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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR SAN FRANCISCO COUNTY

Ellen Corbett and Consumer Action, as private attorneys general, Plaintiffs, v . National Arbitration Forum, a Minnesota corporation, Defendant. ______________________________	))))))))))))	Case No. ________________________ **COMPLAINT FOR VIOLATIONS OF THE UNFAIR BUSINESS PRACTICES ACT AND FOR DECLARATORY AND INJUNCTIVE RELIEF** <u>Type of Case</u>: (Other): Unfair Business Practices

INTRODUCTORY STATEMENT

1. This is a lawsuit charging the National Arbitration Forum ("NAF") with refusing to

comply with a California statute, C.C.P. § 1281.96, that requires private arbitration companies to disclose certain information about consumer disputes that they handle. Any rational consumer considering whether or not to sign an arbitration agreement, or considering whether to pursue a claim in arbitration before NAF, would need to know this information to make informed decisions and to protect his or her interests. The information that § 1281.96 requires arbitration companies to publicly disclose includes the number of cases the arbitration firm has handled for various corporations (so consumers can tell if a given arbitration firm has an ongoing and recurring relationship with a given company), the disposition of those cases (so consumers can ascertain if a given arbitration company tends to favor a given corporation), and the total costs imposed on consumers who have had their cases handled by that arbitration firm.

2. Section 1281.96 is a valuable consumer protection statute because certain private arbitration companies – and particularly NAF – may tend to favor corporate defendants over consumers. If arbitration firms refuse to comply with Section 1281.96 and insist upon handling cases in a secret manner, consumers will have no way of learning if an arbitration firm tends to rule for a given corporation, and will have no way of learning if other consumers have been charged very large total fees. If arbitration companies may ignore Section 1281.96, then they will be less accountable for their actions.

3. Section 1281.96 is also a crucial protection for consumers because it reduces the great disparity of information that would otherwise exist between corporations who use certain arbitration companies repeatedly ("repeat players"), and individual consumers who do not have the kinds of prior contacts with arbitration companies that would give them access to this kind of information.

4. Section 1281.96 also helps policy makers and the public to make informed judgments about the fairness and cost of mandatory arbitration. If arbitration companies refuse to comply with

the statutes, it will deprive legislators and others of valuable data.

5. It also gives NAF an unfair advantage over other private arbitration companies who are its competitors if those other companies expend the time and resources to comply with § 1281.96, but NAF does not do so.

6. By refusing to comply with § 1281.96, NAF has committed an unlawful and unfair act or practice in violation of the Unfair Competition Law, California Business & Professions Code § 17200, *et seq*.

THE PARTIES

Plaintiffs

7. Plaintiff Ellen Corbett is a resident of San Leandro, California and a member of the California Assembly representing the 18th Assembly District. She is the Chair of the Assembly Judiciary Committee. She was the author of AB 2656, which became Section 1281.96.

8. Plaintiff Consumer Action ("CA") is a non-profit membership organization committed to consumer education and advocacy. CA was established more than 30 years ago, and has approximately 1,500 members. CA is headquartered in San Francisco and has members throughout California and nationwide. CA has long recognized and spoken out against abuses of mandatory arbitration clauses. CA was a named plaintiff in several leading cases involving challenges to mandatory arbitration abuses, including Ting and Consumer Action v. AT&T (9th Cir.) 319 F.3d 1126, cert. denied, (2004) 124 S.Ct. 53, and Badie and Consumer Action v. Bank of America (1998) 67 Cal. App.2d 779, 79 Cal. Rptr. 2d 273, review denied (Feb. 24, 1999).

Defendant

9. NAF is a private for-profit arbitration company based in Minneapolis, Minnesota. It is, through its officers, agents and employees, engaged in providing arbitration services and is

doing business in California. An NAF paper entitled "Class Claim Resolution Program," available on NAF's website, states that NAF "arbitrators serve in New York, California and all states in between."

PRIVATE ATTORNEY GENERAL ALLEGATIONS

10. This action is brought by Plaintiffs acting as private attorneys general pursuant to the Unfair Business Practices Act. A private attorney general action pursuant to Business and Professions Code §§ 17203 and 17204 is appropriate and necessary because NAF has engaged in the acts described herein as a general business practice. Plaintiffs request that this Court decide that NAF's practice of refusing to disclose information required by § 1281.96 is unlawful, unfair, deceptive and illegal, and enter an injunction requiring NAF to comply with § 1281.96.

