See supra* pp. 22-23.

Third, Samsung does not have a comprehensive "customer list." RSA23. Individuals typically buy Samsung devices from third parties, like mobile carriers or retailers. Because Samsung device owners are not required to register their devices, Samsung does not have a list of every device owner. The district court cited nothing supporting its contrary finding. If the court relied on Samsung's identification of issues plaguing the arbitration demands to conclude that Samsung had a comprehensive customer list, the court's error is readily explained: Samsung identified those issues by sampling the information that *Appellees submitted* to the AAA. *See* 5-SA1251. And if the court relied on Appellees' observation that Samsung device owners who register their devices provide Samsung with their personal information (*e.g.*, name, email, zip code, and date of birth, *see* Dist. Ct. Doc. 36, at 9 & n.4), the problem is likewise evident: not every owner registers their device.

In sum, established caselaw shows that Appellees bore the burden of submitting *evidence* showing that they each had a valid arbitration agreement with Samsung. Because they submitted no such evidence, the district

court's evidentiary ruling is wrong. To make matters worse, by compelling arbitration without evidence of valid arbitration agreements, the district court in effect "devise[d] [a] novel rule[] to favor arbitration over litigation"—something it clearly cannot do. *Morgan*, 596 U.S. at 418.

II. The district court erred in compelling arbitration and payment of fees because arbitral-fee issues are for the arbitral body, not a court, to decide—as the arbitration agreements and caselaw confirm.

The district court erred in resolving the fee dispute for three reasons. *First*, the arbitration agreements expressly commit administrative-fee issues to the AAA and no court may rewrite the contracts. (Again, Appellees have offered no evidence that they have arbitration agreements.) *Second*, the AAA, applying its own rules, decided that Samsung was not required to pay fees and closed the cases given the nonpayment by either party. The district court was required to respect that determination. *Third*, even if the contracts were silent on the fee issue, administrative fees are quintessential "procedural" matters for arbitral bodies, not courts, to decide, as caselaw from the Fifth Circuit and other courts makes clear. Each counterargument offered by the district court or Appellees fails.

A. The arbitration agreements expressly commit the fee issue to the AAA and no court may rewrite the contracts.

A court may not rewrite an arbitration agreement. Here, the district court ruled that it could compel Samsung to pay filing fees. *See* RSA30-36. That ruling rewrites the (alleged) arbitration agreements, which provide that administrative filing fees "shall be determined according to AAA rules." 5-SA1162. The Court should reverse.

1. Courts must enforce arbitration agreements according to their terms.

"Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *BG Group*, 572 U.S. at 33-34. Thus, consistent with the equal-footing principle, *supra* pp. 16-17, courts must enforce every provision delegating an issue to an arbitral body according to its terms. *See Henry Schein*, 139 S. Ct. at 528-29; *Lamps Plus*, 139 S. Ct. at 1415-16. "[A] court possesses no power" to "override the contract" and decide an issue that the parties expressly delegated to an arbitral body. *Henry Schein*, 139 S. Ct. at 529.

2. The district court rewrote the arbitration agreements' terms.

By ordering Samsung to pay administrative filing fees, the Court rewrote the arbitration agreements, violating one of the most fundamental

principles governing arbitration under the FAA. (Solely for purposes of this appeal, Samsung assumes that, *if* Appellees have arbitration agreements with Samsung, *but see supra* pp. 38-46, the agreements are those attached to Appellees' petition. *See, e.g.*, 5-SA1161-63.)

The arbitration agreements provide: "*Administrative*, facility and arbitrator *fees* for arbitrations in which your total damage claims, exclusive of attorney fees and expert witness fees, exceed $5,000.00 ('Large Claim') *shall be determined according to AAA rules*." 5-SA1162 (emphases added). "Administrative fees" include "filing fees." *See* 5-SA1198; *see also* 5-SA1192, 5-SA1202. And each Appellee sought "at least $15,000" in "statutory damages." 5-SA1246. Under the contracts' plain terms, the parties expressly committed administrative-fee issues to the AAA (again, assuming that each Appellee has a valid arbitration agreement with Samsung). Thus, the AAA "shall" decide whether the parties owe administrative fees and, if so, how much they owe and when payment is due. 5-SA1162.

The district court rewrote these "clear and unmistakable" terms, *Henry Schein*, 139 S. Ct. at 530, giving *itself* the authority to determine whether and when Samsung must pay administrative filing fees. *See* RSA30-36. That was error. The parties specified "the rules" governing administrative fees, *Lamps*

Plus, 139 S. Ct. at 1416—the AAA Rules, not judge-made rules. "The parties thus incorporated the AAA Rules into their agreement." *Lifescan*, 363 F.3d at 1012. And the AAA Rules give the AAA full discretion over every aspect of administrative fees. *Supra* pp. 20-21; *see also Lifescan*, 363 F.3d at 1012 (AAA Rules "give[] arbitrators broad discretion to allocate fees and expenses among the parties."). No court may "override" the parties' agreement to commit administrative-fee issues (and discretion over such issues) to the AAA, *Henry Schein*, 139 S. Ct. at 529, because the FAA "rigorously" and "absolutely" protects bargained-for terms of arbitration, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018), and courts must remain "[f]aithful to the statute," *Lifescan*, 363 F.3d at 1012. The district court rewrote the contracts, in violation of established Supreme Court precedent. And, as explained below, the district court's resolution of the question committed to the AAA was the exact opposite of the AAA's resolution of that question.

B. The AAA decided that Samsung was not required to pay fees, and the district court was required to respect that determination because that issue was committed to the AAA.

The AAA acted well within its authority when it decided not to order Samsung to pay the administrative fees. As explained, the contracts committed that authority to the AAA, *supra* pp. 47-49; as discussed below, so do

background arbitration principles, *infra* pp. 53-57. By ordering Samsung to pay those fees, the district court usurped the AAA's authority and overrode its decision.

1. Precedent makes clear that courts must respect the AAA's fee determinations under its rules.

Just as courts "may not override" contractual terms committing issues to an arbitral body, *Henry Schein*, 139 S. Ct. at 529, "courts have no business overruling" an arbitral determination when it is the arbitral body's decisionmaking that the parties "bargained for" and the arbitral body acted within "the scope of [its] contractually delegated authority," *Oxford Health Plans*, 569 U.S. at 569, 573.

The Ninth Circuit's decision in *Lifescan* is instructive. *Lifescan* refused to second-guess the AAA's determination to "suspend[] the proceedings" given the nonpayment of fees *by either party*, because the parties agreed to "leave" "the apportionment of fees" "up to the arbitrators," which acted "well within their discretion" expressly vested in them by the AAA's rules. 363 F.3d at 1011, 1013. The arbitration agreement at issue in *Lifescan*, like the agreements here, "incorporate[d] the rules of the AAA, which … cover[ed] the apportionment of fees" and gave the AAA "discretion" and "flexibility"

to determine whether, when, and how much fees are due. *Id.* at 1013. Indeed, as the Ninth Circuit observed, "the AAA *may* require a deposit as it deems necessary." *Id.* at 1012. That is precisely what the AAA did. It invoiced each party for administrative fees, but one party "could not afford to pay." *Id.* Accordingly, and consistent with its rules, the AAA exercised its discretion "by allowing the arbitration to proceed on the condition that [the other party] advance the remaining fees." *Id.* at 1012-13. The other party "refused," so the AAA "suspended the proceedings." *Id.* at 1011. *Lifescan* honored that discretionary decision, ordering the district court to "dismiss the petition," because the arbitration "proceeded pursuant to the parties' agreement and the rules they incorporated." *Id.* at 1013.

2. The district court erred in compelling arbitration and payment of fees because the parties committed administrative-fee issues to the AAA, and the AAA declined to order payment and closed the cases.

As in *Lifescan*, the parties committed administrative-fee issues to the AAA (assuming each Appellee is bound by an arbitration agreement), and the AAA acted well within its discretion by deciding (a) not to order or otherwise require Samsung to pay the filing fees; (b) to give Appellees the option to advance the unpaid fees; and (c) to close the cases, rather than stay

them, thus triggering the right of either party to sue in the appropriate court for resolution, *supra* pp. 25-26. (Again, as the district court recognized, a putative class of Samsung device owners is currently litigating claims similar to Appellees'. *See* RSA18 (referencing *G.T.*, No. 1:21-cv-4976 (N.D. Ill.)).)

By ruling that Samsung *had* to pay AAA filing fees—a decision that the AAA *did not* make—the district court ignored the AAA's interpretation and application of its own rules. In other words, it improperly second-guessed the AAA's discretion, which is vested in it by the arbitration agreements, *supra* pp. 47-49, and background principles committing administrative fees to arbitral bodies, *infra* pp. 53-57. Again, the arbitration agreements "leave" administrative-fee issues "up to" the AAA, *Lifescan*, 363 F.3d at 1013, and the AAA Rules give the AAA discretion over every aspect of administrative fees, including whether to "apply [the] fee schedule to a particular case," 5-SA1198. The AAA exercised its discretion, administering Appellees' arbitration demands "pursuant to the parties' agreement and the rules they incorporated." *Lifescan*, 363 F.3d at 1013. Because that discretion is precisely what the parties "bargained for," no court may second-guess it. *Oxford Health Plans*, 569 U.S. at 569, 573.

C. Fee disputes are procedural matters for arbitral bodies to decide even when the contract does not expressly say so.

Even if the (alleged) arbitration agreements were silent on the fee issue, the district court's conclusion that *it* could order Samsung to pay filing fees would still be incorrect. Well-reasoned caselaw shows that administrative fees are procedural matters for arbitral bodies to decide, not substantive matters for courts to decide.

1. When a contract is silent on the issue, courts presume that a procedural condition precedent is for the arbitrator, not the court.

When a contract does not specify "whether a particular matter is primarily for arbitrators or for courts to decide," "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *BG Group*, 572 U.S. at 33-35. Put differently, "procedural" arbitrability questions are presumptively for arbitrators, and "substantive" arbitrability questions are presumptively for courts. *Lumbermans*, 623 F.3d at 480-81.

Procedural arbitrability questions come in many forms. They "include claims of 'waiver, delay, or a like defense to arbitrability,'" as well as "the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and

other conditions precedent to an obligation to arbitrate." *BG Group*, 572 U.S. at 35 (quotation marks omitted). For example, this Court has "held that the question of whether an arbitration agreement forbade consolidated arbitration was a procedural one for the arbitrator to answer." *Lumbermans*, 623 F.3d at 481. Substantive arbitrability questions, on the other hand, tend to concern "*whether* there is a contractual duty to arbitrate at all." *BG Group*, 572 U.S. at 35; *see also id.* at 34. For instance, a "court should decide whether an arbitration clause applied to a party who 'had not personally signed' the document containing it." *Id.* at 34.

2. Administrative-fee issues are procedural questions for arbitrators, not courts.

Administrative fees, like filing fees, are conditions precedent to arbitration, meaning they are presumptively committed to arbitral bodies, not courts. Such fees present issues that must be addressed before for the arbitral proceedings begin or continue. Administrative fees are thus "conditions precedent to an obligation to arbitrate." *Id.* at 35. They are "procedural gateway matters" that courts have no authority to address. *Id.* at 34-35 (emphasis omitted). Here, that means only the AAA may decide whether the parties

owe administrative fees and, if so, how much they owe and when payment is due.

Courts within and outside this Circuit agree—administrative fees are conditions precedent to arbitration and thus fall into the "procedural" bucket of issues that must be decided by arbitral bodies, not courts. *See Dealer Computer Services*, 588 F.3d at 887-88; *McClenon v. Postmates Inc.*, 473 F. Supp. 3d 803, 812 (N.D. Ill. 2020); *Croasmun v. Adtalem Global Education, Inc.*, No. 20-cv-1411, 2020 WL 7027726, at *4 (N.D. Ill. Nov. 30, 2020); *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1255 (N.D. Cal. 2019); *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (describing litigation "filing fees" as "procedural requirements").

Take the Fifth Circuit's decision in *Dealer Computer Services*, which also involved the AAA. 588 F.3d at 888-89. The Fifth Circuit held that the trial court erred in ordering a party "to pay its share of the deposit" for the arbitration. *Id.* at 885. The court underscored that "[p]ayment of fees is a procedural condition precedent that the trial court should not review." *Id.* at 887. That is because, the court explained, the AAA has full "discretion" with respect to administrative fees—not only may it direct one party to advance the other party's fees, it also may decide whether to proceed with arbitration

or suspend the arbitration absent full payment. *See id.* at 887-88. Payment of administrative fees thus "determines *when* the contractual duty to arbitrate arises, not *whether* there is [one]." *BG Group*, 572 U.S. at 35.

This Court has cited *Dealer Computer Services* with approval. In *Lumbermens*, the question was whether a party had met a precondition to arbitration, specifically whether it had sufficiently notified the other party about its grievances. 623 F.3d at 477. That issue was "procedural," the court held, because it was "a condition precedent to arbitration," meaning no court had authority to resolve it. *Id.* at 481. To support that holding, *Lumbermens* twice cited *Dealer Computer Services*. *See id.* at 482-83. As *Lumbermens* put it, *Dealer Computer Services* stands for the notion that "payment of fees is [a] question of procedural condition precedent to arbitration that is for [an] arbitrator, not a court, to decide." *Id.* at 482 (parenthetically describing *Dealer Computer Services*, 588 F.3d at 887).

The Third Circuit's decision in *Chesapeake Appalachia* also aligns with *Dealer Computer Services*. *Chesapeake Appalachia* involved the AAA and determined that the arbitral body's rules "do not mention either class arbitration or the question of class arbitrability." 809 F.3d at 762. In reaching that conclusion, the court explained how the AAA rules "address various *procedural*

matters," including "the administrative filing fee" and similar requirements *Id.* (emphasis added). Such preconditions to arbitration, the court said, are "basic procedural issues that … 'the parties would likely expect the arbitrator to decide.'" *Id.*

3. Even if the contracts were silent, the district court erred in compelling arbitration and payment of fees, because the AAA was still authorized to determine that Samsung need not pay fees.

Basic arbitration principles make clear that fee issues are for the AAA to decide even if the contracts did not expressly commit them to the AAA (though the contracts do exactly that, *supra* pp. 47-49). And because the AAA did *not* require Samsung to pay fees and instead closed the arbitrations after Labaton refused to pay, the district court had no power to compel arbitration and payment of fees. *Supra* pp. 49-52.

D. The district court's reasons for deciding the fee issue lack merit, as do Appellees' likely counterarguments.

The district court's reasons for ignoring both the contracts and background law's commitment of fee issues to the AAA fail. Appellees counterarguments likewise lack merit.

1. The district court wrongly concluded that it could decide whether Samsung must pay fees.

The district court acknowledged Samsung's argument that because the AAA Rules are incorporated into the contracts, "the AAA enjoys sole authority to determine" fee issues. RSA30. But it then proceeded to ignore the language of the AAA Rules. Instead, it concluded that because "the parties disagree that they are bound by the Arbitration Agreement to pay the filing fee," the court had to decide that issue. RSA31. That was error. As explained (at 47-49, 53-57), both the AAA Rules incorporated into the contracts and background arbitration principles committed that question to the AAA.

2. The district court wrongly concluded, and Appellees wrongly argue, that the AAA required Samsung to pay the filing fees.

The district court concluded that the AAA ordered Samsung to pay the filing fees, RSA27-28, and Appellees have likewise argued that the AAA ordered or otherwise required Samsung to pay the filing fees, such that the district court simply gave effect to the AAA's judgment. *See* Doc. 24, at 11, 14. The court's and Appellees' reasoning ignores what the AAA actually did.

The AAA invoiced each party for administrative fees. *See* 5-SA1248 (invoice to Appellees); 5-SA1268 (letter invoice to Samsung). In the invoice to

Samsung, the AAA said only that "Samsung is now responsible for payment of the initial administrative filing fees." 5-SA1269. Samsung then informed the AAA that it would pay the fees for the California residents' claims, and that "[p]ursuant to the AAA Rules and procedures, [it] respectfully declines to pay filing fees" for the non-California claimants. 5-SA1273. The AAA acknowledged that Samsung invoked the AAA Rules and "decline[d] to submit [its] portion of the filing fees" for the non-California-residents' claims. *See* 5-SA1275. But as explained, the AAA did not order or otherwise require Samsung to pay those filing fees. It instead recognized that the claimants could advance "Samsung's portion of the filing fees so that the matters may proceed." *Id.* The claimants refused to advance the fees and proceed with arbitration, asking instead for the AAA to stay the proceedings while they petitioned a federal court to order Samsung to arbitrate and pay the fees. *See* 5-SA1278. The AAA, in response, closed the claims given the nonpayment *by either party*, *see* RSA8-9, triggering the right of "either party" to "submit its dispute to the appropriate court for resolution," 5-SA1275.

In short, the AAA administered Appellees' arbitration demands pursuant to the AAA Rules, which the arbitration agreements expressly incorporate, without requiring Samsung to pay the filing fees. *Supra* pp. 49-

52. The AAA exercised its delegated discretion by deciding (a) not to order or otherwise require Samsung to pay the fees; (b) to give Appellees the option to advance the unpaid fees if they wanted to arbitrate; and (c) to close the cases, triggering the right of either party to submit its dispute to the appropriate court for resolution.

The AAA's denial of Appellees' request to stay the arbitral proceedings pending resolution of their petition in federal court confirms that the AAA did not order or otherwise require Samsung to pay filing fees. If, as Appellees claim, the AAA thought that it had ordered or demanded Samsung to pay the fees, then presumably the AAA would have stayed the proceedings rather than close them; that would have been the most logical and efficient solution. Also, the AAA presumably would have indicated, consistent with the AAA Rules, that it would "decline to administer future consumer arbitrations with [Samsung]." 5-SA1197. But the AAA did none of those things. There is thus no basis for concluding that the district court, by ordering Samsung to pay the filing fees, simply gave effect to a prior AAA decision.

3. The district court's reasoning and Appellees' arguments wrongly treat arbitration agreements as unconditional, when the parties bargained for arbitration *under the AAA Rules*.

The district court's reasoning and Appellees' arguments both rest on the notion that the parties entered into unconditional agreements to arbitrate. In the district court's words, for example, "[t]he fees are bound up in the right to arbitrate." RSA35. That view is mistaken.

The arbitration agreements make clear that the parties agreed to arbitrate *pursuant to the AAA Rules*, which can put the parties back in court if the fees go unpaid. That is precisely how the AAA interpreted and applied the AAA Rules. *Supra* pp. 49-52. Appellees may dislike how the AAA exercised its discretion. But as *Dealer Computer Services* explained, their "remedy lies with the [AAA]," not the courts. 588 F.3d at 888. The parties got what they bargained for—an avenue to arbitrate their claims pursuant to the AAA Rules, which give the AAA full discretion over administrative filing fees—and no court may second-guess whether the AAA reasonably exercised that discretion. *Cf. Lifescan*, 363 F.3d at 1011-13. Because the AAA "is entitled to follow its own view about the meaning of [the AAA Rules]," given its full discretion over the Rules, "it need not knuckle under to the district [court's]"

contrary and unauthorized understanding. *Trustmark Insurance Co. v. John Hancock Life Insurance Co. (U.S.A.)*, 631 F.3d 869, 874-75 (7th Cir. 2011). That is especially true given that the courthouse doors remain open whenever fees go unpaid and where the AAA, as a result of the nonpayment *by either party*, chooses not to proceed. *See* 5-SA1174.

