

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KRISTIN CARIDEO and CATHERINE
CANDLER, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

DELL, INC., a Delaware Corporation,

Defendant,

CLASS ACTION

No. C06-1772 JLR

PLAINTIFFS' SUPPLEMENTAL
RULE 60(B) MOTION FOR RELIEF
FROM THE COURT'S ORDER
COMPELLING ARBITRATION

Noted for Consideration
Friday, April 17, 2009

I. PROCEDURAL BACKGROUND

On October 15, 2007, this Court denied Plaintiffs' Rule 60(b) motion for relief from its order enforcing Dell's class action ban and Texas choice-of-law clause and compelling Plaintiffs to arbitrate their claims against Dell individually. Order at 13 (Dkt. # 57). Plaintiffs petitioned to the Ninth Circuit for a Writ of Mandamus. While that petition was pending, on August 28, 2008, the Washington Supreme Court unanimously affirmed that exculpatory class action bans are unenforceable in Washington, and held that a choice-of-law provision cannot be enforced where it would result in the enforcement of an exculpatory class action ban. *McKee v.*

1 *AT&T Corp.*, 191 P.3d 845 (Wash. 2008). On December 16, 2008, the Ninth Circuit remanded
2 this case for reconsideration in light of *McKee*.

3 II. ARGUMENT

4 A. Under *McKee*, Dell's Class Action Ban is Unconscionable Under Washington Law 5 Because It Would Exculpate Dell from Liability.

6 This Court correctly recognized that, under *Scott v. Cingular Wireless*, 161 P.3d 1000
7 (Wash. 2007), courts applying Washington law must take a “case-specific approach to
8 assessing the enforceability of class-action waivers in arbitration agreements, the application of
9 which ‘will turn on the *facts* of the particular case.’” Order at 5 (Dkt. # 57) (quoting *Scott*, 161
10 P.3d at 1009 n.7) (emphasis added). In *McKee*, applying the principles articulated in *Scott* to
11 the particular facts of that case, the Washington Supreme Court unanimously concluded that the
12 class action ban in AT&T's contract was an exculpatory clause. 191 P.3d at 857–58.

13 In so holding, the *McKee* Court emphasized two core principles that require reversal of
14 this Court's Order. First, the court made clear that the determination of whether a class action
15 ban is exculpatory must be based on the factual evidence *in the record*. Second, the court
16 emphasized that the question of whether a class action ban is exculpatory depends on whether it
17 would permit the alleged misconduct to continue on a *widespread* basis—not on whether a few
18 individuals could possibly seek redress.

19 In contrast to the approach taken in *McKee*, this Court's statements in its October 15,
20 2007 Order are not supported by the testimony of any witnesses who represent individuals in
21 cases of this sort, nor any data about whether Dell's customers can obtain redress in individual
22 arbitration. All the admissible evidence in the record demonstrates that Dell's class action ban
23 functions as an exculpatory clause. In enforcing the class action ban, this Court rejected this
24 factual evidence as insufficient, and instead relied on speculation and unsworn assertions of
25 fact by Dell's counsel. Under *McKee*, this was improper.

1 **1. *McKee* Requires That This Court Base Its Determination of Whether Dell's**
2 **Arbitration Clause is Exculpatory on the Evidence in the Record.**

3 *McKee* reaffirmed that the factual determination of whether a class action ban is
4 exculpatory must be based on the evidence in the record. In particular, the *McKee* Court relied
5 upon evidence from qualified experts familiar with the market for consumer law. The court
6 discussed at length the testimony of former Washington Assistant Attorney General Owen
7 Clarke and “several other experienced attorneys,” who testified that “without class certification
8 the class members would be unable to retain qualified counsel,” that “moderate income
9 consumers cannot afford the hourly rates of trial lawyers,” and that “no attorney would take a
10 case on a contingent basis where the amount in controversy is so small and the risk so great.”
11 191 P.3d at 849–90; *id.* at 857 (“In *Scott*, we . . . relied on several crucial facts.”); *see also*
12 *Scott*, 161 P. 3d at 1003–04, 1007 (describing declarations by experts who testified that private
13 lawsuits were essential to enforcement of consumer protection laws and that the plaintiffs’
14 claims were so small and complex that it would not be cost-effective to litigate them
15 individually). Based on this evidence in the record, *McKee* held, as had *Scott*, that
16 “[w]ithout access to class-wide relief, competent counsel would not be available to redress
17 many meritorious claims,” and that “without class actions, many consumers might not even
18 know they had a claim.” *McKee*, 191 P.3d at 858.