VENUE

11. Venue is appropriate in this Court pursuant to California Civil Code § 1780(c) because NAF is doing business in this county. Rule 32(A) of the NAF's Code provides that "participatory" arbitration hearings may be held in "a reasonably convenient location within the United States federal judicial district or other national judicial district where the Respondent to the Initial Claim resides or does business." Rule 39(A) of the NAF's Code provides that "An Award shall be entered in the state, county, or other jurisdiction provided for a hearing in Rule 32. . . ." In the NAF's "Commentary" to its "Arbitration Bill of Rights," it states that the NAF's "nationwide arbitrator panel consists of former judges, law professors, and senior attorneys who reside in every federal judicial district throughout the United States and in most countries outside the U.S."

GENERAL ALLEGATIONS

12. California Code of Civil Procedure § 1281.96 requires private arbitration companies to publicly disclose information that is extremely important to any consumer considering whether

to bring a case in arbitration. In particular, it states:

> (a) Except as provided in paragraph (2) of subdivision (b), any private arbitration company that administers or is otherwise involved in, a consumer arbitration, shall collect, publish at least quarterly, and make available to the public in a computer-searchable format, which shall be accessible at the Internet Web site of the private arbitration company, if any, and on paper upon request, all of the following information regarding each consumer arbitration within the preceding five years:
>
> (1) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity.
>
> (2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges: less than one hundred thousand dollars ($100,000), one hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and over two hundred fifty thousand dollars ($250,000).
>
> (3) Whether the consumer or nonconsumer party was the prevailing party.
>
> (4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.
>
> (5) Whether the consumer party was represented by an attorney.
>
> (6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.
>
> (7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.
>
> (8) The amount of the claim, the amount of the award, and any other relief granted, if any.
>
> (9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.
>
> (b)(1) If the information required by subdivision (a) is provided by the private arbitration company in a computer-searchable format at the company's Internet Web site and may be downloaded without any fee, the company may charge the actual cost of copying to any person who requests the information on paper. If the information required by subdivision (a) is not accessible by the Internet, the

company shall provide that information without charge to any person who requests the information on paper.

(2) Notwithstanding paragraph (1), a private arbitration company that receives funding pursuant to Chapter 8 (commencing with Section 465) of Division 1 of the Business and Professions Code, and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the information required by subdivision (a) semiannually, provide the information only on paper, and charge the actual cost of copying.

(c) This section shall apply to any consumer arbitration commenced on or after January 1, 2003.

(d) No private arbitration company shall have any liability for collecting, publishing, or distributing the information required by this section.

13. NAF has disregarded § 1281.96's requirements. Instead of making a public report about the cases it has handled in California, NAF has announced that it has no cases that are subject to California law. It is not that NAF has not handled and resolved any arbitrations in cases involving California consumers that were filed after January 1, 2003. Instead, NAF claims to have no cases subject to § 1281.96 because NAF has unilaterally decided that federal law excuses it from complying with the California Arbitration Act. The NAF's "California Consumer ADR Report," set forth on its website, states: "Report of Consumer ADR Proceedings Commenced on Or After January 1, 2003 And Subject To the California Arbitration Act: January-December 2003: None." The NAF's California Consumer ADR Report" goes on to state:

NOTE: A number of courts have held that matters subject to the Federal Arbitration Act ("FAA") are not subject to the California Arbitration Act or to the statutory arbitration procedures of any state. *See e.g., Mayo v. Dean Witter Reynolds*, 2003 WL 1922963 (N.D. Cal. April 22, 2003); *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F.Supp.2d 1177 (S.D. Cal. 2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Basura v. U.S. Home Corp.*, 98 Cal. App. 4th 1205 (Cal. Ct. App. 2002). Such matters are governed by the FAA, agreement of the parties, and procedural rules under which those arbitrations are to be conducted. Absent contrary agreement, parties who choose to arbitrate matters pursuant to the Forum's Code of Procedure select the Federal Arbitration Act as governing law.

14. On information and belief, NAF has handled a number of consumer arbitration cases

in California that were filed on or after January 1, 2003, and have since been resolved. Notwithstanding NAF's declaration that it is not subject to state law, it has resolved a number of cases that fall within the plain terms of § 1281.96.

15. The statement on NAF's website that "matters subject to the Federal Arbitration Act ("FAA") are not subject to the California Arbitration Act or to the statutory procedures of any state" is flatly wrong.