4. The district court wrongly thought that respecting the AAA's position creates a Catch-22.

In denying a stay pending appeal, the district court reasoned that not requiring Samsung to pay the filing fees "set[s] up a Catch 22" by allowing Samsung to require arbitration but stymie the arbitrator's ability to do so by not paying the filing fees. 9-SA2432. The flaws in that reasoning are twofold. *First*, the AAA *did* decide the fee issue—claimants could advance the fees, or the arbitrations would be closed. That was the result the parties bargained for by incorporating the AAA Rules, which give the AAA discretion to make exactly that determination in a mass arbitration. *Supra* pp. 49-52. *Second*, the court's reasoning suggests that Appellees and other parties will be unable to pursue their claims on the merits. But that is false. Under the AAA's decision, Appellees can pursue their claims in court. The reason they are not is that Labaton cannot shake Samsung down in federal court, where it cannot

trigger many millions of dollars in recurring, nonrefundable fees with no connection to the merits of the case.

5. The district court erred in ruling that, absent agreement, administrative fees are substantive matters for courts to decide, rather than procedural matters for arbitral bodies to decide.

Absent an agreement on the matter, fee disputes are procedural matters for arbitral bodies to decide. *Supra* pp. 53-57. The district court's contrary ruling is wrong, both doctrinally and conceptually, and its attempt to distinguish the Fifth Circuit's decision in *Dealer Computer Services* based on a supposed minor factual difference fails. This Court should join the Fifth Circuit, not create a circuit split.

a. The district court wrongly reasoned that administrative fees must be substantive given their role in arbitration: "Money is the means of dispute resolution, and the way to start this process." RSA35. The court's recognition that administrative fees *start* the arbitration process confirms that they are "a procedural condition precedent to arbitration." *BG Group*, 572 U.S. at 35. Indeed, the court elsewhere recognized that "[a]rbitration was *conditioned* on the payment of the AAA's assessed fees." RSA27 (emphasis added). Under the district court's own logic, administrative fees determine

"when the arbitration may begin, … not whether it may occur or what its substantive outcome will be on the issues in dispute." *BG Group*, 572 U.S. at 35-36. Administrative fees are therefore "procedural." *Id.* at 35.

The fact that administrative fees may be necessary for arbitration does not change anything. That is because courts presume that parties to "an arbitration agreement implicitly authorize the arbitrator to adopt such *procedures* as are *necessary* to give effect to the … agreement." *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684-85 (2010) (emphases added). Administrative fees may be necessary, but that does not transform them from "basic procedural issues," *Chesapeake Appalachia*, 809 F.3d at 762, to substantive issues. The district court did not cite any authority supporting the notion that issues necessary for arbitration are automatically substantive issues for courts to decide. There is none.

b. While the district court said that *it* cannot "jigger" administrative fees, RSA35, it overlooked the fact that *the AAA* has that discretion. *Supra* pp. 20-21, 49-52; *Lifescan*, 363 F.3d at 1012-13. The AAA's discretion highlights a critical flaw in the district court's logic. If administrative fees are substantive, as the court ruled, then the AAA should *not* decide them. *Lumbermens*, 623 F.3d at 481. But that would turn the AAA Rules on their head,

not only because the Rules expressly commit administrative fees to the AAA, *see supra* pp. 47-49, but also because the Rules specifically address administrative fees, *see, e.g.*, 5-SA1197-1201. Here, the district court tried to split the difference, ruling that Samsung *had* to pay filing fees *now* without addressing *the amount* due. But as *Lumbermens* recognized, "[i]t would be strange to divide these largely overlapping [issues] between the court and the arbitrator." *Lumbermens*, 623 F.3d at 481. There is no basis to treat one matter, like the timing of administrative fees, as substantive and another matter, like the amount of administrative fees, as procedural. The result is that the district court is telling Samsung to pay what the AAA says, even when the AAA says Samsung need not pay.

c. The district court's reasons for departing from established caselaw fail. *See* RSA32-34.

First, the district court appeared to rely on Samsung's ability to pay filing fees to distinguish *Dealer Computer Services*, where the nonpaying party did not. RSA33-34; *see also* RSA32-33 (discussing *Croasmun*, 2020 WL 7027726, at *4, *McClenon*, 473 F. Supp. 3d at 812, and *Adams*, 414 F. Supp. 3d at 1255). That factual nuance makes no difference to the legal principle established by Supreme Court and this Court's precedent: a condition

precedent to arbitration is a procedural matter for arbitral bodies to decide—period. *See BG Group*, 572 U.S. at 34-35; *Lumbermans*, 623 F.3d at 480-82. As the Supreme Court explained, "a 'condition precedent' determines what must happen before 'a contractual duty arises' but does not 'make the *validity* of the contract depend on its happening.'" *BG Group*, 572 U.S. at 35. Just so with administrative fees. That is why *Dealer Computer Services* held, and *Lumbermans* acknowledged, that "payment of fees is [a] question of procedural condition precedent to arbitration that is for [an] arbitrator, not a court, to decide." *Lumbermans*, 623 F.3d at 482 (citing *Dealer Computer Services*, 588 F.3d at 887). The mere happenstance that the nonpaying party in one case has the means to pay does not—indeed, cannot—transform a condition precedent to arbitration into something that affects "whether there is a contractual duty to arbitrate at all." *BG Group*, 572 U.S. at 35 (emphasis omitted). The district court thus erred in thinking that *Dealer Computer Services* can be distinguished on its facts.

Second, the district court appeared to think that the placement of the AAA rules on fees under the headings "Costs of Arbitration" and "AAA Administrative fees," *i.e.*, in "chapters that lack the word 'procedure,'" meant

that the rules could not be procedural. RSA33-34; *see* 5-SA1197-98. That reasoning makes no sense.

Dealer Computer Services did not rely on the chapter headings in ruling that the AAA rules give the AAA full discretion over administrative fees, including their payment (and nonpayment), as "a procedural condition precedent that the trial court should not review." 588 F.3d at 887-88. The Fifth Circuit reached that holding based on what the rules say; because the rules clearly give the AAA full discretion over administrative fees, including their payment (and nonpayment), *id.* at 888, the Fifth Circuit had no reason to think that the chapter headings would somehow affect the substance of the AAA rules.

That makes sense, because chapter headings shed little light on the question whether administrative fees are procedural or substantive. While a heading or "title can inform the meaning of ambiguous text, it is well-settled that it does not 'limit the plain meaning of the text.'" *United States v. Rand*, 482 F.3d 943, 947 (7th Cir. 2007). And when the AAA Rules are read as a whole, it is plain that administrative fees are part of the arbitration *process*, because payment of such fees determines whether the arbitral proceedings may begin or continue.

CONCLUSION

The Court should reverse, because the district court (1) erred in ruling that Appellees met their evidentiary burden to establish that they each had a valid arbitration agreement with Samsung; and (2) erred by resolving the fee dispute.

Dated: November 14, 2023

Respectfully submitted,

/s/ Shay Dvoretzky

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because, as calculated by Microsoft Word, it contains 13,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I also certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Book Antiqua font.

Dated: November 14, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2023, I electronically filed the foregoing brief and the following Required Short Appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 14, 2023

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CIRCUIT RULE 30(d) CERTIFICATION

In accordance with Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rule 30(a) and (b) are included in the Required Short Appendix and the Supplemental Appendix.

Dated: November 14, 2023

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INDEX OF REQUIRED SHORT APPENDIX

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DISTRICT COURT MEMORANDUM OPINION AND ORDER
DIST CT. DOC. 51 (SEPT. 12, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAULA WALLRICH, DANIELLE JONES, GRANT GRINNELL, JEFFREY BURTON, RHONDA MCCALLUM, PROVIDENCIA VILLEGAS, and 49,980 other individuals,	
Petitioners,	**Case No. 22 C 5506**
v.	**Judge Harry D. Leinenweber**
SAMSUNG ELECTRONICS AMERICA, INC. and SAMSUNG ELECTRONICS CO., LTD.,	
Respondents.	

MEMORANDUM OPINION AND ORDER

Petitioners, each Samsung device users, petitioned this Court to compel arbitration against Respondent Samsung (Dkt. No. 1; Dkt. No. 2) upon Samsung's refusal to pay filing fees. Samsung moved to dismiss the petition for improper venue (Dkt. No. 26) and opposed the merits of the petition. For the reasons stated herein, the Court grants in part Samsung's Motion to Dismiss (Dkt. No. 26) by dismissing the action as to the 14,335 Petitioners who have failed to plead proper venue in the Northern District of Illinois, and the Court grants Petitioners' Motion to Compel Arbitration (Dkt. No. 2) by ordering the remaining parties to arbitrate.

I. BACKGROUND

A. Parties

Petitioners are 49,986 Samsung device users who have lived in Illinois. (Pet. To Compel Arb. ("Pet.") ¶¶1, 21, 28, Dkt. No. 1; Pet. M. to Compel Arb. ("MTC"), Dkt. No. 2 at 1.) Respondents are Samsung Electronics America, Inc. ("SEA") and Samsung Electronics Co. Ltd. ("SEC") (collectively, "Samsung"). (Pet. ¶¶22-23.) SEC, a Korean corporation, is the parent company to SEA. (Pet. ¶23.) Samsung designs, manufactures, and sells devices, including smartphones and tablets. (Pet. ¶27.)

B. Terms

By utilizing their Samsung device, each user agreed to several Terms & Conditions ("T&C") established by Samsung. (*See* Samsung's In-Box Terms & Conditions, Pet. Ex. B, Dkt. No. 1-3; Samsung's End User License Agreement ¶16 "¶16. *Arbitration Agreement*," Pet. Ex. C, Dkt. No. 1-4; Samsung Electronics' Terms and Conditions at 6, Pet. Ex. D, Dkt. No 1-5; Samsung's online Terms & Conditions, Pet. Ex. E, Dkt. No. 1-6 (collectively, "terms" or "Arbitration Agreement").) To register a Samsung device, users must provide the company with personally identifiable information such as the user's name and zip code (Petitioners' Opposition to M. to Dismiss ("Opp. MTD"), Dkt. No. 36 at 9); *see* "Create your Samsung account,"

https://account.samsung.com/accounts/v1/MBR/signUp (last accessed July 13, 2023).

Samsung's terms stipulate alternative dispute resolution (ADR) such that "[a]ll disputes with Samsung arising in any way from these terms shall be resolved exclusively through final and binding arbitration and not by a Court or Jury." (Pet. Ex. E at 3; *see* Pet. Ex. C ¶16; Pet. ¶¶2–3.) These terms also prohibit "class action" and "combined or consolidated" disputes, instead mandating solely individual claims. (Pet. Ex. E at 3; Pet. Ex. C ¶16; *see* Pet. ¶3.)

The terms specifically delegates arbitration proceedings to the American Arbitration Association ("AAA"). "The arbitration shall be conducted according to the [AAA] Consumer Arbitration Rules" (Pet. Ex. B at 10; Pet. Ex. C ¶16). Pursuant to the AAA Consumer Arbitration Rules ("Consumer Rules" or "Rules"), an arbitrator is assigned to resolve the claims brought. (Consumer Rules, Dkt. No. 1-7.) The arbitrator is vested with "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (Rule R-14.)

The Rules outline the Association's fee schedule for AAA administrative proceedings. (*See* Rules at 33–40.) Rule R-6 specifies,

> The AAA may require the parties to deposit in advance of any hearings such sums of money as it decides are necessary

> to cover the expense of the arbitration, including the arbitrator's fee, and shall render any unused money at the conclusion of the case.

(*Id.* at 14.) The AAA's fees were in place when Samsung initially adopted its Arbitration Agreement in 2016, and those fees have been reduced in the multiple case filing scenario by the AAA's adoption of its Supplementary Rules for Multiple Case Filings ("Supplementary Rules"), effective August 1, 2021. (Reply MTC at 2; *see also* AAA Supplementary Rules, Response MTC Ex. 2, Dkt. No. 27-2.)

These Supplementary Rules apply when the same or coordinated counsel files 25 or more similar demands against the same respondents. (*See* Supplementary Rules, Dkt. No. 27-2.) Together with the Consumer Rules, the Supplementary Rules anticipate scenarios where either consumers or businesses cannot pay, or decline to pay, their assigned initial administrative fees. (*See id.*) Specifically,

> If administrative fees, arbitrator compensation, and/or expenses have not been paid in full, the AAA may notify the parties in order that one party may advance the required payment within the time specified by the AAA.

(Supplementary Rule MC-10(d).) A party that advances fees may then recover them in the final arbiter award. (R-44(d); *see* Opp. MTC at 6.) If the arbitrator determines that a party's claim was filed "for purposes of harassment or is patently frivolous," she may allocate filing fees to the other party in the final award. (Rule R-44(c).) Additionally,

> If payments due are not made by the date specified in such notice to the parties, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend or terminate those proceedings. . . .

(Supplementary Rule MC-10(e)).

Neither the terms nor the AAA Rules specifically designate the venue for arbitration. The Rules do provide:

> If an in-person hearing is to be held and if the parties do not agree to the locale where the hearing is to be held, the AAA initially will determine the locale of the arbitration. If a party does not agree with the AAA's decision, that party can ask the arbitrator, once appointed, to make a final determination. The locale determination will be made after considering the positions of the parties, the circumstances of the parties and the dispute, and the Consumer Due Process Protocol.

(Rule R-11.) (*Id.*)

C. Dispute

Seeking redress for alleged violations of the Illinois' Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1, *et seq.*, Petitioners filed 50,000 individual arbitration demands before the AAA on September 7, 2022. (Pet. ¶¶ 1, 11, 14 n. 2; *see* Representative Sample of Demand, Pet. Ex. J, Dkt. No. 1-11; MTD, Dkt. No. 26 at 6, 17.) Appended to each petition was the arbitration agreement. (Dkt. No. 35 at 6 (citing 2022.10.31 Letter from AAA to Parties, Reply MTC Ex. A, Dkt. No. 35-1, replicated in Opp. MTC Ex. 14, Dkt. No. 27-14.) On September 27, 2022, the AAA invoiced Petitioners for their share of the initial administrative fees, which Petitioners

thereafter paid. (*Id.*; *see also* AAA Invoice to Claimants, Dkt. No. 1-13; Claimants Payment Confirmation, Dkt. No. 1-14.) On September 27, 2022, Samsung notified the AAA that it would not pay its share of the assessed initial administrative fees for the Illinois claimants because it found the claimant list included discrepancies such as deceased claimants and claimants who were not Illinois residents. (*See* Pet. ¶14, Ex. N, Dkt. Nos. 1, 1-15.) Samsung agreed to pay the fees for fourteen petitioners now living in California, citing California Code of Civil Procedure § 1281 *et seq.,* which provides for sanctions in event of nonpayment. (Pet. ¶14 n. 2; *see* Pet. Ex. N.)

On October 7, 2022, Petitioners, as 49,986 individual claimants, filed in this Court a Petition for an Order to compel Samsung to arbitrate. (*See* Pet.) Petitioners have not sought class certification.

In reviewing the arbitration demands at issue here, the AAA determined both the AAA Rules and the Supplementary Rules apply. (10.12.22 Letter from AAA to Parties, Opp. MTC, Ex. 3, Dkt. No. 27-3.) Pursuant to these rules, the claimants must provide to the AAA a spreadsheet that includes the claimant's name, claimant city, state, zip code, claim date, and locale state. (*See id.; see* Rule R-2; Supplementary Rule MC-2.) Claimants did so. (*See* 10.12.22 Letter.) But, consistent with Samsung's objections a couple weeks prior as to

certain individuals listed, the AAA found the spreadsheet contained "inaccurate/incomplete information." (*Id.*) Thus, the AAA requested a corrected spreadsheet (*id.*), thereafter provided by Petitioners (2022.10.21 Labaton Email, Dkt. No. 27-13 at 1) to the AAA's satisfaction (2022.10.31 AAA Letter, e.g., Dkt. No. 27-14; *see* Amended Claimant Spreadsheet, Exhibit D, Dkt. No. 36-4.) Aside from the 14 California claimants, 14,334 claimants listed as their claimant city an Illinois town in the Central or Southern districts of Illinois, one individual listed Brooklyn, New York, and the remainder listed a locale within the Northern District of Illinois. (*Id.*; MTD.)

The AAA issued its administrative determination on October 31, 2022, that "claimants have now met the AAA's administrative filing requirements on each of the 50,000 cases filed," and that "Samsung is now responsible for payment of the initial administrative filing fees totaling $4,125,000.00." (10.31.22 AAA Letter, Dkt. Nos. 27-14; 35-1.) On November 8, 2022, Samsung again declined to pay the initial fees. (Dkt. No. 27-15.) On November 14, the AAA notified the parties: "Based on the claimants' and Samsung's statements declining to pay Samsung's portion of the filing fees for the non-California cases, unless we hear otherwise prior to November 16, 2022, the AAA will close all non-California cases." (Dkt. No. 27-16.) On November 17, 2022, Petitioners again declined to pay Samsung's fees.

(Dkt. No. 27-17.) On November 30, 2022, the AAA notified the parties that it had administratively closed those 49,986 claims. (Dkt. No. 27-19.) Since the AAA required the payment of initial fees to proceed, the AAA neither assigned an arbitrator to the claims, nor designated a locale for arbitration. (*See* Supplementary Rule MC-10(a); Rule R-11; *see also* Opp. MTD at 1-2; Reply MTD at 8-9.)

II. LEGAL STANDARD

The Court considers the parties' arguments as demanded by the respective standards.

A. Subject Matter Jurisdiction

A federal court must have subject matter jurisdiction to adjudicate any claim brought before it. *Mathis v. Metro. Life Ins. Co.*, 12 F.4th 658, 663 (7th Cir. 2021). Subject matter jurisdiction cannot be waived, and if the Court determines at any point that it lacks subject matter jurisdiction over the matter, it must dismiss the action. FED. R. CIV. P. 12(h)(3).

B. Motion to Dismiss for Improper Venue

Pursuant to Federal Rule of Procedure 12(b)(3), this Court reviews the motion to dismiss for improper venue by "construing all facts and drawing reasonable inferences in favor of the plaintiff." *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 806 (7th Cir. 2011); *see also* FED. R. CIV. P. 12(b)(3). The Court may consider

facts beyond the pleadings in its venue analysis. *Cont'l Cas. Co. v. Am. Nat'l Ins. Co.,* 417 F.3d 727, 733 (7th Cir. 2005).

C. Motion to Compel Arbitration

The FAA allows that a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that . . . arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Thus, "arbitration should be compelled if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate." *Scheurer v. Fromm Family Foods LLC,* 863 F.3d 748, 752 (7th Cir. 2017) (citing *Zurich Am. Ins. Co. v. Watts Indus., Inc.,* 417 F.3d 682, 687 (7th Cir. 2005)).

Courts in this Circuit apply an evidentiary standard akin to that articulated in Federal Rule of Civil Procedure 56(e) for summary judgment when determining whether the parties agreed to arbitrate. *Tinder v. Pinkerton Sec.,* 305 F.3d 728, 735 (7th Cir. 2002). Thus, if the party seeking arbitration offers evidence sufficient to find the parties' agreement to arbitrate, the opposing party must demonstrate a "genuine dispute of material fact regarding whether the parties agreed to arbitrate in the first place," *Kass v. PayPal Inc.,* 2023 WL 4782930, at *5 (7th Cir. July 27, 2023). The opposing

party cannot "generally deny[] facts" but must identify specific evidence in the record to support its argument. *Tinder,* 305 F.3d at 735. A court may not rule on either the potential merits of the underlying claim or its arbitrability when these determinations are assigned by contract to an arbitrator, even if a court perceives frivolity. *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S.Ct. 524, 530 (2019); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 649-50 (2011).

III. DISCUSSION

A. Subject Matter Jurisdiction

In their petition, Petitioners attribute this Court's subject matter jurisdiction to the federal question of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.,* pursuant to federal jurisdictional statutes, 28 U.S.C. §§ 1331 and 1367. It is not so simple.

In 1925, Congress enacted the FAA "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006), and to declare "'a national policy favoring arbitration' of claims that parties contract to settle in that manner," *Preston v. Ferrer,* 552 U.S. 346, 353 (2008) (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984)). Pursuant to Section 4 of the FAA, aggrieved parties "may petition any United States district court which, save for such agreement, would have

jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

Still, the Act remains "'something of an anomaly in the field of federal-court jurisdiction' in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis." *Hall St. Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 581–82 (2008) (quoting *Moses H. Cone,* 460 U.S. at 25, n. 32); *see also Badgerow v. Walters,* 142 S.Ct. 1310, 1314 (2022). An "independent jurisdictional basis" may derive from the underlying controversy. *Vaden v. Discover Bank,* 556 U.S. 49, 62, (2009)). Section 4 "instructs a federal court to 'look through' the petition to the 'underlying substantive controversy' between the parties—even though that controversy is not before the court. *Badgerow,* 142 S.Ct. 1310, 1314 (quoting *Vaden,* 556 U.S. at 62). Arbitration agreements, like this one, often involve only questions of state law. *See id.* at 1326 (Breyer, J., dissenting). Here, the action is predicated under Illinois state law, i.e., the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/15(b). Therefore, Petitioners' claim of subject matter jurisdiction by means of a federal question remains improper.

Nevertheless, Respondents concede a different jurisdictional basis still rooted in the FAA itself, citing *Vaden,* 556 U.S. at 59

n.9 (2009) and sections 202 and 203 of the FAA, "because . . . the arbitration agreement is not 'entirely between citizens of the United States'" as Respondent SEC is a South Korean corporation. (MTD, Dkt. No. 26 at 9-10 (quoting 9 U.S.C. § 202); *see* Pet. ¶23.) The Court agrees that there is jurisdiction under Chapter 2.

In 1970, the United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, (Convention), which Congress codified by implementing Chapter 2 of the FAA, as expressed in section 201 of the FAA. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* 140 S.Ct. 1637, 1644 (2020) ("*GE France*") (citing 84 Stat. 962 and 9 U.S.C. §§ 201–208). "Chapter 2 . . . empowers [federal] courts to compel arbitration" over actions falling under the Convention. *GE France,* 140 S.Ct. at 1644 (citing § 206 and Convention Article II(3)); *see* 9 U.S.C. § 202. An agreement "fall[s] under the Convention" when it is commercial in nature and a party is foreign. 9 U.S.C. § 202. Chapter 2 also states, "'Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention.'" *Id.* (quoting § 208).

Therefore, although Petitioners bring the action to compel arbitration under Section 4 in Chapter 1 of the statute, this Court maintains its subject matter jurisdiction through Chapter 2 to compel

arbitration of this commercial arbitration agreement with a foreign party.

B. Venue

Chapter 2, section 204 of the FAA contains its venue provision, which "supplement[s], but do[es] not supplant the general [venue] provision, [28 U.S.C. § 1391]." *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.,* 529 U.S. 193, 198 (2000); *see also Day v. Orrick, Herrington & Sutcliffe, LLP,* 42 F.4th 1131, 1141 (9th Cir. 2022) (Section 204 is a "permissive, supplemental venue provision in addition to the general venue provision, 28 U.S.C. § 1391."). Samsung seeks to dismiss on grounds that neither provision affords venue to this action. Petitioner argues that venue is proper under both statutes. The Court considers each path.

1. FAA Venue Provision, 9 U.S.C. § 204

Under section 204 of the FAA, a court exercising jurisdiction under section 203 is a proper venue for an action where (1) "save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought," or (2) "the district . . . embraces the place designated in the agreement as the place of arbitration." 9 U.S.C. § 204.

As discussed, *supra*, Petitioners cannot establish the first option for venue under section 204 of the FAA because the arbitration agreement itself *is* the source of subject matter jurisdiction. Absent

an agreement subject to the Convention, this Court would not have jurisdiction on the underlying BIPA issue. This leaves the second option. Petitioners claim, "[v]enue is proper in this District because . . . the arbitrations were venued to take place in this District." (Pet. ¶26.) However, the numerous exhibits to this action do not show as much. Rather than designating a place of arbitration, Samsung's Arbitration Agreement simply incorporates the AAA Rules. Rule R-11 provides that if the parties do not agree to the locale for a hearing, the appointed arbitrator will determine the venue after considering the positions of the parties, dispute, and AAA due process protocol. The AAA did not appoint an arbitrator, nor determine venue of any arbitration before closing its proceedings.

For these reasons, venue does not lie in this District pursuant to the FAA.

2. General Venue Statute, 28 U.S.C. § 1391

Petitioners alternatively seek to establish venue under the general venue statute, 28 U.S.C. § 1391, through § 1391(b)(2), which affords venue to "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b).

Petitioners claim that venue lies here "because many of the Petitioners live in this District" (Pet. ¶26), and the claimants' use of their Samsung Devices in this district evidence a "substantial

part of the events giving rise" to Petitioners' claims occurring here. (Opp. MTD, Dkt. No. 36 at 29). Petitioners assert via exhibits that its 49,985 claimants are Illinois residents, approximately 35,651 of whom reside within the Northern District of Illinois. (*See* Pet. Ex. A, Dkt. No. 1-1; Pet. Opp. MTD Ex. D, Dkt. No. 36-4.) Samsung argues that because Petitioners' Exhibit D does not provide the names associated with these claims, Petitioners failed to identify the claimants as necessary for Samsung to form a defense. Petitioners retort that Samsung has these names, which are listed in the otherwise identical spreadsheet provided to the AAA. Petitioners suggest that they omitted the names in the case filing to preserve these claimants' privacy during the litigation. (*See* Opp. MTD, Dkt. No. 36 at 22 n. 6.) Petitioners argue that when coupled with the identifying information Samsung obtains from its users upon users' registration or account creation, these cross-references offer sufficient evidence for Samsung to identify each claimant during arbitration. The Court agrees.

Samsung next argues, "[t]o the extent that Petitioners seek to use their place of residence as a proxy . . . to satisfy the 'substantial events' provisions of Section 1391 in this District, Petitioners fail to provide sufficient evidence of each Petitioner's residence" (MTD at 15), and "[Petitioners'] speculation that all Petitioners may have used their devices while residing in and

traveling throughout this District is mere guesswork" (MTD Reply, Dkt. No. 38 at 22 (citations omitted)). It is true that a plaintiff's residence alone fails to satisfy § 1391's requirements. *Ford-Reyes v. Progressive Funeral Home,* 418 F.Supp. 3d 286, 290 (N.D. Ill. 2019). Instead, this Court looks to events that constitute part of the historical predicate of Plaintiffs' suit. *See Johnson v. Creighton Univ.,* 114 F.Supp. 3d 688, 696 (N.D. Ill. 2015).

The historical predicate to Petitioner's petition for compelled arbitration includes the formation of a contract to arbitrate (upon the Petitioner's assent to Samsung's Arbitration Agreement when, *e.g.,* purchasing or activating their Samsung Device), the alleged violations that occurred during Petitioners' foreseeable use of the device, and Samsung's actions rejecting arbitration. Petitioners adequately showed that the formation of the contract and the alleged violations took place, foreseeably, in the Northern District of Illinois for most Petitioners. The Court takes judicial notice of today's norm that smartphone users use their smartphone where they live and travel and likely purchased it nearby. Drawing all reasonable inferences from Petition Exhibit D, its cross-references, and Petitioners' assertions that each claimant used their Samsung Device within the Northern District of Illinois (usage which motivated their individual arbitration claims, and by extension, the petition in this court), the approximately 35,651 Petitioners

residing in this district have established that this is the proper venue for their motion to compel arbitration.

Not so, however, for the 14,335 Petitioners who admittedly do not reside in this district. Petitioners fail to explain the connection between the Northern District of Illinois and the Illinois residents living outside it. Illinois is a sizeable state. For example, ten claimants list as their residence Dongola, Illinois, a town located nearly 350 miles from this Courthouse. Although Petitioners correctly point out that a "substantial part" does not require a majority and that "substantial part[s]" of the same claim can occur in multiple districts, *see Receivership Mgmt. v. AEU Holdings,* 2019 WL 4189466, at *14 (N.D. Ill. 2019), the Court recognizes no presumption that every Illinois resident conducts a substantial part – or any part – of their life in Chicagoland or this district more broadly. Thus, for those 14,335 individuals, even after drawing all reasonable inferences, Petitioners have failed to allege sufficiently that a "substantial part of the events" giving rise to the present dispute occurred in this district. § 1391(b)(2).

Petitioners argue that because Samsung admitted that this District was the proper venue in the BIPA class-action suit against Samsung in the Northern District, *G.T. v. Samsung Electronics America, Inc.,* No. 1:21-cv-04976, ECF No. 17, Samsung cannot now argue to the contrary in this suit. *See* Opp. MTD at 31. But, as

Petitioners appear to acknowledge, the claimants in this action are not necessarily party to the other one. *See* Reply MTC at 14 ("Samsung cannot simply refuse to pay its fees in hopes of ushering Petitioners into the *G.T.* class action," implying the Plaintiffs in these two cases are not identical). Petitioners offered no authority to support their claim that a finding of proper venue in one case transfers. Nor will they find validation from this Court today. Therefore, for the approximately 14,355 non-residents of this District, Petitioners have failed to allege sufficient facts to determine that this is the proper venue for their suits.

Thus, this Court infers that for the 35,651 claimants who alleged residence within the Northern District of Illinois, a substantial part of the events giving rise to this dispute occurred in this District. Therefore, Petitioners have sufficiently established that venue lies in this district for their breach of arbitration agreement claims. The petitions as to these remaining non-resident claimants are dismissed without prejudice for improper venue.

C. Compel Arbitration

Before the Court considers whether to compel arbitration, the Court will explain why it can. After determining that the case warrants such an order, the Court considers whether to explicitly order the payment of fees.

Samsung declares that the Court may not compel arbitration (including its fees) because Petitioners are now entitled to proceed in Court from where Petitioners might attain an adequate remedy at law. The authorities Samsung cites, address different forms of relief than that sought here. *See United States v. Rural Elec. Convenience Co-op. Co.,* 922 F.2d 429, 432 (7th Cir. 1991) (preliminary injunction); *Unilectric, Inc. v. Holwin Corp.,* 243 F.2d 393, 396 (7th Cir. 1957) (royalties); *King Mechanism & Eng'g Co. v. W. Wheeled Scraper Co.,* 59 F.2d 546, 548 (7th Cir. 1932) (patent infringement). Because the FAA empowers this Court to compel arbitration, Samsung's arguments against specific performance remain inconsistent with the statute.

Samsung alternatively argues that this action should not continue in court. Because the AAA applied its established rules to this matter, Samsung's theory goes, the Court lacks authority to "second-guess that determination and order [the AAA] to re-open the proceedings." (Reply MTD at 8-9.) Not quite. *See McClenon v. Postmates Inc.,* 473 F.Supp. 3d 803, 812 (N.D. Ill. 2020) (granting motion to compel arbitration after the AAA had closed the cases upon failure of parties to pay the required fees). Samsung's Arbitration Agreement requires dispute resolution "exclusively through final and binding arbitration, and not by a court or jury." (*See* Pet. Ex. E,

Dkt. No. 1-6 at 3.) But no "final and binding" arbitration has been had here.

The cases upon which Samsung relies are distinguishable. For instance, the Fifth Circuit in *Noble Cap Fund Mgmt., L.L.C. v. US Cap. Glob. Inv. Mgmt., L.L.C.,* 31 F.4th 333, 336 (5th Cir. 2022), affirmed a district court's denial of a motion to compel arbitration where the claim had been terminated for failure to pay arbitral fees, because "[e]ven though the arbitration did not reach the final merits and was instead terminated because of a party's failure to pay its JAMS [the ADR provider] fees, the parties still exercised their contractual right to arbitrate prior to judicial resolution in accordance with the terms of their agreements." *Id.* In *Noble,* both parties had met the association's prerequisites to proceed with the arbitration, and the assigned arbitrator had already entered an Emergency Arbitrator's Award after a hearing on the merits. *Id.* at 335. It was only after the arbitration's sustaining fees went unpaid that the arbitration "officially closed." *Id.* Here, the AAA proceedings did not get that far. The cases were administratively closed on November 30, 2022, having not moved beyond the AAA's determination the claims could proceed. An arbitrator was never assigned to their dispute. Thus, our granting the motion to compel arbitration does not "second-guess" any merits determination. It simply returns the matter to the AAA so it may issue one.

The Court will now assess the Motion to Compel on the merits.

1. Valid Agreement to Arbitrate

The Court may only compel arbitration when the written arbitration agreement is enforceable. 9 U.S.C. § 2; *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4); *see GE France,* 140 S.Ct. at 1645 (citing Convention Article II(3)); *see also* Convention Article II(1).

Petitioners claim to be Samsung device users who agreed to Samsung's drafted Arbitration Agreement. To contend Plaintiff has not met their burden to show a valid agreement to arbitrate, Samsung cites cases where the moving party failed to show the existence of *an* agreement. That is not the issue here. It remains undisputed that the arbitration agreement is written and enforceable against the parties that accede to it. Samsung's strongest argument here is that Petitioners failed to show that *each* one entered into this agreement.

In *Bigger v. Facebook, Inc.,* 947 F.3d 1043, 1051 (7th Cir. 2020), the Seventh Circuit reviewed this Court's grant of class certification when Facebook opposed the issuance of notice on the grounds that its employees entered arbitration agreements that prohibited class actions. *Id.* To support this argument, Facebook provided a template of the agreement and estimates of how many employees signed such forms. *Id.* It did not supply actual executed documents. *Id.* The Seventh Circuit directed this Court to permit the

parties to submit additional evidence on the agreements' existence and validity. *Id.* at 1050.

Here, the Court has more information. There is a discrete list of named Petitioners. The AAA has already reviewed Petitioners' arbitration agreements and determined that they met the filing requirements. The terms do not require signature for execution (see Pet. Opp. MTD, Dkt. No. 36 at 9); elsewhere, Samsung acknowledged that each Samsung device holder accepted Samsung's terms and conditions containing the arbitration clause when using their Samsung device. *See G.T. v. Samsung Electronics America, Inc.,* No. 1:21-cv-04976, ECF No. 17 at 10. As discussed *supra,* the Court finds Petitioners have made a sufficient showing that they are customers. In light of the record, the Court finds a valid agreement to arbitrate between Samsung and the Petitioners who are customers.

To find that each Petitioner residing in this District is a Samsung customer, the Court must accept the word of over 30,000 individuals, some of whom may have been recruited to this action by obscure social media ads. (*See* Dkt. Nos. 27-7—27-10.) Samsung has not identified a genuine issue of fact as to any individual Petitioner. *Kass,* 2023 WL 4782930, at *5. Samsung has a customer list, against which they could compare the list of Petitioners. Samsung raised concerns about specific names to the AAA, which in turn asked Petitioners to correct their list. Petitioners did so,

and the record does not show that Samsung has raised specific concerns since. Samsung's current rejection that all Petitioners are customers is merely "denying facts," and this is not enough. *Tinder,* 305 F.3d at 735 ("Just as in summary judgment proceedings, a party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests; the party must identify specific evidence in the record demonstrating a material factual dispute for trial."); *see* FED. R. CIV. P. 56(e).

Moreover, the inquiry for purposes of providing notice involves different interests than those of whether to compel arbitration. In *Bigger,* the Court explained the inconveniences associated with providing notice of a class to many people who could eventually be found ineligible due to an arbitration agreement. 947 F.3d at 1050–51. Here, the claimants, as parties to the case, are already aware of it.

Therefore, the Court finds a valid agreement to arbitrate.

2. Dispute within the Scope of the Arbitration Agreement

Once the court finds a valid agreement to arbitrate, the party opposing arbitration has the burden to show that the dispute falls outside the scope of the agreement. *Hoenig v. Karl Knauz Motors.,* 983 F.Supp. 2d 952, 962 (N.D. Ill. 2013) (citing *Shearson/Am. Express, Inc. v. McMahon,* 482 U.S. 220, 226–27 (1987)). Still, when parties clearly and unmistakably delegate threshold arbitrability

questions to an arbitrator, a court "possesses no power to decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S.Ct. 524, 530 (2019). The Court assesses the parties' arbitration agreement under Illinois law to determine whether there exists an enforceable delegation clause. *See Gupta v. Morgan Stanley Smith Barney, LLC,* 934 F. 3d 705, 711 (7th Cir. 2019).

Petitioners argue, and Samsung does not meaningfully dispute, that through text such as, "The arbitrator shall decide all issues of interpretation and application of this Agreement" (Pet. Exs. B-E), Samsung's arbitration agreement delegates questions regarding its scope to an arbitrator. The Court agrees with this interpretation of the plain language. *See Rent-A-Ctr., W., Inc. v. Jackson,* 561 U.S. 63, 66, 72 (2010) (holding that language, "Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement" constituted a clear and unmistakable delegation of arbitrability questions to the arbitrator). Additionally, many courts have held that reference to or incorporation of AAA rules – which the agreement here references – constitutes clear and unmistakable evidence to delegate arbitrability to an arbitrator. *See Tel. Invs. USA, Inc. v. Lumen Techs., Inc.,* 2022 WL 2828751, at *4 (N.D. Ill. July 20, 2022) (collecting cases).

Samsung argues that petitioning on behalf of nearly 50,000 petitioners violates the Arbitration Agreement's collective action waiver. Whether the mass filings are indeed appropriate under the arbitration agreement in light of its class action waiver provision is clearly a question of scope. Thus, because the parties both agreed to delegate enforceability questions to the arbitrator and incorporated the AAA rules in the arbitration agreement, the question of whether Petitioners' mass filings violate the Arbitration Agreement remains for an arbitrator, not this Court. *See Henry Schein,* 139 S.Ct. at 530; *see also McClenon,* 473 F.Supp. 3d at 811–12.

The question of arbitrability of Petitioners' underlying BIPA claims reaches the same result. Samsung insinuates that Petitioner's claims are frivolous and for that reason Samsung should be entitled to evade arbitration. The U.S. Supreme Court said otherwise: "[The FAA] contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text." *Henry Schein,* 139 S. Ct. at 530.

Therefore, the Court resolves this element in favor of arbitration.

3. Refusal to Arbitrate

The Court now turns to whether Samsung's refusal to pay the AAA's fees for each individual claimant constitutes a breach of its

own arbitration agreement. Determining that it does, the Court then considers whether its order to compel arbitration should specify fee payment.

Under the FAA, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," in the event of "failure, neglect, or refusal" of the non-moving party to arbitrate. 9 U.S.C.A. § 4.