A. The FAA at most preempts state laws that single out arbitration clauses for worse treatment than other types of contracts when these laws interfere with the enforcement of agreements to arbitrate.

B. Section 1281.96 does not interfere with the enforcement of agreements to arbitrate. NAF could readily comply with § 1281.96 without interfering with any agreement to arbitrate. Section 1281.96 merely places obligations on the arbitration company that come into effect only after the completion of an arbitration proceeding. Plaintiffs here do not seek to bar the enforcement of any agreement to arbitrate; Plaintiffs only ask for an injunction compelling NAF to make the disclosures required by California law.

C. The FAA does not generally override all state arbitration acts. The U.S. Supreme Court has stated that "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

D. Section 1281.96 can thus only be preempted if it "actually conflicts" with Federal law, either because it is "impossible for a private party to comply with both . . . requirements" or because the sate laws "stand [ ] as an obstacle to the accomplishment and execution of the full purposes" of Congress. *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287 (citations omitted).

E. Section 1281.96 does not conflict with the FAA because the FAA contains no rules governing arbitrator disclosures or ethics.

F As proof that arbitrators can readily comply with § 1281.96 without undermining the FAA on the enforcement of agreements to arbitrate, NAF's principal competitors do comply with § 1281.96. Both the American Arbitration Association and JAMS have made the disclosures required by § 1281.96. NAF is the only major private arbitration company to refuse to comply with this state law. NAF derives an unfair advantage over its competitors by refusing to comply with § 1281.96.

16. NAF's practice of refusing to comply with § 1281.96 is not only unlawful, it is unfair to consumers. Many corporations have drafted arbitration clauses that permit consumers to choose between several different possible arbitration providers. A very partial list of companies whose standard agreements include such provisions is American Express, Capitol One, Chase Manhattan Bank, Citibank, Discover Financial Services, Fleet Bank and Household Bank. The information that § 1281.96 requires arbitration companies to disclose is helpful to California consumers who are parties to contracts that put them in a position to choose between private arbitration companies at the time a dispute arises.

17. NAF's practice of refusing to comply with § 1281.96 is also unfair to consumers because it perpetuates a disparity in knowledge between consumers and businesses. If a business

repeatedly has cases before NAF's arbitrators, it will know much more than the business's consumers about which arbitrators to select. This knowledge is important. When a situation is created where only corporate repeat players have ready access to information about arbitration decisions, consumers are disadvantaged. Such a system puts the corporate repeat player "in a vastly superior legal posture since as a party to every arbitration it will know every result and be able to guide itself and take legal positions accordingly, while each [consumer] will have to operate in isolation and largely in the dark." *Ting v. AT&T*, 182 F.Supp.2d 902, 933 (N.D. Cal. 2002) (footnote omitted), *aff'd in relevant part and reversed in part on other grounds*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 319 S. Ct. 53 (2003).

18. A study performed for the California legislature shortly before § 1281.96 was passed demonstrates that some corporations may value and act upon information about how arbitrators have ruled in earlier cases. A study of the results of arbitration in California HMOs by the California Research Bureau found that in every instance where an arbitrator awarded a plaintiff over $1 million, "the arbitrator was only employed in that case." Marcus Nieto and Margaret Hosel (2001) *Arbitration in California Managed Health Care Systems* at 22-23.

19. The NAF's rules permit NAF to influence the outcomes of arbitrations against consumers. As a result, the disclosures required by § 1281.96 are particularly important for consumers faced with bringing claims at NAF. Under the NAF Code of Procedure, parties must select an arbitrator from a short list of individuals approved and pre-selected by NAF. The parties are provided with a list containing one more name than the number of parties, and each party then gets to make one strike. Left after the strikes would be the one extra arbitrator selected by the NAF. These limited NAF arbitration panels permit NAF's administrators to steer cases to particular decision makers. A recent study by Michael Geist, a Professor at the University of Ottowa Law

School, demonstrates how this system can give rise to abuse. The study found that NAF arbitrators rule for the complainant in the internet domain name dispute resolution system far more often than arbitrators from other providers, because of NAF's practice of "granting an ever-larger share of its caseload to a small group of panelists." *New UDRP Study Finds Forum Shopping, Panel Problems,* ADRWorld.com, March 26, 2002. The study found that "three of NAF's busiest panelists have decided 324 out of 324 cases in favor of complainants in default cases." *Id*. While this study refers to default cases, that fact does not adequately explain the unbalanced results. The study further explains that default cases in the setting of domain name disputes have not been automatic wins for the complainants in front of arbitrators who are not connected with the NAF and explains that those results with other arbitrators are unsurprising in light of UDRP's proof requirements. *Id.*