Samsung sets forth interweaving arguments: Samsung's refusal to pay fees was not a breach; Petitioners waived their right to arbitrate thus relieving Samsung of responsibility; and the AAA enjoys sole authority to determine a resolution regarding fees. Petitioners argue that Samsung's failure to pay constitutes a breach that this Court must remedy by ordering Samsung to take effective action to arbitrate.

Samsung asserts that it "declined to pay the arbitral fees but stood ready to arbitrate." (Reply MTD at 4.) That is a contradictory position. Arbitration was conditioned on the payment of the AAA's assessed fees, per Samsung's own Arbitration Agreement. The AAA's Consumer Rules establish that "the AAA may *require* the parties to deposit in advance of any hearings such sums of money as it decides are necessary to cover the expense of the arbitration," (Rule R-6 (emphasis added)), and the AAA did this. (*See* ex. 27-14 ("Samsung is

now *responsible for* payment of the initial administrative filing fees totaling $4,125,000.00") (emphasis added).)

Samsung retorts that because the AAA rules anticipated non-payment, *see e.g.,* Supplementary Rule 10(d), Samsung's actions were acceptable. But the fact that Petitioners had the option to pay Samsung's fees does not negate the reality that those fees were deemed Samsung's responsibility by the AAA. A rule's mere anticipation of violations thereof does not render violations permissible. If so, this justice system in which we operate would make a lot less sense.

Samsung goes on to argue that Petitioners had a choice "between (i) advancing the filing fees and seeking to recoup them in the arbitration and (ii) permitting the arbitral cases to be closed and proceeding in court," and because they failed to pay Samsung's fees, Petitioners' waived their right to compel arbitration. (Reply MTD, Dkt. No. 38 at 15.) Samsung thus concludes that Petitioners "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right." *Morgan v. Sundance, Inc.,* 142 S.Ct. 1708, 1714 (2022).

The Court disagrees. In *Morgan,* the defendants litigated in court for nearly eight months after the suit's filing before moving to stay the litigation and compel arbitration. *Id.* at 1711. Here, Petitioners immediately moved to compel arbitration when Samsung

expressed its refusal to pay the fees. This is after Petitioners had sent Samsung notices of intent to arbitrate, filed complaints in the forum agreed upon by the Arbitration Agreement, and satisfied their AAA-dictated financial responsibilities by paying their own filing fees.

Samsung's reference to *Cota v. Art Brand Studios, LLC,* 21-cv-1519 (LJL), 2021 U.S. Dist. LEXIS 199325, at *46 (S.D.N.Y. Oct. 15, 2021), also misses the mark. In *Cota,* the district court denied the defendant art studio company's motion to compel arbitration after the defendants refused to pay AAA arbitration fees for the plaintiff artists. *Id.* But in that case, both parties consistently paid the AAA's initial fees to allow the claims to be heard by the arbitrator panel. *Id.* at 14. Only after receiving significantly larger invoices for subsequent final fees, the plaintiffs notified the AAA they were unable to pay due to financial hardship, then the AAA offered to the defendants the option to cover those costs to keep the arbitration alive. *Id.* at 27. But here, Samsung declined to pay its share of the arbitration fees, not because of financial hardship, but because of its own independent determination of deficiencies within Petitioners' claims, even after Petitioners corrected them to AAA's satisfaction. Samsung also declined to pay the fees from the beginning, unlike the party in *Cota* that initially paid the fees in a showing of good faith.

Given the AAA's own determination that the claimants met the AAA's administrative filing requirements and Petitioners' own compliance with its filing and financial requirements based on the AAA's rules and procedures, Petitioners' refusal to meet Samsung's financial obligations does not constitute a waiver to compel arbitration. Plaintiff's conduct has consistently aligned with their right to arbitrate. At least, Defendant has not shown otherwise.

4. Fees

Finally, the Court turns to whether to compel Samsung to pay fees. Other courts have observed "no totally satisfactory solution" to a party's nonpayment of its share of arbitration fees. *Lifescan,* 363 F.3d at 1013.

Samsung argues that because the AAA's rules include provisions regarding the payment of fees, and the parties elected to grant the AAA discretionary authority regarding the implementation of those rules, the AAA enjoys sole authority to determine a resolution to Samsung's shirked fee responsibilities. In other words, the Court should treat this like it treated the class action waiver.

In *Howsam v. Dean Witter Reynolds, Inc.,* the Supreme Court distinguished between procedural and substantive questions of arbitrability. 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide.") The Court

concluded that the ADR tribunal's time-bar rule was akin to a "waiver, delay, or a like defense" and was thus procedural, for an arbitrator. *Id.* at 85 (cleaned up). The *Howsam* Court looked to comments to the Revised Uniform Arbitration Act ("RUAA"), modeled to incorporate FAA jurisprudence, providing, " 'in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, *i.e.,* whether prerequisites such as *time limits,* notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.' " *Id.,* (quoting RUAA § 6, comment 2, 7 U.L.A., at 13 (emphasis in *Howsam*). Here, the parties disagree that they are bound by the Arbitration Agreement to pay the filing fee, therefore, it is for this Court to decide "whether the parties are bound" to do so. *Id.* at 84.

Indeed, the filing fee is more substantial than a time limit. The AAA, commonsensically, requires fees to perform its services. The AAA can validly refuse to conduct arbitrations without payment, as it did here. To expect it to perform its arbitral services regarding payment without payment places undue burden on a non-breaching party, either the AAA or the claimants, to front the costs. If this Court merely orders arbitration but not the payment of fees, the AAA might seek payment from Petitioners with the expectation that Petitioners will invoice Samsung for this payment. (See Rule R-

2 (a)(3), Dkt. No. 1-7.) For what it is worth, the Court understands that Samsung – who has argued neither inability to pay nor unconscionability – can also recoup its fees if Petitioners' claims are as "harass[ing]" or "frivolous" as it contends (see Rule R-44 (c)), but the Court has not been convinced that Petitioners are able to lend over $4,000,000 while the dispute pends.

The Court also remains unpersuaded by courts that have compelled arbitration yet declined to extend the ruling to payment of arbitration fees in distinguishable cases. In *Croasmun v. Adtalem Glob. Educ., Inc.,* Judge Lefkow declined to compel arbitral fees upon finding "no indication that JAMS [the arbitration tribunal] will not resolve the fees issue if asked." 2020 WL 7027726, at *4 (N.D. Ill. Nov. 30, 2020). However, the court invited the parties to "return to this court for resolution" if JAMS declined to arbitrate without the payment of fees, explaining that the petitioners "should not face checkmate." *Id.*

A few months earlier, in *McClenon v. Postmates Inc.,* 473 F.Supp. 3d 803, 812 (N.D. Ill. 2020), Judge Rowland granted the petitioners' motion to compel after the AAA closed the claims for Postmates' failure to pay fees. Yet, she stopped short of ordering Postmates to pay all fees, citing an on-going case against the same defendant in California, *Adams v. Postmates, Inc.,* 414 F.Supp. 3d 1246, 1255 (N.D.

Cal. 2019), and *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 887 (5th Cir. 2009).

In *Dealer Computer*, 588 F.3d at 887, cited approvingly by *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 482 (7th Cir. 2010), the Fifth Circuit reversed a district court's order of payment of arbitral fees where the respondent appeared unable to pay them, while the petitioner had the means. *Dealer Computer Servs.*, 588 F.3d at 888 n.3. The court explained,

> A difficult situation might be presented if [the respondent] could afford to put up its part of the arbitral fee attributable to its counterclaim, and [the petitioner] was not financially able to put up the entire thus enhanced fee (although being able to put up what the fee would have been without such enhancement), and the arbitral panel refused [the petitioner's] request to proceed on its claims . . . However, we are not faced with any such case.

Id. This Court faces such a case.

In any event, when the Fifth Circuit in *Dealer Computer* observed, "payment of fees seems to be a procedural condition precedent set by the AAA," it looked to AAA Rules R-52 and R-54, which fall under the "General Procedural Rules" chapter of the Consumer Rules. *Id.* at 887. The Rules, since updated, still list Rules R-52 and R-54 within the "General Procedural Rules" chapter. Rule R-52 now is titled, "Serving of Notice and AAA and Arbitrator Communications," and Rule R-54 is "Remedies for Nonpayment." (*See* AAA Rules, Dkt. No. 1-7.) The rules for payment of fees themselves are contained in other chapters that lack the word "procedure."

(*Compare* "Cost of Arbitration" and "AAA Administrative Fees" *with* "Hearing Procedures" and "Procedures for the Resolution of Disputes through Document Submission," AAA Rules, Dkt. No. 1-7.)

Nevertheless, the determination of "procedural" is "difficult." *See Romspen Mortg. Ltd. P'ship v. BGC Holdings LLC - Arlington Place One,* 20 F.4th 359, 369 (7th Cir. 2021). Federal courts adjudicating claims through pendant jurisdiction classify as substantive rather than procedural issues that are bound up in the rights of the forum. *See USA Gymnastics v. Liberty Ins. Underwriters, Inc.,* 46 F.4th 571, 580 (7th Cir. 2022); *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938) (and its progeny). For example, attorney's fees are typically substantive. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 259 (1975). On the other hand, federal procedural rules obliging an answer to a complaint dictate that a party who "defaults" on their defense faces a detriment; but allowing "default" by unpaid fees here might well benefit Samsung. *See* Alexi Pfeffer-Gillett, *Unfair by Default: Arbitration's Reverse Default Judgment Problem*, 171 U. PA. L. REV. 459, 488 (2023). If anything, allowing that to stand would be making special procedural rules for arbitration – which the courts cannot do. *Morgan v. Sundance, Inc.,* 142 S.Ct. 1708, 1713 (2022).

Whether from the perspective of the judiciary or through the lens of the AAA, this Court does not see filing fees as procedural

in this case. The fees are bound up in the right to arbitrate that the ADR tribunal governs. Unlike the time limit rule in *Howsman* that delineates when parties can arbitrate or the collective action provision that might instruct how, the filing fee rule affects whether the parties can exercise their right to arbitrate at all. Money is the means of dispute resolution, and the way to start this process. Fees are not something the Court can "jigger" to promote or disfavor arbitration. *Johnson v. Mitek Sys., Inc.,* 55 F.4th 1122, 1124 (7th Cir. 2022). If it could, it might suggest a more modest figure.

Samsung was surely thinking about money when it wrote its Terms & Conditions. The company may not have expected so many would seek arbitration against it, but neither should it be allowed to "blanch[] at the cost of the filing fees it agreed to pay in the arbitration clause." *Abernathy v. Doordash, Inc.,* 438 F.Supp. 3d 1062, 1068 (N.D. Cal. 2020) (describing the company's refusal to pay fees associated with its own-drafted arbitration clause as "hypocrisy" and "irony upon irony").

Alas, Samsung was hoist with its own petard. *See Nat'l Ass'n of Regul. Util. Comm'rs v. U.S. Dep't of Energy,* 736 F.3d 517, 520 (D.C. Cir. 2013); William Shakespeare, *Hamlet,* Act III, Scene 4. As a New York court recently stated in a mass arbitration case involving Uber, "While Uber is trying to avoid paying the arbitration fees associated

with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision." *Uber Tech., Inc. v. American Arbitration Assn., Inc.,* 204 A.D.3d 506, 510 (N.Y. App. Div. 2022). Samsung made the same business decision here, and for better or for worse, the time calls for Samsung to pay for it.

IV. CONCLUSION

For the reasons stated herein, the Court grants in part Samsung's Motion to Dismiss (Dkt. No. 26) by dismissing the action as to the 14,335 Petitioners who have failed to allege proper venue in the Northern District of Illinois. The Court grants Petitioner's Motion to Compel Arbitration (Dkt. No. 2) by ordering the parties to arbitrate, specifically ordering Samsung to pay its fee so they can.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: 9/12/2023

Exhibit 7

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.

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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*

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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*

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

Exhibit 8

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

ORDER

Case Number: 01-22-0001-6396

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

RESPONDENT'S MOTION FOR A MORE DEFINITIVE STATEMENT

After reading and considering Respondent's Motion for Claimants to Provide Basic Information About Each Dispute Prior to the Demand Proceeding Through the Arbitration Process, Claimants' Opposition, Respondent's Reply and hearing oral argument by Respondent's Attorney Alicia A. Baiardo and Claimants' Attorney Richard D. McCune during a conference call on October 18, 2022, the Arbitrator rules as follows:

Respondent's motion is granted in part and denied in part. Claimants are each ordered to file and serve an Amended Claim for all Claims filed before the date this Order is served in which it is specifically plead, 1) each Claimant's Wells Fargo account number for the account at issue, 2) facts to establish each Claimant was enrolled in DCOS during the time period at issue and 3) facts sufficient to establish that each Claimant incurred overdraft fees in connection with transactions covered by Regulation E. Claimants are not ordered; 1) to file Amended Claims specifying which state laws have been violated or 2) allege the specific amount of overdraft fees each Claimant was wrongly charged.

An attorney of record for Claimants is ordered to sign each Amended Claim as required by California Code of Civil Procedure section 128.7. In lieu of filing and serving a separate Amended Claim for each Claimant, one spreadsheet signed by an attorney of record for Claimants may be filed and served for all Claimants if it includes the ordered information for each Claimant.

The pleadings in all Claims submitted to American Arbitration Association after the service date of this Order must comply with the requirements of this Order in paragraph two above. The invoicing of AAA fees is stayed for all Claims that have not already been invoiced and for all new Claims filed with AAA until the requirements in paragraph two have been satisfied.

During the conference call on October 18, 2022, a conference call was scheduled for 10:00 AM PT on November 30, 2022, to discuss any other processes that would make the resolution of this Multiple Case Filing efficient and economical. A status conference will also be held during the November 30, 2022 conference call to discuss compliance with this Order.

October 27, 2022
Date

Anita Rae Shapiro
Hon. Anita Rae Shapiro, Process Arbitrator

Exhibit 9

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Wells Fargo Bank, N.A. and Wells Fargo & Co.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANDREW PENUELA and KOUSHIK CHARAN, JILL MOLARIS, MARIA SMYTHE, JESSICA WILLSHIRE, and DAYMOND WALTON individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

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

Defendants.

CASE NO. 4:24-cv-00766-KAW

Hon. Kandis A. Westmore

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS OR TRANSFER

Courtroom: TBD
Hearing Date: August 15, 2024
Hearing Time: 1:30 p.m.

Complaint Filed: February 8, 2024
FAC Filed: April 26, 2024

TO THE COURT, PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on August 15, 2024 at 1:30 p.m. or as soon thereafter as the matter can be heard in a to be determined Courtroom of the above-entitled Court, located at 1301 Clay Street, Oakland, California, 94612, Defendants Wells Fargo & Company and Wells Fargo Bank N.A., (together, "Wells Fargo"), will, and hereby do, move the Court to dismiss or transfer this case brought by Plaintiffs Andrew Penuela, Koushik Charan, Jill Molaris, Maria Smythe, Jessica Willshire, and Daymond Walton (collectively, "Plaintiffs") to Judge Sabraw in the United States District Court, Southern District of California pursuant to the First to File Rule and 28 U.S.C. § 1404(a).

Under the First to File Rule, dismissal or transfer of this case to Judge Sabraw is proper in order to avoid inconsistent judgments and conserve judicial resources. Plaintiffs are required to individually arbitrate their claims pursuant to the terms of the applicable arbitration agreement between Wells Fargo and each Plaintiff, as described in length in Wells Fargo's concurrently filed Motion to Compel Arbitration. Judge Sabraw has already been briefed on the issues in Plaintiffs' Complaint and made a ruling on Plaintiffs' counsel, McCune Law Group's ("MLG") prior attempt to avoid the American Arbitration Association Process Arbitrator's procedural orders. Judge Sabraw's order was affirmed by the Ninth Circuit Court of Appeals on March 7, 2024. Transfer is also warranted under 28 U.S.C. § 1404(a) because this case could have been brought in the Southern District of California and because transfer will serve the interests of justice by dissuading MLG's blatant forum shopping.

This motion is based upon this Notice, the accompanying Memorandum of Points and Authorities in Support of this Motion, the Declaration of Alicia A. Baiardo, the pleadings and documents filed in this case, and such other written and oral argument as may be presented to the Court.

DATED: May 28, 2024

MCGUIREWOODS LLP

By: *Alicia A. Baiardo*
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I. INTRODUCTION

To avoid inconsistent judgments and conserve judicial resources, this case should be dismissed or transferred to the Southern District of California. This lawsuit stems from an ongoing mass arbitration attack by McCune Law Group ("MLG") against Defendants Wells Fargo & Company and Wells Fargo Bank N.A. (together, "Wells Fargo") within the American Arbitration Association ("AAA"). A mass arbitration is a process by which a plaintiff's lawyer or law firm will file hundreds of nearly identical arbitration demands against a single defendant. In this lawsuit, MLG filed suit on behalf of just six Plaintiffs who are part of a group of over 3,900 claimants for whom MLG filed arbitration demands against Wells Fargo. At bottom, MLG seeks to avoid the interlocutory, procedural order entered by a duly appointed Process Arbitrator in October of 2022 (the "October 27 PA Order") that governs claims brought by these 3,900+ claimants. In entering the October 27 PA Order (and the orders that followed), the Process Arbitrator required MLG to provide basic information regarding claimants' demands prior to claimants proceeding with their individual merit arbitrations. MLG takes issue with this because—in contravention of its professional responsibilities—it wholly failed to perform diligence on claimants' claims prior to submitting them with AAA. Indeed, MLG eventually conceded that it could not provide the basic information required by the Process Arbitrator for 89% of claimants, and that 41.5% of claimants never had and could never have had the claim they asserted against Wells Fargo in their demands.

Notwithstanding the fact that Plaintiffs must be compelled to arbitration here—and ignoring the mischaracterizations and conspiracy theories MLG relies on in support of its argument that Plaintiffs (and MLG's other claimants within the mass arbitration) were "shut out of the arbitration process"[1]—MLG already attempted an end-around of the October 27 PA Order in federal court on behalf of its mass arbitration claimants bringing an action on behalf of four different individuals who were subject to the same October 27 PA Order. *See Mosley, et al. v. Wells Fargo & Co., et al.*, No. 3:22-cv-01976-DMS-AGS (S.D. Cal. filed Dec. 13, 2022) [hereinafter *Mosley*]. In *Mosley*, like

[1] Filed simultaneously with this Motion to Dismiss or Transfer is Wells Fargo's Motion to Compel Arbitration. Therein, Wells Fargo details the absurdity of MLG's claims regarding the underlying arbitral proceedings and why Plaintiffs must be compelled back to arbitration (again).

here, MLG sought to avoid arbitration by arguing that Wells Fargo had taken actions within the mass arbitration such that the mass arbitration claimants were entitled to avoid arbitration entirely. Wells Fargo sought to compel arbitration. After full briefing on the issue, Judge Sabraw granted Wells Fargo's motion to compel, holding that the *Mosley* Plaintiffs' arbitration agreements—the same arbitration agreements Plaintiffs entered with Wells Fargo—"clearly and unmistakably delegate[d] gateway issues of arbitrability to the arbitrator" and that the October 27 PA Order was a procedural order not subject to judicial review.

Still not convinced, MLG appealed Judge Sabraw's order compelling arbitration to the Ninth Circuit. After additional appellate briefing, the Ninth Circuit affirmed Judge Sabraw's order, confirming that the October 27 PA Order was not subject to judicial review. The Ninth Circuit further held that claimants had "refused to comply with information requests from Wells Fargo after months of arbitration and a PA Order and now seek to circumvent the [October 27] PA Order in federal court." This lawsuit is nothing more than a second attempt to avoid the Process Arbitrator's procedural orders in federal court.

To avoid inconsistent judgments and conserve judicial resources, this case should be dismissed or transferred to the Southern District of California. Judge Sabraw has already been briefed on the issues in Plaintiffs' Complaint and made a ruling on MLG's attempt to avoid the Process Arbitrator's procedural orders. As detailed below, dismissal or transfer is appropriate under the first-to-file rule and under 28 U.S.C. § 1404(a). Accordingly, Wells Fargo requests that the Court dismiss this case or transfer it to the Southern District of California.

II. FACTUAL AND PROCEDURAL BACKGROUND

In a mass arbitration, plaintiffs' attorneys will file hundreds, or even thousands, of individual arbitration demands against a single defendant. In response, arbitration organizations, including AAA, have issued specific procedural rules that "streamline the administration of large volume filings involving the same party, parties, and party representative(s)," and that provide "an efficient and economical path toward the resolution of multiple individual disputes." *Mass Arbitration Supplementary Rules*, Am. Arbitration Ass'n 3 (amended and effective April 1, 2024). These rules apply to each of the cases within the mass arbitration. *Id.* In April of 2022, MLG initiated a mass

arbitration against Wells Fargo when they filed 501 individual arbitration demands, asserting virtually identical claims under Regulation E. Declaration of Alicia Baiardo ("Baiardo Decl.") at ¶ 3. AAA notified the parties on April 22, 2022, that these claims would be subject to a prior version of AAA's Supplementary Rules. *Id.* at ¶ 4, n.4. The Plaintiffs in both *Mosley* and this matter are part of the same mass arbitration.

A. Plaintiffs File Arbitration Demands as Part of Mass Arbitration Initiated by MLG

Each Plaintiff submitted an individual arbitration demand against Wells Fargo as part of MLG's mass arbitration (collectively, "Plaintiffs' Arbitration Demands"). Declaration of Alicia Baiardo ("Baiardo Decl.") at ¶ 3, Exs. 2-7. These demands were all submitted before the October 27 PA Order. *Id.* (Penuela on April 11, 2022; Walton on April 13, 2022; Molaris on May 6, 2022; Charan on June 1, 2022; Smythe on June 9, 2022; Willshire on August 30, 2022). Plaintiffs' Arbitration Demands are virtually identical. Each seeks "statutory damages and return of overdraft fees collected in violation of Regulation E"[2] and in "violation of state consumer fraud laws that [were] also violated as a result of [Wells Fargo's] violations of Regulation E." *Id.* Each includes identical statements when required to briefly explain the dispute, and each includes a virtually identical "Statement of Claims" that does not specify which state consumer fraud law or statute applies to Plaintiffs' arbitrations. *Id.*

B. Pursuant to AAA's Supplementary Rules, Wells Fargo Seeks Relief from MLG's Failure to Perform Diligence into Claimants' Allegations, Process Arbitrator Partially Grants Wells Fargo's Requested Relief

Plaintiffs' Arbitration Demands are part of a mass arbitration administered by the AAA that was initiated and coordinated by MLG. As part of the mass arbitration, MLG filed nearly 4,000

[2] Regulation E precludes financial institutions from assessing overdraft fees on certain debit card transactions unless the bank abides by its requirements. 15 U.S.C. § 1693m(g). In order to assert a cognizable Regulation E claim against Wells Fargo, a claimant must, at a minimum, have signed up for a checking account with Wells Fargo, agreed to participate in Wells Fargo's Debit Card Overdraft Service ("DCOS"), and been assessed an overdraft fee during an actionable limitations period.

virtually identical individual arbitration demands on behalf of claimants MLG purportedly represents. *Id.* at ¶¶ 4-5. AAA informed Wells Fargo and MLG that the mass arbitration would be subject to AAA's Supplementary Rules for Multiple Case Filings (the "Supplementary Rules"). *Id.* at ¶ 4, Ex. 8. The Supplementary Rules provided for the appointment of a Process Arbitrator[3] to make determinations on "administrative issues for all of the cases included in the [mass arbitration] affected by such administrative issues," including filing requirements, fee payments, and any other issue arising out of the mass arbitration. *Id.* at ¶ 4, Ex. 9 at MC-6(b), MC-6(d)(i), (ii), and (iii).

Each demand filed by MLG, including Plaintiffs' Arbitration Demands, alleged a violation of Regulation E and no other claims. *Id.* at ¶ 3, Exs. 2-7. As Wells Fargo began analyzing the demands, as well as the solicitations MLG used to gather the claimants for whom it filed demands, it became clear that MLG was not performing adequate due diligence to confirm that claimants had a cognizable Regulation E claim against Wells Fargo. *Id.* at ¶¶ 8-10. As a result, Wells Fargo filed a motion with the Process Arbitrator pursuant to Supplementary Rule MC-6, requesting that the Process Arbitrator require MLG to provide the basic information necessary for Wells Fargo to defend itself against claimants' alleged claims. *Id.* at ¶¶ 11-13, Ex. 19.

On October 27, 2022, after Wells Fargo's motion was fully briefed and a hearing was held on the matter, the Process Arbitrator entered the October 27 PA Order, partially granting Wells Fargo's request for relief. *Id.* at ¶ 13-16, Ex. 22. The October 27 PA Order ordered each claimant to file and serve an amended demand for all claims filed before October 27, 2022—and required all demands filed thereafter to—"specifically plead, 1) each Claimant's Wells Fargo account number for the account at issue, 2) facts to establish each Claimant was enrolled in DCOS during the time period at issue and 3) facts sufficient to establish that each Claimant incurred overdraft fees in

[3] MLG claims that AAA "lack[ed] any basis in the rules for" assigning a Process Arbitrator to its mass arbitration and that the "procedural requirements … were not reflected in any set of rules at the time Plaintiffs filed their arbitration demands." *See* Dkt. No. 14, First Am. Compl. at ¶¶ 113, 117. This is demonstrably false. *See* Baiardo Decl. at ¶ 4, Ex. 9 at 1 (stating that the Supplementary Rules became effective on August 1, 2021), MC-6(b) (stating that "AAA in its sole discretion may … appoint an arbitrator (the Process Arbitrator) to hear and determine the administrative issue(s) for all of the cases included in the [mass arbitration] affected by such administrative issues").

connection with transactions covered by Regulation E." *Id.* at Ex. 22. The October 27 PA Order also ordered that an attorney of record for claimants sign each amended claim as required by California Code of Civil Procedure section 128.7 or, in lieu of filing and serving a separate amended claim for each claimant, file one spreadsheet signed by an attorney of record for claimants including all of the ordered information for each claimant. *Id.* The October 27 PA Order further held that the "invoicing of AAA fees is stayed for all Claims that have not already been invoiced and for all new Claims filed with AAA until the [specificity] requirements [ ] have been satisfied." *Id.* The October 27 PA Order did not require, as Wells Fargo requested, claimants to identify which state laws Wells Fargo allegedly violated or the specific amount of overdraft fees each claimant was wrongly charged. *Id.*

C. Rather than Abide by the Process Arbitrator's Order MLG Seeks to Overturn it in Federal District Court, the District Court Compels MLG Back to Arbitration

On December 13, 2022, rather than abide by the October 27 PA Order by conferring with its purported clients and gathering the basic information necessary to meet the order's requirements, MLG filed a complaint in the federal district court for the Southern District of California. *Id.* at ¶ 23; s*ee also Mosley* at Dkt. No. 1 ("*Mosley* Complaint"). The *Mosley* Complaint was filed on behalf of just four of MLG's then over 3,330 claimants who had filed demands as part of MLG's mass arbitration (the "*Mosley* Plaintiffs"). *See Mosley* Complaint at ¶¶ 16-19. The *Mosley* Complaint alleged that Wells Fargo's practices related to its DCOS program violated Regulation E and that it enrolled plaintiffs into DCOS through unlawful disclosures and practices. *Mosley* Complaint at ¶¶ 48-75. The *Mosley* Complaint further alleged that Wells Fargo had breached its arbitration agreement due to the Process Arbitrator's entry of the October 27 PA Order. *See id.* at ¶¶ 79-91.

The *Mosley* Complaint's claim that Wells Fargo had breached the *Mosley* Plaintiffs' arbitration agreements was based on the following allegations: (i) by seeking relief under the Supplementary Rules, Wells Fargo robbed the *Mosley* Plaintiffs of the "quick and efficient means of resolving their claims" promised in their arbitration agreements (*Id.* at ¶¶ 3, 7, 86); (ii) Wells Fargo refused to pay fees to facilitate the *Mosley* Plaintiffs' arbitrations (*Id.* at ¶ 88); (iii) the

October 27 PA Order required "an arbitrary stay of all individual arbitrations until all active claimants" met its requirements (*Id.* at ¶¶ 81, 87); (iv) the information necessary for the *Mosley* Plaintiffs to meet the October 27 PA Order's requirements was in Wells Fargo sole possession (*Id.* at ¶¶ 8, 79, 87); (v) "Wells Fargo ensure[d] that consumers [we]re not able to secure a hearing" due to "endless red tape, delay tactics, and burden" (*Id.* at ¶¶ 4-5, 86); and (vi) the October 27 PA Order imposed collective arbitration procedures in violation of the *Mosley* Plaintiffs' arbitration agreements (*Id.* at 87; *see also Mosley* at Dkt. No. 25 ("*Mosley* Opp'n to MTC") at 7, 11-12).

The *Mosley* Complaint asserted three causes of action. The first sought a declaratory judgment from the Court finding that Wells Fargo had breached its arbitration agreement with the *Mosley* Plaintiffs, that the *Mosley* Plaintiffs were thus no longer bound by the agreement, and asked the Court to "issue appropriate injunctive relief staying or terminating the current arbitration proceedings." *Mosley* Complaint at ¶¶ 90-91. The second sought a declaratory judgment from the Court finding that Wells Fargo violated Regulation E and unlawfully charged the *Mosley* Plaintiffs overdraft fees on relevant transactions in order to utilize that declaratory judgment to "streamline" the mass arbitration. *Id.* at ¶¶ 14, 101. The third asserted a claim for violation of California Business & Professions Code § 17200 related to Wells Fargo's alleged violations of Regulation E and also sought relief to invalidate Wells Fargo's arbitration provision. *Id.* at ¶¶ 104-111.

Wells Fargo sought to compel the *Mosley* Plaintiffs back to arbitration. Baiardo Decl. at ¶ 25; *see also Mosley* at Dkt. Nos. 21, 21-1 ("*Mosley* MISO Mot. to Compel"). Wells Fargo argued that the *Mosley* Plaintiffs' arbitration agreements were valid and enforceable and encompassed their disputes with Wells Fargo. *Mosley* MISO Mot. to Compel at § III.B. Wells Fargo further argued that the Court lacked authority to review or enjoin MLG's mass arbitration against Wells Fargo because the October 27 PA Order was an interim arbitral order not subject to judicial review, and because reviewing the order would constitute an unlawful collateral attack on the Process Arbitrator's ruling and an unlawful advisory opinion. *Id.* at § III.C.

On May 1, 2023, the District Court granted Wells Fargo's motion to compel arbitration. *Mosley v. Wells Fargo & Co.*, No. 22-CV-01976-DMS-AGS, 2023 WL 3185790 (S.D. Cal. May 1, 2023), *aff'd*, No. 23-55478, 2024 WL 977674 (9th Cir. Mar. 7, 2024). The Court held that the

Mosley Plaintiffs' arbitration agreements "'clearly and unmistakably' delegate[d] gateway issues of arbitrability to the arbitrator" and that their request for relief was neither provisional nor ancillary such that it fell within the arbitration agreements' carve-out provision. *Id.* at *3-4. In doing so, the Court held that to provide the relief sought by the *Mosley* Plaintiffs, it "would have to determine the merits of the dispute that Plaintiffs ha[d] already submitted to arbitration," which it refused to do because "once a party demands arbitration, as here, the party has submitted to the authority of the arbitral tribunal." *Id.* at *4.

The Court further held that the October 27 PA Order was "not an award on the merits but a procedural order that addresses claim filing requirements in the" mass arbitration. *Id.* The Court held that although the *Mosley* Plaintiffs argued that the October 27 PA Order "directly impact[ed] their rights to arbitrate because it require[d] information at the pleading stage that Plaintiffs are unable to obtain," the *Mosley* Plaintiffs "provided the information required by the [October 27] PA Order in the [*Mosley*] Complaint, and [could] do so in the [mass arbitration] with Plaintiffs' and other customers' demands." *Id.* (cleaned up). Ultimately, the Court held that because the October 27 Order dealt "with procedure, namely pleading and filing requirements, to provide an orderly process for the [mass arbitration]—all based on [the Process Arbitrator's] interpretation of the Supplementary Rules to which the parties agreed," it was not a final order subject to judicial review. *Id.* The Court then dismissed the case without prejudice. *Id.* at *5.

On May 26, 2023, MLG appealed the District Court's order in *Mosley*. Baiardo Decl. at ¶ 27; *Mosley* at Dkt. No. 31.

D. The Mass Arbitration Continues Pending MLG's Appeal to Ninth Circuit, the Process Arbitrator Enters Additional Orders After MLG Repeatedly Refuses to Abide by Her Prior Order

1. The Process Arbitrator Enters the June 14 PA Order, setting deadlines for MLG to abide by October 27 PA Order.

Given that there was not a stay pending MLG's appeal of the Court's decision in *Mosley*, the Process Arbitrator moved forward with enforcing the October 27 PA Order. Baiardo Decl. at ¶¶ 24, 26-27. On June 14, 2023, the Process Arbitrator entered an order (the "June 14 PA Order")

setting several due dates for compliance with the October 27 PA Order. *Id.* at ¶ 28, Ex. 40. The June 14 PA Order states that the October 27 PA Order was "still in full force and effect" with the amendments requiring compliance by certain dates. *Id.* at Ex. 40. The June 14 PA Order further held that claimants who fail to comply with the October 27 PA Order by the deadlines "are precluded from presenting certain evidence at their individual arbitration hearing." *Id.* The June 14 PA Order did not dismiss any claimants' arbitration demands. *See id.*

2. Rather than abide by the June 14 PA Order, MLG improperly submits a motion to file amended claims and to amend the Process Arbitrator's prior orders.

On July 14, 2023, shortly before it was required to abide by the June 14 PA Order, MLG filed an unauthorized motion to file amended claims and to amend the Process Arbitrator's October 27 PA Order and June 14 PA Order (the "Motion to Amend"). *Id.* at ¶ 29, Ex. 41. On July 28, 2023, Wells Fargo informed AAA that it did not believe any applicable AAA rules permitted claimants to unilaterally submit the Motion to Amend and asked AAA to advise Wells Fargo on how it would proceed. *Id.* at ¶ 30, Ex. 43. On August 4, 2023, the Process Arbitrator entered an order that acknowledged AAA's rules requiring the arbitrator's approval to file the Motion to Amend, deemed MLG's service of its motion a "request for the Arbitrator to allow it to be filed and considered," and requested a conference call to consider the motion (the "August 4 PA Order"). *Id.* at ¶ 30, Ex. 44. The conference was set for August 15, 2023. *Id.* at ¶ 30.

3. MLG confirms that it did not investigate claimants' claims prior to filing demands on their behalf, Wells Fargo moves to dismiss without prejudice claimants who failed to abide by the Process Arbitrator's orders.

On August 14, 2023 and September 13, 2023, MLG attempted to comply with the October 27 PA Order and June 14 PA Order. *Id.* at ¶¶ 31-34, Exs. 45-50. MLG's submissions to the Process Arbitrator established its failure to perform diligence into claimants' allegations prior to filing demands on their behalf. MLG confirmed that it submitted demands on behalf of at least 2,389 claimants who MLG could not establish had a Regulation E claim for which they sought relief. *Id.*

at ¶ 35, Ex. 51. Moreover, MLG conceded that 1,635 of such claimants do not have and never had a Regulation E claim against Wells Fargo. *Id.*

Based on MLG's admission of its failure to perform basic diligence prior to filing claimants' demands, Wells Fargo sought an order from the Process Arbitrator that would allow it to move forward with defending MLG's mass arbitration. *Id.* at Ex. 51. Wells Fargo requested that the 432 claimants for whom MLG was able to provide information meeting the requirements of the October 27 PA Order move forward with their individual merit arbitrations. *Id.* Wells Fargo also requested that the 3,493 claimants that failed to meet the requirements of the October 27 PA Order be dismissed without prejudice to refiling their demands under certain conditions, including providing Wells Fargo with the basic information necessary for the claimant to assert a colorable claim. *Id.*

4. The Process Arbitrator enters the November 10 PA Order, dismissing claimants who failed to abide by the October 27 PA Order without prejudice.

On November 10, 2023, the Process Arbitrator entered an order (the "November 10 PA Order"). *Id.* at ¶ 37, Ex. 54. The November 10 Order denied MLG's request to amend the October 27 PA Order and the June 14 PA Order. *Id.* The November 10 PA Order held that MLG had "failed to comply with the pleading requirements in the" October 27 PA Order "for over a year" and, accordingly, dismissed without prejudice all claimants who had failed to comply with the October 27 PA Order. *Id.* The November 10 PA Order stated that the dismissed claimants may refile claims concerning qualifying Regulation E transactions in the mass arbitration on the condition that "l) they comply with the three pleading requirements in the October 27th Order, and 2) Claimants' Attorney complies with the requirement of California Code of Civil Procedure Section 128.7." *Id.* The November 10 PA Order also granted MLG's request to file a motion to file amended claims.

5. The Process Arbitrator enters the January 10 PA Order denying MLG's motion to file amended claims as to the dismissed claimants, MLG files the underlying Complaint.

On January 10, 2024, after full briefing, the Process Arbitrator entered an order on MLG's motion to file amended claims (the "January 10 PA Order"). *Id.* at ¶¶ 38-41, Exs. 55-58. The Process

Arbitrator noted that "all the" claims filed by MLG since the beginning of the mass arbitration "alleged that [Wells Fargo] had been wrongfully charging overdraft fees in violation of Regulation E." *Id.* at ¶ 41, Ex. 58. The January 10 PA Order then dismissed without prejudice claimants who had failed to meet the October 27 PA Order's requirements. *Id.* The January 10 PA Order granted MLG's motion to amend for the claimants who had met the October 27 PA Order's requirements. *Id.* The January 10 PA Order then ordered that "[b]efore any new cases or refiled cases alleging one or more violations of any" claim MLG sought to include in the amended demands, "each [demand] must specifically plead l) each Claimant's Wells Fargo account number or numbers for the account or accounts at issue, 2) the statute or statutes that Respondents violated, and 3) facts sufficient to establish the violation of each of those statutes concerning that Claimant." *Id.* The January 10 PA Order also stayed invoicing of AAA fees for all new and refiled demands until they comply with the order's pleading requirements, and also required an attorney of record for claimants to sign each new case or amended demand as required by California Code of Civil Procedure section 128.7 or, in lieu of filing and serving a separate amended claim for each claimant, file one spreadsheet signed by an attorney of record for claimants including all the ordered information for each claimant. *Id.*

On February 8, 2024, MLG filed the underlying Complaint in this action. *See generally*, Dkt. No. 1, Compl.