20. The information that § 1281.96 requires private arbitration companies to disclose is particularly important for consumers with respect to NAF, because of the results in the one set of disclosures from an independent party about the outcomes in NAF arbitrations of consumer cases. In the case of *Bownes v. First USA Bank*, N.A., Civil Action No. 99-2479-PR (Cir. Ct. Montgomery Cty.), First USA's interrogatory answers indicated that in arbitrations before the NAF, First USA prevailed in 19,618 cases, and the card member prevailed in only 87 cases. That works out to a success rate for the lender of 99.6%. This case also demonstrates the advantages of being a repeat player, advantages that § 1281.96 works to diminish. First USA has been a major repeat client for NAF. In 1999, Clinton Walker, General Counsel of First USA, testified in a deposition that First USA had then paid at least $2 million to NAF in fees. This is a great deal of money to NAF, whose corporate parent Equilaw went bankrupt in 1994.

21. NAF has apparent links with corporate defendants, particularly in the financial services area. This relationship highlights why consumers would reasonably like to know the

information that NAF is required to disclose under §1281.96, and why it is unfair to consumers and NAF's competitors for NAF not to comply with that statute.

A. One NAF advertisement labeled "Professionals and the National Arbitration Forum," consists of a list of favorable quotes, all of which come from attorneys or officials affiliated with corporations, and none of whom principally represents individual Plaintiffs.

B An NAF News Release dated August 1, 1998 includes a list of "Lenders Adopting Forum Agreements," and identifies 21 persons who specialize in representing financial institutions and banks as "Information Resources."

22. NAF repeatedly stresses in its advertisements and solicitations aimed at businesses that its rules favor businesses. This behavior further demonstrates why it is unfair for NAF to violate § 1281.96.

A. For example, NAF has stressed that it has a rule requiring consumers who do not prevail in cases to pay the attorneys' fees of the corporate defendant ("a Loser Pays Rule"). In an interview with a glossy magazine targeted to in-house corporate counsel, an NAF principal, Ed Anderson, explained that this Loser Pays Rule extends to attorneys' fees and is aimed at making it more risky for individuals to bring claims against businesses, as a means of achieving tort reform:

> Editor: Another goal of Civil Justice Reform is to impose a penalty on commencing litigation as a way to extort a settlement of a frivolous claim. Civil Justice Reform advocates have proposed a "loser pays" rule to counter such tactics.
>
> Anderson: The rules of the National Arbitration Forum allows the arbitrator to award the prevailing party the cost of the arbitration including attorneys' fees. The rules of the other major arbitration administrators have similar provisions. The economics of dispute resolution by arbitration are entirely different from the economics of bringing lawsuits. There is no such thing as a "no risk" arbitration for either side.

Do an LRA: Implement Your Own Civil Justice Reform Program NOW, Metropolitan Corp. Couns., Aug. 2001.

B. Applying a Loser Pays Rule undermines remedial statutes, such as those aimed at protecting consumers and the civil rights of workers. *See Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 418. One state Supreme Court has held that a similar Loser Pays Rule in an arbitration agreement rendered the agreement substantively unconscionable. *See Sosa v. Paulos* (Utah 1996) 924 P.2d 357, 362 (an arbitration provision requiring a medical malpractice plaintiff to pay the litigation costs of the doctor if the patient "wins less than half the amount of damages sought in arbitration" was unconscionable). Moreover, California Code of Civil Procedure section 1284.3 prohibits private arbitration companies from administering a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney or witnesses.

C. Another set of NAF rules that may disadvantage consumers relates to discovery. In one advertisement distributed to corporate in-house counsel on NAF letterhead, NAF pronounced that its rules provide for "[v]ery little, if any, discovery." This NAF rule is also likely to disadvantage many consumers. In *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83, 104, the California Supreme Court held that "adequate discovery is indispensable for the vindication of FEHA claims."

D. NAF stresses in its promotional materials marketing its services to companies that its rules (unlike the American Arbitration Association's rules) prohibit claimants

from proceeding on a class action basis. Illustrative of these promises is a January 14, 1999 letter from NAF's Curtis Brown to a prospective client, stating in the first sentence that "A number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements <u>eliminates class actions</u> . . . ." (Emphasis in original.) This letter also promises that NAF arbitration "<u>will make a positive impact on the bottom line</u>." (Emphasis in original.) This anti-class action rule is contrary to California law. *See Keating v. Superior Court* (1982) 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360, *rev'd on other grounds*, *Southland Corp. v. Keating* (1984) 465 U.S. 1 ("If, however, an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party.").