E. The Ninth Circuit Affirms the District Court's Order Compelling MLG to Arbitration

Prior to Wells Fargo's deadline to respond to the Complaint, the Ninth Circuit affirmed the District Court's decision in *Mosley*. *Mosley v. Wells Fargo & Co.*, No. 23-55478, 2024 WL 977674, *1 (9th Cir. Mar. 7, 2024). In doing so, the Ninth Circuit held that the October 27 PA Order was a procedural, interlocutory order not subject to judicial review, and that "[n]o claimant has yet won or lost a claim against Wells Fargo; an arbitration award has not been given." *Id.* The Ninth Circuit also found that "Claimants have refused to comply with information requests from Wells Fargo after months of arbitration and a PA Order ***and now seek to circumvent the [October 27] PA Order in federal court***." *Id.* (emph. added).

The Ninth Circuit further held that the District Court did not err in concluding that the parties "clearly and unmistakably" delegated arbitrability to the arbitrator. *Id.* at *2. The Ninth Circuit noted that although case law permits courts to decline to compel arbitration where one party defaults or entirely refuses to cooperate in arbitration, Wells Fargo did not do so. *Id.* Instead, the Ninth Circuit held that "***Wells Fargo did not act improperly or otherwise breach the agreement***." *Id.* (emph. added). "In fact, ***Wells Fargo simply sought information establishing that each Claimant had a legitimate dispute with them***. ***Wells Fargo complied with the Arbitration Agreement and paid more than half a million dollars in arbitration fees over several months of arbitration*** before Claimants filed their case in federal court." *Id.* (emph. added).

Notably, via Rule 28(j) letters, the Ninth Circuit was apprised of the November 10 PA Order and the January 10 PA Order at the time it entered its order affirming the District Court's order granting Wells Fargo's motion to compel arbitration in *Mosley*. Baiardo Decl. at ¶ 42, Exs. 59-60.

F. MLG Amends Plaintiffs' Complaint Which—Like the *Mosley* Complaint—Seeks an End-Around to the Process Arbitrator's Orders

On March 27, 2024, the parties submitted a stipulated request setting the briefing schedule for Plaintiff's First Amended Complaint. *See* Dkt. No. 7. Plaintiffs sought to file an amended complaint so that MLG could evaluate and amend the claims in light of the Ninth Circuit's opinion in *Mosley*. *See id.* The Court granted the request. *See* Dkt. No. 8. On April 26, 2024, MLG filed Plaintiffs' First Amended Complaint (the "FAC"). *See generally*, Dkt. No. 14, FAC. Plaintiffs were Wells Fargo customers who were assessed overdraft fees on a one-time debit card or ATM transaction. FAC ¶¶ 44-49. Plaintiffs allege that, prior to May 2022, Wells Fargo's Regulation E disclosures were flawed and failed to satisfy the requirements of Regulation E. *Id.* at ¶¶ 83-94. Plaintiffs also allege that Wells Fargo "engages in additional conduct constituting unfair and deceptive business practice" and constituting a breach of Plaintiffs' Wells Fargo Account Agreements (the "Account Agreements") by improperly charging multiple fees for the same electronic transfer, charging overdraft fees on APSN transactions. *Id.* at ¶¶ 95-100. Based on these allegations, Plaintiffs allege six causes of action and seek to certify three separate classes. *Id.* at ¶¶ 134, 147-187.

Plaintiffs admit that they submitted their claims to arbitration pursuant to their Account Agreements, but argue that they are no longer bound by their agreement to arbitrate based on alleged actions by Wells Fargo in the mass arbitration and an alleged "cozy pre-existing relationship between AAA and Wells Fargo." *Id.* at ¶¶ 9-14, 101-131. MLG's only basis for bringing this lawsuit in federal court is premised on the argument that Plaintiffs are no longer bound to have their claims heard in arbitration. Notably, the vast majority of the arguments MLG makes in the FAC as to why Plaintiffs are no longer bound to arbitration were made—and denied—in MLG's prior attempt to circumvent the Process Arbitrator's orders in *Mosley*. Baiardo Decl. at ¶ 45 (setting forth comparison chart of allegations regarding Wells Fargo's actions permitting Plaintiffs to avoid arbitration made in the FAC that were already made in *Mosley*). Remarkably—and in a blatant attempt to seek an end around to the prior decisions in *Mosley*—MLG failed to address the District Court's and the Ninth Circuit's rulings concerning the Process Arbitrator's orders in *Mosley*. Because the Southern District of California has already decided this issue, this action should be dismissed or transferred accordingly.

III. ARGUMENTS & AUTHORITIES

The first-to-file rule applies here and, in the interest of preserving judicial resources and minimizing the risk of inconsistent judgments, the case should be dismissed or transferred to Judge Sabraw in the United States District Court for the Southern District of California. *Mosley* pre-dates this action, and Plaintiffs' core theory in both cases is identical—that Plaintiffs are no longer bound by their agreements to arbitrate as a result of the Process Arbitrator's Order and thus can seek relief in federal court. The claims and parties in the two actions substantially overlap, and plaintiffs in both actions seek to invalidate the Process Arbitrator's procedural orders on similar (and in some cases identical) grounds so that they may have their claims heard in federal court.

Alternatively, transfer is warranted under 28 U.S.C. § 1404(a) because *Penuela* could have been brought in the Southern District of California and because transfer will serve the interests of justice by dissuading MLG's blatant forum shopping.

A. Dismissal or Transfer under the First to File Rule is Warranted

Under the first-to-file rule, a court may "dismiss, stay, or transfer a case if a similar case

with substantially similar issues and parties was previously filed in another district court." *Puentes v. Amazon.com Servs., LLC*, 2021 WL 5984867, at *2 (C.D. Cal. Sept. 30, 2021) (quoting *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015)). The purpose of the rule is to "minimize the risk of inconsistent judgments, conserve judicial resources and allow discovery to be managed by a single court." *Jia v. Weee! Inc.*, 2024 WL 218121, at *3 (N.D. Cal. Jan. 19, 2024). The rule "is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). In determining whether to invoke the first-to-file rule, courts evaluate three factors: (1) the chronology of actions; (2) the similarity of the parties; and (3) the similarity of the issues. *Prime Healthcare Servs., Inc. v. Serv. Emps. Int'l Union*, 2014 WL 5422631, at *2 (N.D. Cal. Oct. 24, 2014). Dismissal or transfer to the Southern District of California is appropriate under the first-to-file rule because each of the relevant factors weighs heavily in support of transfer.

1. Chronology favors dismissal or transfer.

There can be no argument that *Mosley* was filed well before MLG filed this dispute on behalf of Plaintiffs. As a result, this factor favors transfer. *Serv. Emps. Int'l Union*, 2014 WL 5422631 at *2. ("If the action in the transferee court was filed prior to the action pending before the transferor court, then this factor supports transfer.")

2. Similarity of the parties and issues favor dismissal or transfer.

The similarity of the parties also favors transfer. The similarity of the parties factor "is satisfied if some [of] the parties in one matter are also in the other matter, regardless of whether there are additional, unmatched parties in one or both matters." *Serv. Emps. Int'l Union*, 2014 WL 5422631 at *2 (citation omitted). Courts do not condone gamesmanship or attempts to "skirt" the rule by using different parties and will apply the first-to-file rule if it will encourage fairness and judicial efficiency. *See Kohn Law Grp., Inc.*, 787 F.3d at 1240. Even if the plaintiffs in the two suits are different, the parties may be substantially related If there are shared interests or a legal relationship between the plaintiffs. *See CareFusion 202, Inc. v. Tres Tech Corp.*, 2013 WL 12335011, at *1 (N.D. Cal. Aug. 2, 2013) (applying first-to-file rule even though earlier-filed case

involved a different plaintiff because the two plaintiffs were "related entities").

Here, there is similarity. It is undisputed that Wells Fargo Bank, N.A. and Wells Fargo & Co. are the defendants in both actions. Although the plaintiffs here are not identical to those in *Mosley*, they have shared interests and advance the same positions. Both sets of Plaintiffs are subject to the same arbitration agreements with Wells Fargo, are claimants in the same underlying mass arbitration with the same counsel, and are subject to the same Process Arbitrator orders forming the basis for MLG's attempt to circumvent arbitration. Any holding in this dispute regarding the validity of the Process Arbitrator's orders—which have already been held valid by Judge Sabraw and the Ninth Circuit—will impact the *Mosley* Plaintiffs and vice versa. Dismissal or transfer is warranted to minimize the risk of inconsistent holdings and to discourage MLG's clear gamesmanship and attempt at a second bite at the apple. Otherwise, MLG can continue cherry-picking other claimants within the mass arbitration and filing additional suits across the country in an attempt to find a court that will invalidate the Process Arbitrator's order.

3. Similarity of the issues favors dismissal or transfer.

Under the third factor, courts assess "the similarity of the issues between the two cases." *Serv. Emps. Int'l Union*, 2014 WL 5422631 at *3. The similarity of the issues factor is satisfied if the issues are substantially similar. *Kohn Law Grp., Inc.*, 787 F.3d at 1241-42. This factor favors transfer if the issues in the two cases substantially overlap. *Id.* The key inquiry for this factor is "whether 'the core theory for both cases is the same.'" *Weee! Inc.*, 2024 WL 218121 at *3 (quoting *Mullinix v. US Fertility, LLC*, 2021 WL 4935976, at *3 (C.D. Cal. June 8, 2021)). Here, Plaintiffs' core theories are the same as those set forth in *Mosley*.

The dispute in both cases come down to the same issue—whether the Plaintiffs can avoid arbitration, circumvent the Process Arbitrator's order, and proceed in federal court. In *Mosley*, MLG sought to avoid arbitration by arguing that Wells Fargo's actions within the mass arbitration allowed the *Mosley* Plaintiffs (and MLG's other claimants) to ignore the Process Arbitrator's procedural, interim orders related to the filing requirements necessary to move forward with individual arbitrations within the mass arbitration. *See supra* §§ II.C, II.E. The Ninth Circuit foreclosed this issue, holding that the October 27 PA Order is "not subject to judicial review" and explaining that

"[i]t is well-settled that questions of procedure relating to arbitration are outside the purview of federal courts." *Mosley*, 2024 WL 977674, at *1. The Ninth Circuit also rejected MLG's arguments that Wells Fargo acted improperly in seeking relief from the Process Arbitrator, holding that "Wells Fargo did not act improperly or otherwise breach the agreement," that "Wells Fargo simply sought information establishing that each Claimant had a legitimate dispute with them," and that "Wells Fargo complied with the Arbitration Agreement and paid more than half a million dollars in arbitration fees over several months of arbitration before Claimants filed their case in federal court." *Id.* at *2. Rather, according to the Ninth Circuit, it was MLG and claimants that "refused to comply with information requests from Wells Fargo after months of arbitration and a PA Order ***and now seek to circumvent the [October 27] PA Order in federal court***." *Id.* at *1.

MLG—through Plaintiffs—seeks the exact same result here that it sought in *Mosley*, and it does so using many of the exact same arguments it put forth in *Mosley*. As a result of the overlapping issues, and to dissuade MLG's forum shopping, dismissal or transfer is appropriate. *See Johnson v. Siemens Indus., Inc.*, 2023 WL 486015, at *3 (N.D. Cal. July. 21, 2023) (first to file rule properly invoked where counsel appeared to engage in forum shopping by "fil[ing] essentially the same complaint, previously found insufficient, in a new venue"); *Weee! Inc.*, 2024 WL 218121 at *3 (transfer under the first-to-file rule was appropriate because the plaintiffs' core allegations in the two cases were identical and transfer would promote judicial efficiency, lower the danger of inconsistent holdings, and permit discovery to be controlled by one court).

B. Transfer is Also Appropriate Under § 1404(a)

A district court may also transfer the venue of an action "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). "A motion for transfer lies within the broad discretion of the district court, and must be determined on an individualized basis." *Keene v. McKesson Corp.*, 2015 WL 9257949, at *2 (N.D. Cal. Dec. 17, 2015). In determining whether to transfer venue under § 1404(a), courts utilize a two-part test: "The moving party must "demonstrate jurisdiction and proper venue would exist in the [transferee] court and that the balance of conveniences favors transfer." *Southard v. Kipper Tool Co.*, 2023 WL 6959145, at * (N.D. Cal. Oct. 19, 2023).

Transfer under § 1404(a) is appropriate here because the two factor test is met. This case could have been brought in the Southern District of California and balancing the relevant factors clearly demonstrates that it is more convenient to the parties to litigate this action in the Southern District of California.

1. Plaintiffs' action could have been brought in the Southern District of California.

Under § 1404(a), Wells Fargo must demonstrate that both jurisdiction and venue are proper in the transferee district. *Ponomarenko v. Shapiro*, 287 F. Supp. 3d 816, 833 (N.D. Cal. 2018). The Southern District of California would have subject matter jurisdiction over this action under 28 U.S.C. § 1331 (claims arising under the laws of the United States) and 28 U.S.C. § 1367(a) (supplemental jurisdiction). Venue would be proper in the Southern District of California because Wells Fargo conducts business in that district and entered into contracts in that district. Additionally, Plaintiff Smythe opened her account in the district and entered into the Deposit Agreement Contract in that district. *See* 28 U.S.C. § 1391(b) (Venue is appropriate in the district where "a substantial part of the events or omissions giving rise to the claim occurred"); *see* Baiardo Decl. at ¶ 3, Ex. 5. The plaintiffs' residence has no bearing on whether venue is appropriate in the Southern District of California. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184 (1979) ("it is absolutely clear that Congress did not intend to provide for venue at the residence of the plaintiff"). Wells Fargo has therefore met its burden.

2. The convenience of the parties and the interests of justice favor transfer.

In determining whether the convenience to the parties or the interests of justice support transfer, Ninth Circuit courts may consider eight different factors: (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof. *Shapiro*, 287 F. Supp. 3d at 833. No one factor is dispositive, and courts will weigh these factors against

each other in deciding on a motion to transfer. *Chen v. Pioneer Oil, LLC*, 472 F. Supp. 3d 704, 709 (N.D. Cal. 2020). Balancing these factors demonstrates that transfer is appropriate because three factors clearly support transfer while no factor clearly weighs against transfer.

a) *Plaintiffs' choice of forum suggests they are engaging in forum shopping and supports transfer.*

The deference given to a plaintiff's choice of forum "is substantially reduced where the plaintiff does not reside in the venue" or if there is "any indication" of forum shopping. *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001). In fact, evidence of forum shopping alone may support transfer, and courts have granted motions to transfer to specifically discourage forum shopping. *Pacini v. Bank of America, N.A.*, 2012 WL 12952630, at * 5 (N.D. Cal. Aug. 7, 2012) (finding transfer served the interests of justice by discouraging forum shopping after Plaintiffs filed a nearly identical complaint in the N.D. Cal. that was previously dismissed in the C.D. Cal.); *Gerin v. Aegon USA, Inc.*, 2007 WL 1033472, at *7 (N.D. Cal. Apr. 4, 2007) (finding transfer appropriate where plaintiffs' forum choice appeared "to be a textbook case of forum-shopping."); *Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc.*, 2003 WL 22387598, at *5 (N.D. Cal. Oct. 14, 2003) ("evidence of plaintiff's attempt to avoid a particular precedent from a particular judge weighs heavily . . . and would often make the transfer of venue proper.").

Only two of the six plaintiffs reside in the Northern District of California, while the other four Plaintiffs live elsewhere in California or in Virginia. *See* Baiardo Decl. at Exs. 2-7. Plaintiffs' forum choice should be given less deference on this basis alone. But more importantly, there is strong evidence of forum shopping given that Plaintiffs and the *Mosley* Plaintiffs are represented by same counsel and must comply with the same Process Arbitrator's orders, yet choose to bring this follow-on action in the Northern District of California after being compelled to arbitrate on the same facts by the Southern District of California and the Ninth Circuit – a fact not mentioned in the FAC. Though the plaintiffs in the two actions are different, both sets of plaintiffs are, through the same counsel, attempting to circumvent the Process Arbitrator's orders and get into federal court on the same theories—theories that were foreclosed by the Southern District of California and the Ninth Circuit. This lawsuit is clearly a second attempt at a more favorable ruling in the Northern

District of California. Plaintiffs' choice of forum demonstrates they are forum shopping, and transfer is therefore appropriate.

b) *The feasibility of consolidation favors transfer.*

"The feasibility of consolidation is a significant factor in a transfer decision, and even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties." *Cardoza v. T–Mobile USA Inc.*, 2009 WL 723843, at *5 (N.D. Cal. Mar. 18, 2009). This factor favors transfer when it "is possible that some or all of these cases may ultimately be consolidated and/or related if this case is transferred." *Martin v. Global Tel*Link Corp.*, 2015 WL 2124379 at *5 (N.D. Cal. May 6, 2015). Although *Mosley* is currently stayed in the Southern District of California, it is still considered pending because "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal." *Washington & I.R. Co. v. Coeur D'Alene Ry. & Nav. Co.*, 60 F. 981, 984 (9th Cir. 1894) ("An action is deemed to be pending from the time of its commencement until its final determination upon appeal"). There has been no final determination upon appeal of the entire *Mosley* case, as such it is pending. As explained above, there is substantial overlap between the cases. If transferred, there is a strong possibility that *Penuela* and *Molsey* would be related or transferred to Judge Sabraw under the Southern District's local rules. *See* S.D. Cal. L.R. 40.1(f) & (e). The possibility that *Mosley* and *Penuela* could be related under the Southern District of California's local rules favors transfer.

c) *Judicial efficiency favors transfer.*

Under the judicial efficiency factor, courts ask "whether a trial may be speedier in another court because of a less crowded docket." *Martin*, 2015 WL 2124379 at *6. Courts compare the "median time from filing to disposition or trial." *Id*. According to the Federal Court Management Statistics published by the Administrative Offices of the United States Courts, the average filing to trial time for Northern District of California during the 12-month period ending on December 31, 2023 (the last available statistics) was 48.9 months.[4] The average time to trial for the Southern

[4] *Federal Court Management Statistics: December 2023 Report*, Administrative Office of the U.S.