E. In *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal. App.4th 1659, 18 Cal. Rptr. 2d 563, the Court of Appeal held that "the likely effect of these procedures [NAF's rules] is to deny a borrower against whom a claim has been brought any opportunity to a hearing. . . ." 14 Cal. App.4th at 1666, 18 Cal. Rptr.2d at 566. One basis for the *Patterson* decision was that at that time, NAF required California residents to go to Minnesota to litigate even modest consumer claims. While the NAF subsequently changed that rule after the *Patterson* decision was handed down, the fact that NAF attempted to impose such term upon California consumers demonstrates why consumers would want to know the information that arbitration companies must disclose under § 1281.96.

23. NAF has repeatedly made inappropriate statements to businesses indicating that NAF

sees its role as limiting corporate liability and reducing the recoveries obtained by consumers. These statements call into question NAF's neutrality, and highlight why consumers need the information that NAF is required to disclose under § 1281.96.

A. One NAF solicitation sent to multiple potential corporate clients states in huge print that NAF is "The alternative to the million dollar lawsuit." It is inappropriate for NAF to suggest than $1 million is an excessive award before it has heard any evidence as to the facts of a case or a consumer's specific damages.

B. A letter dated April 16, 1998, from Roger Haydock, NAF's Director of Arbitration, to a corporate defense lawyer warns that the "class action bar" is threatening to bring lawsuits involving the Y2K issue, and states that the "*only* thing" that will "prevent" such suits is the adoption of an NAF arbitration clause "in every contract, note and security agreement." The approach in Mr. Haydock's letter is not that of an even-handed neutral, but of an advocate advising defense counsel how to defeat a mutual adversary ("the class action bar").

C. A letter dated September 26, 1996, from NAF's Director of Development, Curtis D. Brown, to in-house counsel for a corporate lender, states "By adding arbitration language to your contracts, the [NAF's] national system of arbitration lets you minimize lawsuits, and the threat of lender liability jury verdicts."

D. On January 29, 1997, Leaf Steines, a policy analyst for NAF, wrote the same lender's in-house counsel and urged that "[t]here is no reason for Saxon Mortgage, Inc. to be exposed to the costs and the risks of the jury system." An attachment to that letter offers free legal advice on how lenders can defeat class actions where common questions predominate and the class representatives' claims are typical.

E. NAF issues a publication entitled "Domain News" that touts when its arbitrators rule for famous persons in domain name disputes. *E.g., Johnny Unitas Wins Another One,* 2 Domain News Vol 4, at 2; *Master of Domains: metallica.org*, 1 Domain News Vol 7 at 1; *Hey You, Get Off of My Domain!: MickJagger.com*, 1 Domain News Vol. 6 at 2. Plaintiffs know of no other arbitrator, and certainly of no court, that publicizes decisions favoring one party over another, or that publicly mocks the losers in disputes that they resolve.

24. NAF has taken positions and made statements in court that may suggest a predisposition toward corporate defendants, and highlight why consumers need the information that NAF is required to disclose under § 1281.96.

A. NAF has repeatedly entered into litigation between corporate defendants and individual Plaintiffs as an *amicus curiae*. In each instance NAF stated that it was "neutral" with respect to the litigation. Nonetheless, in each case, NAF made arguments in support of the factual and legal positions being advanced by the corporate defendants in the case and against the positions taken by the individual Plaintiffs. This pattern has been replicated in at least the following cases: *Marsh v. First USA Bank, N.A.*, No. 00-10648 (5th Cir Dec. 12, 2000) (NAF also filed a brief in support of First USA's position in the trial court); *Green Tree Financial Corp. v. Randolph*, (2000) 531 U.S. 79; and *Baron v. Best Buy Co., Inc.*, No-14028-E (11th Cir. Dec. 5, 1999).

B. In the case of *Toppings v. Meritech Mortg. Services, Inc.* (S.D. W. Va. 2001) 140 F.Supp.2d 683, the consumer plaintiff challenged the enforceability of the arbitration clause at issue on the grounds that NAF was biased. NAF provided the defendant

with a letter listing the names and addresses of West Virginia attorneys who were supposedly NAF arbitrators. The defendant then provided the NAF's letter to the U.S. District Court as proof of the NAF's bona fides. In fact, a number of the people listed were not NAF arbitrators, and several of them were prompted to write to the NAF or to the court to respond to the NAF's false statement about them.