District of California was 40.2 months. *Penuela* could go to trial faster in the Southern District, so this factor favors transfer.

d) *Local interest does not weigh against transfer.*

Under the local interest factor, courts consider "the local interest in having localized controversies decided at home." *Baker v. Bayer Healthcare Pharms. Inc.*, 2015 WL 4456085, at * 3 (N.D. Cal. July 21, 2015). Courts will consider where the defendant does business and where the relevant events occurred. *See id.* (local interest factor was neutral where defendant conducted business "throughout the state of California," the product at issue was located in all three potential venues, and the plaintiff allegedly suffered injuries in California and Indiana). Courts also consider the residency of the plaintiffs. *Ctr for Biological Diversity v. McCarthy*, 2015 WL 1535594, at *5 (N.D. Cal. Apr. 6, 2015) (local interest factor favored transfer even though both plaintiffs resided in the Northern District, because the conduct at issue occurred in other districts). While two Plaintiffs live in the Northern District of California, the remaining four Plaintiffs live in other districts, including the Southern District of California. Baiardo Decl. at ¶ 3, Ex. 5 (showing Plaintiff Smythe lives within the Southern District of California). Thus, Plaintiffs' residencies do not favor one forum over another. Further, Wells Fargo conducts business in both the Southern and Northern Districts, and the relevant conduct at issue occurred throughout California and in Virginia. The Northern District does not have a "unique interest" in litigating these claims when compared to the Southern District. This factor is neutral.

e) *Convenience of the parties does not weigh against transfer.*

Under the convenience of the parties factor, courts may consider the residency of the parties. *Martin*, 2015 WL 2124379, at *4. However, this factor may favor transfer even when the parties reside in the transferor district. *Id.* (explaining that the convenience to the parties factor favored transfer, even though the plaintiff resided in the Northern District of California, because the plaintiff's decision to file suit in the Northern District was due to strategic reasons and the

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Courts, (last accessed May 28, 2024) https://www.uscourts.gov/sites/default/files/fcms_na_distcomparison1231.2023.pdf.

defendants were already litigating three similar lawsuits in a different district). Although two plaintiffs reside in the Northern District, this factor is still neutral. This is because, as in *Martin*, Plaintiffs chose this district not for convenience, but for strategic reasons—to attempt to relitigate the validity of the Process Arbitrator's orders in a new forum. Moreover, *Mosley* is pending in the Southern District, and it would be more convenient for Wells Fargo to also litigate *Penuela* in that district should the stay in *Mosley* be lifted. This factor is either neutral or weighs in favor of transfer.

f) *The remaining factors are neutral.*

The remaining factors are neutral. The bulk of the evidence in this litigation will likely be in electronic form, so this factor is neutral. *Martin*, 2015 WL 2124379 at *5 (explaining that this factor is "is neutral or carries only minimal weight when the evidence is in electronic form."). The Southern and Northern District of California will be equally familiar with the applicable law in this case, so this factor is neutral. *Bhatia v. Silvergate Bank*, 2023 WL 4937325, at *8 (N.D. Cal. Aug. 1, 2023) (holding that "both forums are federal courts located in California equally familiar with California and federal law."). The convenience of the witnesses factor is neutral. The most important consideration is the convenience for non-party witnesses. *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 762–63 (C.D. Cal. 2016). The convenience of a "litigant's employee witnesses" will be given minimal weight. *Martin*, 2015 WL 2124379, at *4. It is not clear what, if any, third party witnesses may give testimony in the *Penuela* action. Any witnesses who may eventually provide testimony will likely reside all over the country. As such, the convenience interests of third-party witnesses is not implicated.

In sum, three factors clearly weigh in favor of transfer and no factors clearly weigh against transfer. The Court should transfer *Penuela* to the Southern District of California. *See Heredia v. Sunrise Senior Living, LLC*, 2018 WL 5734617, at *7 (N.D. Cal. Oct. 31, 2018) (granting motion to transfer under § 1404 where two factors weighed in favor of transfer and only one factor weighed against transfer).

IV. CONCLUSION

Wells Fargo respectfully requests the Court grant its Motion to Dismiss or Transfer for all the foregoing reasons and transfer the case to Judge Sabraw in the United States District Court for

the Southern District of California.

DATED: May 28, 2024

MCGUIREWOODS LLP

By: *Alicia A. Baiardo*
Alicia A. Baiardo
Amy Morrissey Turk (Admitted *pro hac vice*)
Todd Dressel

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

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024 I electronically filed the foregoing document entitled **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS OR TRANSFER** with the Clerk of the Court for the United States District Court, Northern District of California using the CM/ECF system and served a copy of same upon all counsel of record via the Court's electronic filing system.

/s/ Alicia A. Baiardo
Alicia A. Baiardo

Exhibit 10

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May 9, 2024

VIA ELECTRONIC MAIL
Matthew Levington
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RE: Attempted Filings with JAMS Against Discovery Communications, LLC

Dear Mr. Levington:

We represent Discovery Communications, LLC ("Discovery"). We write regarding the 693 substantially identical demands for arbitration that Keller Postman LLC ("Keller") has attempted to file with JAMS against Discovery on May 7, 2024 (the "Demands").[1] These Demands should be rejected—as should any subsequently-filed demands—because Keller has attempted to file them in the wrong arbitral forum.

The Demands purport to commence arbitrations under the outdated and superseded Discovery+ Visitor Agreement dated November 21, 2022, that designated JAMS as the arbitral forum for consumer disputes. But on January 9, 2023, Discovery+ updated the Visitor Agreement to designate National Arbitration and Mediation ("NAM") as the arbitral forum for consumer disputes. (Ex. A, Arbitration Agreement § 3.) The updated Visitor Agreement applies to "claims that arose before this or any prior Agreement" and therefore applies to the claims asserted in the Demands. (*Id.*, Arbitration Agreement § 1.)

[1] Keller previously attempted to file 697 substantially similar demands for arbitration with JAMS against Discovery on February 2, 2024, but Keller withdrew those demands on February 8, 2024.

To the extent there is a dispute as to the operative arbitration agreement, it must be resolved in a federal or state court in New York County, New York. (Ex. A, Arbitration Agreement § 3 ("[T]he scope and enforceability of the Arbitration Agreement or whether a dispute can or must be brought in arbitration (*including whether a dispute is subject to this Arbitration Agreement or a previous arbitration provision between you and Discovery*)" must be resolved by "a court of competent jurisdiction." (emphasis added)); *id.*, Governing Law and Venue ("[A]ny issues involving arbitrability or enforcement of any provisions under the dispute resolution clause or Arbitration Agreement shall be brought in the appropriate state or federal court located in New York County, New York.").)

These improper filings are part of a troubling pattern by Keller. Keller also attempted to file arbitrations against an affiliate of Discovery+ in the wrong arbitral forum—the American Arbitration Association (the "AAA"). As it did here, Keller invoked an outdated and superseded arbitration clause for the improper purpose of trying to weaponize the AAA's fee schedule and procedures. The AAA declined to administer those arbitrations or to assess filing fees. The same result is warranted here.

Discovery informed Keller months ago that JAMS was the improper forum. It further explained that its operative arbitration agreement designates NAM as the exclusive administrator for consumer arbitrations involving Discovery. Nevertheless, Keller improperly proceeded with attempting to file the Demands for the improper purpose of trying to weaponize JAMS' fee schedule and procedures to the detriment of Discovery, its consumers, and JAMS. JAMS has expressly acknowledged that these tactics "impair the integrity of the Arbitration process."[2]

In addition, none of the claimants have completed the applicable pre-arbitration dispute resolution procedures mandated by the Visitor Agreement before attempting to file the Demands.

And while the underlying claims have no merit, JAMS should also be aware that Keller knows or should know that it has no basis to pursue many of the claims against Discovery. Just by way of example, based on Discovery's initial review of the Demands and its records, it appears that 117 of the 693 claimants never subscribed to Discovery+ and thus have no arbitration agreement with Discovery at all.

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[2] On May 1, 2024, JAMS observed in its Mass Arbitration Procedures and Guidelines that the "filing of dozens, hundreds or even thousands of individual claims may create administrative burden and onerous fees, as well as delay and potential unfairness to all Parties, all of which may impair the integrity of the Arbitration process." JAMS Mass Arbitration Procedures and Guidelines, effective May 1, 2024, https://www.jamsadr.com/mass-arbitration-procedures.

For the foregoing reasons, Discovery requests that JAMS promptly decline administration of the Demands and decline to invoice Discovery for any arbitration fees. We appreciate JAMS' attention to this matter. Discovery reserves all rights against all appropriate parties.

Sincerely,

Michael W. McTigue Jr.

cc: Meredith C. Slawe
Warren Postman
Albert Pak
Patrick Huber

Exhibit A

discovery+ Last Changes to Visitor Agreement: January 9, 2023

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10. Third Party Beneficiary: Discovery and you acknowledge and agree that Apple, and Apple's subsidiaries, are third party beneficiaries of the agreement between Discovery and you in this Visitor Agreement, and that, upon your acceptance of this Visitor Agreement, Apple will have the right (and will be deemed to have accepted the right) to enforce such agreement against you as a third party beneficiary thereof.

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If a charge applies to your discovery+ Subscription, you will be charged for it using the payment method you designate (the "Primary Payment Method"). In addition, you may have the option to provide multiple payment methods to be associated with your Account. In the event you submit multiple payment methods, you hereby authorize Discovery to charge such backup payment method in the event the Primary Payment Method cannot be charged. If your discovery+ Subscription automatically renews, subscription payments will be taken automatically on the first day of each new subscription period for your discovery+ Subscription at the same price (unless we have notified you of a price change as described below). Usually the first payment will be taken on the day you subscribe or, if you have a free period of access, the day after your free period of access ends. If you are eligible for a Promotional Offer involving a discount, your bill and payments will be reduced accordingly for the promotion period. To view your billing information or to change your payment method, go to your account section in discovery+ (unless you're paying via a third party or through another service, for example via one of our partners, in which case see "Third Party Platforms and Services" below).

If a payment is not successfully settled, because your payment method has expired and there is no viable backup payment method associated with your account, you have insufficient funds, or otherwise, and you do not change your payment method or cancel your discovery+ Subscription, we may suspend your access to your discovery+ Subscription and/or your discovery+ Account until we (or the relevant third party) have obtained a valid payment method. When you update your payment method in your account, you authorize us to charge the updated payment method for your discovery+ Subscription and you remain responsible for any uncollected amounts. This may result in a change to your payment dates or subscription period.

We reserve the right to change the date we charge you if your payment method has not been successfully authorized or if your subscription renewal date does not occur in a given month, for example, if you are usually charged on the 30th of each month, in February you will be charged on the 28th.

We use other companies (including other companies in the same group as Discovery), agents or contractors to process credit card transactions or other payment methods. For some payment methods, the relevant issuer may charge you certain fees, such as a foreign transaction fee or other fees relating to the processing of your payment method. Local taxes and charges may vary depending on the payment method used. You will be solely responsible for any such taxes and charges which may apply. Check with your payment provider for details.

If you subscribe to a discovery+ Subscription which starts with a free period of access, or if you use a Promotional Offer which requires you to provide your payment details, a payment may be authorized by your bank when your free period of access or Promotional Offer begins but no payment will be taken by us for this free period of access or for this Promotional Offer period. You should be aware however that this may affect your available balance or credit limit.

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Certain types of discovery+ Subscriptions automatically renew unless you cancel your subscription before your next renewal date. If you purchase a discovery+ Subscription through us, we will let you know, at the point of sign-up, if your type of discovery+ Subscription will automatically renew. If you have a discovery+ Subscription which automatically renews, and you do not cancel your subscription before the end of the current subscription period (or free period of access), your discovery+ Subscription will automatically renew. If your discovery+ Subscription automatically renews, you will be charged the total subscription fee at the same price (unless we have notified you of a price change, in accordance with “Price Changes” below) due for the next subscription period.

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We may change the price of your discovery+ Subscription from time to time. Any price changes will apply to you no earlier than 30 days following notice to you. We will let you know the date on which any price change is due to come into effect. If you have purchased a discovery+ Subscription through one of our third party partners, price changes will be subject to that third party's terms and conditions.

If we notify you of a price change and you do not want to continue your discovery+ Subscription at the new subscription price, you can cancel your discovery+ Subscription either: (i) before the start of the next subscription period by following the steps in “Cancellation” below; or (ii) at any time before the price change becomes effective by providing us with notice at cancel@discoveryplus.com.

We will always try to make sure the price of your discovery+ Subscription will not change until the start of your next subscription period. If a price change is going to come into effect during your current subscription period, you can cancel your discovery+ Subscription before the price change comes into effect and we will provide you with a refund for amounts you have paid for but not yet received.

CANCELLATION

You can cancel your discovery+ Subscription before the end of the current subscription period (or free period of access) and, unless we tell you otherwise, the cancellation will be effective at the end of the current subscription period (or free period of access). This means that if you are part of the way through a subscription period (or free period of access), you will be able to continue to use your discovery+ Subscription until the end of the current subscription period (or free period of access), unless we tell you otherwise.

To manage your discovery+ Subscription, click on the account area in discovery+. If you signed up for a discovery+ Subscription through a third party (for example via one of our partners) and wish to cancel your subscription, you will need to do so through that third party. For example, you may need to visit your account with a third party and turn off auto-renew for discovery+.

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Without affecting your applicable statutory rights, payments are non-refundable and there are no refunds or credits for partially used billing periods. At any time, and for any reason, we may provide a refund, discount, or other consideration to some or all of our subscribers. If we do this for any reason this does not mean we are obligated to do so again, even in the same circumstances.

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If you access discovery+ or purchase a discovery+ Subscription through a third party (for example, via a bundle of services provided by one of our third party partners) or another product or service sold by that third party, your payment will be to that third party or to that other product or service and you will be subject to that third party's

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To enjoy Magnolia Network and related companion content in the Watch, Workshop and Blog sections of Magnolia Sites that requires an account to access, users must use the same username and password for both your discovery+ Subscription and your Magnolia account to create a common account that can be used across both services. Your account login information and information about your use of the Magnolia Watch, Workshop, and Blog sections of the Sites is shared between Discovery and Magnolia for purposes of activating, administering and improving your experience with those sections and the Magnolia Sites.

If you have any questions or are having trouble creating a common account, please contact customer service here.

Your use of Magnolia Watch, Workshop, and Blog sections of the Magnolia Sites, including your use of any content you access and view through those sections , is subject to this Visitor Agreement and Discovery's Privacy Notice . Your use of the remainder of the Magnolia Service is subject to Magnolia's Visitor Agreement and Magnolia's Privacy Notice.

You may manage your Magnolia account and your discovery+ Subscription at any time by accessing your account profile on either the via the discovery+ app or website or Magnolia Site.

Please note that because they are a common account any changes you make to either your discovery+ Subscription or your Magnolia account will apply to both services, including changes such as changing your password, credit card information, cancellation etc. If you need to manage your discovery+ Subscription click here.

NOTICE AND PROCEDURE FOR MAKING CLAIMS OF COPYRIGHT INFRINGEMENT

Pursuant to Title 17, United States Code, Section 512(c)(2), notifications of claimed copyright infringement must be sent to Discovery's Designated Agent. The Name and Address of Agent Designated to Receive Notification of Claimed Infringement: Leah Montesano, Legal, Discovery Communications, LLC, 8403 Colesville Road, Silver Spring, MD 20910; 240.662.0000 (telephone); or DMCA_notices@discovery.com.
To be effective, the notification must be a written communication that includes the following:

1. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
2. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;
3. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit us to locate the material;
4. Information reasonably sufficient to permit us to contact the complaining party, such as an address, telephone number and, if available, an e-mail address at which the complaining party may be contacted;
5. A statement that the complaining party has a good-faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law; and
6. A statement that the information in the notification is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

We may give notice to our users by means of a general notice on any of our websites, electronic mail to a user's e-mail address in our records, or written communication sent by first-class mail to a user's physical address in our records. If you receive such a notice, you may provide counter-notification in writing to the designated agent that includes the information below. To be effective, the counter-notification must be a written communication that includes the following:

1. Your physical or electronic signature;

2. Identification of the material that has been removed or to which access has been disabled, and the location at which the material appeared before it was removed or access to it was disabled;
3. A statement from you, under penalty of perjury, that you have a good-faith belief that the material was removed or disabled as a result of a mistake or misidentification of the material to be removed or disabled; and
4. Your name, physical address and telephone number, and a statement that you consent to the jurisdiction of a federal district court for the judicial district in which your physical address is located, or if your physical address is outside of the United States, for any judicial district in which we may be found, and that you will accept service of process from the person who provided notification of allegedly infringing material or an agent of such person.

COMMUNITY AND SOCIAL MEDIA SITES, CHAT ROOMS, FORUMS, AND BLOGS

Discovery wants to encourage an open exchange of information and ideas on and through designated parts of discovery+. But we cannot and do not review every posting made on discovery+'s community and social media sites, or in chat rooms, forums, blogs, and other public posting areas. You can expect these areas to include content, information, and opinions from a variety of individuals and organizations other than Discovery. We do not endorse or guarantee the accuracy of any posting, regardless of whether the posting comes from a user, from a celebrity or "expert" guest, or from a member of our staff. There is no substitute for healthy skepticism and your own good judgment. Responsibility for what is posted on Discovery's community and social media sites, or in chat rooms, forums, blogs and other public posting areas on discovery+ lies with each user – you alone are responsible for material you post. Discovery does not control the messages, information or other content that you or others may provide through discovery+. You may use discovery+ for lawful purposes only.

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- Violates or infringes the rights of others including, without limitation, patent, trademark, trade secret, copyright, publicity, privacy or other proprietary rights;
- Allows you to gain unauthorized access to discovery+, or any account, computer system, or network connected to discovery+, by means such as hacking, password mining or other illicit means;
- Is unlawful, threatening, abusive, harassing, defamatory, libelous, deceptive, fraudulent, invasive of another's privacy, tortuous, or contains explicit or graphic descriptions or accounts of sexual acts;

- Victimizes, harasses, degrades, or intimidates an individual or group of individuals on the basis of religion, gender, sexual orientation, race, ethnicity, age, or disability;
- Collects for marketing purposes any email addresses or other personal information that has been posted by other users of discovery+.
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- Encourages conduct that would constitute a criminal offense or that gives rise to civil liability or that otherwise encourages others to commit illegal activities or cause injury or property damage to any other person;
- Results in the posting or transmission of any message anonymously or under a false name;
- Permits any person to access, using your account, any features of discovery+ that may require registration;
- Results in a single message being posted to any area of discovery+ if that message is, in our view, off-topic or in violation of this Visitor Agreement; or
- Violates this Visitor Agreement, guidelines or any policy posted on discovery+, or interferes with the use of discovery+ by others.

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You must be at least 13 years old to use discovery+. However, you must be at least 18 years old to register on discovery+. By registering on discovery+, you warrant that you are at least 18 years old. Please do not use discovery+ if you are not at least 13 years old.

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USER ACCOUNT INFORMATION AND SECURITY

You agree that the information you supply during the registration process will be accurate and complete. You also agree not to (i) select, register, or attempt to register, or use a user name of another person with the intention of impersonating that person; (ii) use a user name of anyone else without authorization; (iii) use a user name in violation of the intellectual property rights of any person; or (iv) use a user name that Discovery considers to be offensive. Discovery reserves the right to reject or terminate any user name or password that, in its judgment, it deems offensive. You agree not to,

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DISPUTE RESOLUTION

We endeavor to resolve customer concerns as quickly as possible. Please contact Discovery at help@discoveryplus.com.

In the unlikely event that you're not satisfied with customer service's solution, and you and Discovery are unable to resolve a dispute through the Informal Dispute Resolution Procedures below, we each agree to resolve the dispute through binding arbitration or small claims court instead of in courts of general jurisdiction.

Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Unless expressly limited by this arbitration provision, arbitrators can award the same damages and relief that a court can award. **Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted.** In arbitration you may be entitled to recover attorneys' fees from us to the same extent as you would be in court.

ARBITRATION AGREEMENT

(1) **Claims Subject to Arbitration**: To the fullest extent permitted by applicable law, Discovery and you agree to arbitrate **all disputes and claims** between us, except for claims arising from bodily injury or that pertain to enforcing, protecting, or the validity of your or our intellectual property rights (or the intellectual property rights of any of our licensors, affiliates and partners). This Arbitration Agreement is intended to be broadly interpreted. It includes, but is not limited to:

• claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, fraud, misrepresentation or any other statutory or common-law legal theory;

• claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);

• claims for mental or emotional distress or injury not arising out of physical bodily injury;

• claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and

• claims that may arise after the termination of this Agreement.

References to “Discovery,” “you,” “we” and “us” in this Arbitration Agreement include our respective predecessors in interest, successors, and assigns, as well as our respective past, present, and future parents, subsidiaries and affiliates (including Warner Bros. Discovery, Inc. and its affiliates); those entities and our respective agents, employees, licensees, licensors, and providers of content as of the time your or our claim arises; and all authorized or unauthorized users or beneficiaries of Services under this or prior Agreements between us. Notwithstanding the foregoing, either party may elect to have claims heard in small claims court seeking only individualized relief, so long as the action is not removed or appealed to a court of general jurisdiction. This Arbitration Agreement does not preclude you from bringing issues to the attention of federal, state, or local agencies. **You agree that, by entering into this Agreement, you and we are each waiving the right to participate in a class action and to a trial by jury to the fullest extent permitted by applicable law.** This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act (9 U.S.C. §§ 1-16) governs the interpretation and enforcement of this arbitration provision. This Arbitration Agreement shall survive termination of your subscription or this Agreement.

(2) **Mandatory Pre-Arbitration Notice and Informal Dispute Resolution Procedures**: You and we agree that good-faith, informal efforts to resolve disputes often can result in a prompt, cost-effective and mutually beneficial outcome. Therefore, a party who intends to initiate arbitration or file a claim in small claims court must first send to the other a written Notice of Dispute (“Notice”). A Notice from you to Discovery must be emailed to notice@wbd.com (“Notice Address”). A Notice to you by Discovery must be sent to the email address associated with your Discovery Plus subscription. Any Notice must include (i) the claimant’s name, address, and email address; and (if different) the email address associated with the relevant Discovery Plus subscription; (ii) if you are submitting the Notice, how and when you became a subscriber, your subscription history, and current subscription status; (iii) a description of the nature and basis of the claim or dispute; including any relevant facts, and if you are submitting the Notice, facts pertaining to your use of Discovery Plus and the platform(s) on which you watch it (e.g., via connected TV, iPhone, desktop); (iv) a description of the nature and basis of the specific relief sought, including the damages sought, if any, and a detailed calculation for them; (v) a personally signed statement from the claimant (and not their counsel) verifying the accuracy of the contents of the Notice; and (vi) if you are the claimant and are represented by counsel, your signed statement authorizing Discovery to disclose your Discovery Plus Account details to your attorney while seeking to resolve your claim. The Notice must be individualized, meaning it can concern only your dispute and no other person’s dispute.

After receipt of a completed Notice, the parties shall engage in a good faith effort to resolve the dispute for a period of 60 days (which can be extended by agreement). You and we agree that, after receipt of the completed Notice, the recipient may request an individualized telephone or video settlement conference (which can be held after the 60-day period) and both parties will personally attend (with counsel, if represented). You and we agree that the parties (and counsel, if represented) shall work cooperatively to schedule the conference at the earliest mutually convenient time and to seek to reach a

resolution. If we and you do not reach an agreement to resolve the issues identified in the Notice within 60 days after the completed Notice is received (or a longer time if agreed to by the parties), you or we may commence an arbitration proceeding or a small claims court proceeding (if permitted by small claims court rules).

Compliance with this Mandatory Pre-Arbitration Notice and Informal Dispute Resolution Procedures section is a condition precedent to initiating arbitration. Any applicable limitations period (including statute of limitations) and any filing fee deadlines shall be tolled while the parties engage in the informal dispute resolution procedures set forth in this Arbitration Agreement. All of the Mandatory Pre-Arbitration Notice and Informal Dispute Resolution Procedures are essential so that you and Discovery have a meaningful opportunity to resolve disputes informally. If any aspect of these requirements has not been met, a court of competent jurisdiction may enjoin the filing or prosecution of an arbitration. In addition, unless prohibited by law, the arbitration administrator may not accept, administer, assess, or demand fees in connection with an arbitration that has been initiated without completion of the Mandatory Pre-Arbitration Notice and Informal Dispute Resolution Procedures. If the arbitration is already pending, it shall be administratively closed. Nothing in this paragraph limits the right of a party to seek damages for non-compliance with these Procedures in arbitration.

(3) **Arbitration Procedure**: The arbitration will be governed by applicable rules of National Arbitration & Mediation ("NAM") (including the Comprehensive Dispute Resolution Rules and Procedures and/or the Supplemental Rules for Mass Arbitration Filings, as applicable) ("NAM Rules")), as modified by this Arbitration Agreement, and will be administered by NAM. (If NAM is unavailable or unwilling to do so, another arbitration provider shall be selected by the parties that will do so, or if the parties are unable to agree on an alternative administrator, by the court pursuant to 9 U.S.C. §5.) The NAM Rules are available online at www.NAMADR.org, by calling NAM at 1-800-358-2550, or by requesting them in writing at the Notice Address. You may obtain a form to initiate arbitration
at: https://www.namadr.com/content/uploads/2020/09/Comprehensive-Demand-for-Arb-revised-9.18.19.pdf or by contacting NAM.

You and we agree that the party initiating arbitration must submit a certification that they have complied with and completed the Mandatory Pre-Arbitration Notice and Informal Dispute Resolution Procedures requirements referenced in the Arbitration Agreement and that they are a party to the Arbitration Agreement enclosed with or attached to the demand for arbitration. The demand for arbitration and certification must be personally signed by the party initiating arbitration (and their counsel, if represented).

All issues are for the arbitrator to decide, except as otherwise expressly provided herein and except as to issues relating to the scope and enforceability of the Arbitration Agreement or whether a dispute can or must be brought in arbitration (including whether a dispute is subject to this Arbitration Agreement or a previous arbitration provision between you and Discovery), which are for a court of competent jurisdiction to decide. The arbitrator may consider but shall not be bound by rulings in other arbitrations involving different customers.

Unless we and you agree otherwise, or the applicable NAM Rules dictate otherwise, any arbitration hearings will take place in the county (or parish) of your billing address and you and a Discovery representative will be required to attend in person. At the conclusion of the arbitration proceeding, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based. The arbitrator's decision is binding only between you and Discovery and will not have any preclusive effect in another arbitration or proceeding that involves a different party. An arbitrator's award that has been fully satisfied shall not be entered in any court.

As in court, you and Discovery agree that any counsel representing a party in arbitration certifies when initiating and proceeding in arbitration that they are complying with the requirements of Federal Rule of Civil Procedure 11(b), including certification that the claim or relief sought is neither frivolous nor brought for an improper purpose. The arbitrator is authorized to impose any sanctions under the NAM Rules, Federal Rule of Civil Procedure 11, or applicable federal or state law, against all appropriate represented parties and counsel.

Except as expressly provided in the Arbitration Agreement, the arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorneys' fees and costs, in accordance with applicable law. Unless otherwise provided by applicable law, the parties shall bear their own attorneys' fees and costs in arbitration unless the arbitrator awards sanctions or finds that either the substance of the claim, the defense, or the relief sought is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)).

(4) **Arbitration Fees**: The payment of arbitration fees (the fees imposed by the arbitration administrator including filing, arbitrator, and hearing fees) will be governed by the applicable NAM Rules, unless you qualify for a fee waiver under applicable law. If after exhausting any potentially available fee waivers, the arbitrator finds that the arbitration fees will be prohibitive for you as compared to litigation, we will pay as much of your filing, arbitrator, and hearing fees in the arbitration as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive, regardless of the outcome of the arbitration, unless the arbitrator determines that your claim(s) were frivolous or brought for an improper purpose or asserted in bad faith. You and we agree that arbitration should be cost-effective for all parties and that any party may engage with NAM to address the reduction or deferral of fees.

(5) **Confidentiality**: Upon either party's request, the arbitrator will issue an order requiring that confidential information of either party disclosed during the arbitration (whether in documents or orally) may not be used or disclosed except in connection with the arbitration or a proceeding to enforce the arbitration award and that any permitted court filing of confidential information must be done under seal to the furthest extent permitted by law.

(6) **Offer of Settlement**: In any arbitration between you and Discovery, the defending party may, but is not obligated to, make a written settlement offer at any time before the evidentiary hearing or, if a dispositive motion is permitted, prior to the dispositive

motion being granted. The amount or terms of any settlement offer may not be disclosed to the arbitrator until after the arbitrator issues an award on the claim. If the award is issued in the other party's favor and is less than the defending party's settlement offer or if the award is in the defending party's favor, the other party must pay the defending party's costs incurred after the offer was made, including any attorney's fees. If any applicable statute or case law prohibits the shifting of costs incurred in the arbitration, then the offer in this provision shall serve to cease the accumulation of any costs to which the party bringing the claim may be entitled for the cause of action under which it is suing.

(7) **Requirement of Individualized Relief**: The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, YOU AND WE AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR OUR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL PROCEEDING**. Further, unless both you and we agree otherwise, the arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative, class, or private attorney general proceeding. If, after exhaustion of all appeals, any of these prohibitions on non-individualized declaratory or injunctive relief; class, representative, and private attorney general claims; and consolidation are found to be unenforceable with respect to a particular claim or with respect to a particular request for relief (such as a request for injunctive relief sought with respect to a particular claim), then the parties agree such a claim or request for relief shall be decided by a court of competent jurisdiction, after all other arbitrable claims and requests for relief are arbitrated. You agree that any arbitrations between you and Discovery will be subject to this Arbitration Agreement and not to any prior arbitration agreement you had with Discovery, and, notwithstanding any provision in this Agreement to the contrary, you agree that this Arbitration Agreement amends any prior arbitration agreement you had with Discovery, including with respect to claims that arose before this or any prior arbitration agreement.

(8) **Opt Out of Future Changes**: Notwithstanding any provision to the contrary, if Discovery makes any future change to this Arbitration Agreement (other than a change to the Notice Address), you may reject any such change by sending Discovery an email from the email address associated with your Discovery Plus subscription to notice@wbd.com within 30 days of the posting of the amended arbitration agreement that provides: (i) your full legal name, (ii) your complete mailing address, (iii) your phone number, (iv) if applicable, the username or email address associated with any potential account or newsletter; and (v) the approximate date of your initial use of the relevant Site. Such an opt-out email must be sent by you personally, and not by your agent, attorney, or anyone else purporting to act on your behalf. It must include a statement, personally signed by you, that you wish to reject the change to the Arbitration Agreement. This is not an opt out of arbitration altogether.

(9) **Mass Filing**:

If, at any time, 25 or more claimants (including you) submit Notices or seek to file demands for arbitration raising similar claims against the other party or related parties by the same or coordinated counsel or entities, consistent with the definition and criteria of Mass Filings ("Mass Filing") set forth in NAM's Mass Filing Supplemental Dispute Resolution Rules and Procedures ("NAM's Mass Filing Rules," available at https://www.namadr.com/resources/rules-fees-forms/), you and we agree that the additional procedures set forth below shall apply. The parties agree that throughout this process, their counsel shall meet and confer to discuss modifications to these procedures based on the particular needs of the Mass Filing. The parties acknowledge and agree that by electing to participate in a Mass Filing, the adjudication of their dispute might be delayed. Any applicable limitations period (including statute of limitations) and any filing fee deadlines shall be tolled beginning when the Mandatory Pre-Arbitration Notice and Informal Dispute Resolution Procedures are initiated, so long as the pre-arbitration Notice complies with the requirements in this Arbitration Agreement, until your claim is selected to proceed as part of a staged process or is settled, withdrawn, otherwise resolved, or opted out of arbitration.

Stage One: Counsel for the claimants and counsel for Discovery shall each select 25 claims per side (50 claims total) to be filed and to proceed in individual arbitrations as part of a staged process. Each of these individual arbitrations shall be assigned to a different, single arbitrator unless the parties agree otherwise in writing. Any remaining claims shall not be filed or be deemed filed in arbitration, nor shall any arbitration fees be assessed in connection with those claims unless and until they are selected to be filed in individual arbitration proceedings as part of a staged process. After this initial set of staged proceedings is completed, the parties shall promptly engage in a global mediation session of all remaining claims with a retired federal or state court judge and Discovery shall pay the mediator's fee.

Stage Two: If the remaining claims are not resolved at this time, counsel for the claimants and counsel for Discovery shall each select 50 claims per side (100 claims total) to be filed and to proceed in individual arbitrations as part of a second staged process, subject to any procedural changes the parties agreed to in writing. Each of these individual arbitrations shall be assigned to a different, single arbitrator unless the parties agree otherwise in writing. Any remaining claims shall not be filed or be deemed filed in arbitration, nor shall any arbitration fees be assessed in connection with those claims unless and until they are selected to be filed in individual arbitration proceedings as part of a staged process. After this second set of staged proceedings is completed, the parties shall promptly engage in a global mediation session of all remaining claims with a retired federal or state court judge and Discovery shall pay the mediator's fee.

Stage Three: If the remaining claims are not resolved at this time, counsel for the claimants and counsel for Discovery shall each select 100 claims per side (200 claims total) to be filed and to proceed in individual arbitrations as part of a third staged process, subject to any procedural changes the parties agreed to in writing. Any remaining claims shall not be filed or be deemed filed in arbitration, nor shall any arbitration fees be assessed in connection with those claims unless and until they are selected to be filed in individual arbitration proceedings as part of a staged process.

Following this third set of staged proceedings, counsel for claimants may elect to have the parties participate in a global mediation session of all remaining claims with a retired federal or state court judge.

If your claim is not resolved as part of the staged process identified above, either:

Option One: You and Discovery may separately or by agreement, opt out of arbitration and elect to have your claim heard in court consistent with the Agreement. You may opt out of arbitration by providing your individual, personally signed notice of your intention to opt out by sending Discovery an email from the email address associated with your Discovery Plus subscription to notice@wbd.com. Such an opt-out email must be sent by you personally, and not by your agent, attorney, or anyone else purporting to act on your behalf. It must include a statement, personally signed by you, that you wish to opt out of arbitration within 30 days after the conclusion of Stage 3 or the elective mediation associated with Stage 3. Discovery may opt your claim out of arbitration by sending an individual, personally signed notice of its intention to opt out to your counsel within 14 days after the expiration of your 30 day opt out period. Counsel for the parties may agree to adjust these deadlines.

OR

Option Two: If neither you nor Discovery elect to have your claim heard in court consistent with Option One, then you agree that your claim will be resolved as part of continuing, staged individual arbitration proceedings as set forth below. Assuming the number of remaining claims exceeds 200, then 200 claims shall be randomly selected (or selected through a process agreed to by counsel for the parties) to be filed and to proceed in individual arbitrations as part of a staged process. If the number of remaining claims is fewer than 200, then all of those claims shall be filed and proceed in individual arbitrations. Any remaining claims shall not be filed or be deemed filed in arbitration, nor shall any arbitration fees be assessed in connection with those claims unless and until they are selected to be filed in individual arbitration proceedings as part of a staged process. After each set of 200 claims are adjudicated, settled, withdrawn, or otherwise resolved, this process shall repeat consistent with these parameters. Counsel for the parties are encouraged to meet and confer, participate in mediation, and engage with each other and with NAM (including through a Procedural Arbitrator) to explore ways to streamline the adjudication of claims, increase the number of claims to proceed at any given time, promote efficiencies, conserve resources, and resolve the remaining claims.

A court of competent jurisdiction shall have the authority to enforce these Mass Filing provisions and, if necessary, to enjoin the mass filing, prosecution, or administration of arbitrations and the assessment of arbitration fees. If these additional procedures apply to your claim, and a court of competent jurisdiction determines that they are not enforceable as to your claim, then your claim shall proceed in a court of competent jurisdiction consistent with this Agreement.

You and Discovery agree that we each value the integrity and efficiency of arbitration and wish to employ the process for the fair resolution of genuine and sincere disputes between us. You and Discovery acknowledge and agree to act in good faith to ensure the processes set forth herein are followed. The parties further agree that application of

these Mass Filing procedures have been reasonably designed to result in an efficient and fair adjudication of such cases.

(10) **Severability**: If any portion of this Arbitration Agreement is found to be void, invalid, or otherwise unenforceable, then that portion shall be deemed to be severable and, if possible, superseded by a valid, enforceable provision, or portion thereof, that matches the intent of the original provision, or portion thereof, as closely as possible. The remainder of this Arbitration Agreement shall continue to be enforceable and valid according to the terms contained herein.

CLASS ACTION AND JURY TRIAL WAIVER

You and Discovery agree that, to the fullest extent permitted by law, each party may bring claims (whether in court or in arbitration) against the other only in an individual capacity, and not participate as a plaintiff, claimant, or class member in any class, collective, consolidated, private attorney general, or representative proceeding. This means that you and Discovery may not bring a claim on behalf of a class or group and may not bring a claim on behalf of any other person unless doing so as a parent, guardian, or ward of a minor or in another similar capacity for an individual who cannot otherwise bring their own individual claim. This also means that you and Discovery may not participate in any class, collective, consolidated, private attorney general, or representative proceeding brought by any third party. Notwithstanding the foregoing, you or Discovery may participate in a class-wide settlement.

To the fullest extent permitted by law, you and Discovery waive any right to a jury trial.

GOVERNING LAW AND VENUE

These Terms shall be governed by the laws of the State of New York, without regard to conflict of law principles. Any dispute that is not subject to arbitration, or any issues involving arbitrability or enforcement of any provisions under the dispute resolution clause or Arbitration Agreement shall be brought in the appropriate state or federal court located in New York County, New York; and we and you each irrevocably consent to the exclusive jurisdiction and venue of the state or federal courts in New York County, New York for the adjudication of all non-arbitral claims.

TIME LIMITATION FOR CLAIMS

Subject to the dispute resolution clause and to the extent permitted by applicable law, any dispute, claim or controversy arising out of or relating in any way to the service or your use of the service and/or Site, these Terms of Use, or the relationship between us, must be commenced within one year of the relevant events. A dispute is commenced if it is filed in an arbitration or, if the dispute is non-arbitrable, a court of competent jurisdiction, during the one-year period. If you or we provide notice of a dispute, the one-year period is tolled for 60 days following receipt of the notice of dispute (although for

the sake of clarity, it may be further extended if your dispute, claim or controversy is part of a mass filing as contemplated in Subsection (9) of the Arbitration Agreement).

INDEMNITY

You agree to indemnify, defend and hold harmless Discovery, its affiliates, and their officers, directors, employees, agents, licensors and suppliers, from and against any and all losses, expenses, damages and costs (including reasonable attorneys' fees) resulting from any violation of this Visitor Agreement or any activity related to your account (including negligent or wrongful conduct) by you or any other person accessing any Discovery Site using your account.

RELEASE

In the event that you have a dispute with one or more other users of discovery+, you release Discovery (and our officers, directors, agents, subsidiaries, joint ventures and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes.

SEVERABILITY

In the event that any portion of this Visitor Agreement is found to be invalid or unenforceable for any reason, such invalidity or unenforceability shall not affect the enforceability or validity of any other portion of this Visitor Agreement, which shall remain in full force and effect and be construed as if the invalid or unenforceable portion were not part of the Visitor Agreement.

Exhibit 11

May 29, 2024

NOTICE TO ALL PARTIES

Re: **Keller Postman Discovery Communications, LLC Filings**
Ref. No.: 1601003993

Dear Counsel:

JAMS has received and reviewed Respondent's objection to the above-referenced Demands for Arbitration, and Claimants' response thereto. In light of the current Visitor Agreement, which names another arbitration provider and which appears to have gone into effect before these Demands were filed, JAMS is unable to proceed with administration at this time. If the parties agree to JAMS, or if a court orders the parties to proceed at JAMS, we will be happy to proceed.

Sincerely,

Matthew Levington
Arbitration Practice Manager - West
mlevington@jamsadr.com