25. Several courts have refused to enforce arbitration clauses that required consumers to take their disputes before the NAF. This fact highlights the concerns that would lead rational consumers to want the information that NAF is required to disclose under § 1281.96.

A. In *Mercuro v. Superior Court* (Cal. Ct. App. 2002) 116 Cal. Rptr. 2d 671, the court held that an arbitration clause designating the NAF was unconscionable in part because of concerns that the NAF would favor the employer, a "repeat player."

B. In *Toppings v. Meritech Mortgage Services, Inc.* (W. Va. 2002) 569 S.E.2d 149, the court held that a lender's arbitration clause requiring consumers to submit disputes to the NAF where the NAF's future income depends on continued lender referrals so impinges on neutrality and fundamental fairness as to be unconscionable and unenforceable under West Virginia law.

26. NAF's practice of refusing to make the disclosures required by § 1281.96 is unfair to consumers because it denies them valuable information about the actual costs of arbitration.

A. Section 1281.96(a)(9) requires private arbitration companies to disclose the arbitrators "total fee for the case, and the percentage of the arbitrator's fee allocated to each party."

B. Information about the actual total costs that other consumers have been required to pay is vitally important to consumers. As the United States Supreme Court

recognized in *Green Tree Financial Corp. v. Randolph* (2000) 513 U.S. 79, 91, "It may well be that the existence of large arbitration costs could preclude [a consumer litigant] from effectively vindicating her federal statutory rights in the arbitral forum. . . ."

C. Information about the total arbitration fees levied on consumers is particularly important for consumers considering bringing claims before NAF because NAF imposes separate changes for each discovery request and hearing, and for any motion or any opposition to another party's motion. Given such a system, a rational consumer would wish to know the total sums ultimately billed to other consumers.

D. Several courts have struck down arbitration clauses at least in part on the grounds that NAF's fees were excessive. *See, e.g., Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778 (arbitration clause was unconscionable, in part, because of NAF's fees); *Licitra v. Gateway, Inc.* (N.Y. Civ. Ct. 2001) 734 N.Y.S.2d 389 (tracing NAF fees, holding that "it is obvious that these costs can make arbitration not a viable alternative for many consumers."); *Tamayo v. Brainstorm USA*, Case No. 01-20386 JF (N.D. Cal. March 29, 2002), on appeal, No. 02-51721 (arbitration clause unconscionable, in part, because NAF's fees were prohibitive.)

FIRST CAUSE OF ACTION
(Violation of the Unfair Competition Law,
California Business and Professions Code §§ 17200, *et seq*.)

27. Plaintiffs reallege and incorporate herein by reference each and every allegation set forth in paragraphs 1 though 26 above.

28. Plaintiffs file this Cause of Action acting as private attorneys general to challenge NAF's policy of refusing to comply with Cal. Code Civ. P. § 1281.96. The Unfair Business Practices Act defines unfair competition to include any "unlawful" or "unfair" business act or

practice. Business and Professions code § 17200. The Act authorizes injunctive relief and restitution for violations. *Id*. at § 17203. Defendant NAF has refused to comply with § 1281.96 as a business practice. Plaintiffs request that this Court enjoin this practice as unlawful and unfair.

SECOND CAUSE OF ACTION
(Declaratory Relief)

29. Plaintiffs reallege and incorporate herein as though set forth in full the allegations of paragraph 1 through 28 above.

30. An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that plaintiffs contend that the NAF's practice of refusing to disclose the information required by § 1281.96 is unlawful and unfair under California law, whereas NAF contends that federal law preempts California law and excuses NAF from following any California statutes.

31. Plaintiffs desire a declaration as to the legality of NAF's practice of refusing to comply with § 1281.96. A judicial declaration is necessary and appropriate at this time so that plaintiffs may receive the information to which they have a right under § 1281.96.

WHEREFORE, plaintiffs pray:

1. That this Court declares that NAF's practice of refusing to comply with § 1281.96 violates the Unfair Competition Law.

2. That this Court preliminarily and permanently enjoin NAF from refusing to provide consumers with the information required by § 1281.96.

3. That plaintiffs be awarded reasonable attorneys' fees and costs of suit.

4. That plaintiffs be awarded such other relief as the Court may deem appropriate, just and proper.

DATED: May 17, 2004 Respectfully submitted,

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