19 In analyzing the question of whether Dell’s class action ban would exculpate the
20 corporation from liability for the claims alleged here, however, this Court disregarded the
21 precise kind of evidence relied upon in *McKee*. First, the Court concluded that Dell customers
22 can easily pursue their cases in individual arbitration at minimal expense. The Court focused
23 on the size of Plaintiffs’ claims, and theorized that because they are not “insignificant,”
24 Plaintiffs would necessarily be able to obtain legal assistance. Order at 11. In so holding, the
25 Court disregarded the only admissible evidence on this issue in the record—the testimony of
26 Jonathan Selbin and Peter Maier. The Court also ignored the fact that Dell’s contract limits

1 each Plaintiff’s potential recovery to the cost of the computer. Pape Decl. Ex. A & B (Dkt.
2 #15).

3 Mr. Selbin—the only witness produced by either party whose primary practice is
4 representing consumers in product defect cases—testified that expert analysis *is* required to
5 prove claims such as those at issue here. Selbin Decl. at ¶¶ 9–10 (Dkt. # 33). As Mr. Selbin
6 explained, such an expert must be knowledgeable about the specific type of computer at issue
7 and must be able to diagnose the “failure mechanism” and analyze engineering schematics,
8 repair records, and warranty claims obtained from the manufacturer. *Id.* ¶¶ 11–16. Mr. Selbin
9 testified that the costs of expert testimony would greatly outweigh the amount of potential
10 recovery in an individual case. *Id.* ¶ 18–19, 24. In addition, Mr. Maier testified that the need
11 for an expert witness is paramount in “cases brought against a computer product manufacturer,
12 which has experts readily available to it and can be expected to present expert testimony” itself.
13 Maier Decl. ¶ 14 (Dkt. # 48).

14 Rather than rely on this testimony, which had a strong empirical evidentiary foundation,
15 the Court adopted statements by Dell’s counsel that customers do not need experts or discovery
16 to prove their product defect cases, because they can simply locate complaints of other
17 consumers on the Internet and use them as proof. Order at 9 (“As Dell noted in its oral
18 argument, a claimant might cost-effectively print out the many complaints about a particular
19 model posted on Dell’s online community forum and submit those as proof . . .”).

20 It is black-letter law in the Ninth Circuit and Washington, as elsewhere, that
21 “[s]tatements of counsel are not evidence.” *U.S. v. Phillips*, 606 F.2d 884, 887 (9th Cir. 1979);
22 *see also Jones v. Hogan*, 351 P.2d 153, 159 (Wash. 1960) (“Argument is not evidence.”);
23 *People v. Washington*, 664 N.W.2d 203, 207 (Mich. 2003) (“unsubstantiated assertions of
24 defense counsel are not substantive evidence”). Thus, conjecture by Dell’s counsel as to what a
25 Dell customer may or may not be able to do to prove her case has no evidentiary value and was
26 not a proper basis for this Court’s conclusion that Dell’s class action ban is enforceable.

1 The Court does not indicate how such customer complaints could possibly be sufficient
2 to prove the elements of plaintiffs' fraud-based claims. Furthermore, if a Dell customer were to
3 rely—as Dell's counsel proposed—on unauthenticated documents such as pages printed from a
4 Web site to prove the existence of a defect, this would violate the hearsay rule. *See Sadler v.*
5 *State Farm Mut. Auto. Ins. Co.*, 2007 WL 2778257, at *4 (W.D. Wash Sept. 20, 2007) (striking
6 web printouts as unauthenticated hearsay); *Whelan v. Hartford Life & Accident Ins. Co.*, 2007
7 WL 1891175, at *11 n. 4 (C.D. Cal. June 28, 2007) (same). It was improper for the Court to
8 base its holding on a theory that would require Dell's customers not only to violate evidentiary
9 rules, but to stake their chances of recovery on documents that lack any authentication or
10 foundation and that would likely be ignored by any legal decision maker.

11 Second, the Court suggested that an “enterprising” attorney could readily represent Dell
12 customers in individual arbitration before the National Arbitration Forum (“NAF”). Order at
13 10. The Court based this theory on a series of assumptions, each of which is defied by the
14 factual record. The Court starts with the speculative premise that because “NAF rules provide
15 that orders and awards are not confidential and may be disclosed by any party,” a Dell
16 customer or her attorney could easily obtain information about past Dell arbitrations. *Id.* at 9–
17 10 (citing NAF Rule 4). However, NAF Rule 4 only permits a party to disclose an arbitration
18 **award**. Thus, even if a consumer learned of a previous arbitration against Dell, the utility of
19 that information would be very limited. Because NAF does not require its arbitrators to
20 provide any findings of fact or conclusions of law,¹ an NAF award would not inform a
21 prospective claimant of the type of defect alleged, the legal theories and defenses at issue, or
22 the evidence used in a case. NAF Rule 4 **prohibits** disclosure of **that** information “unless all
23 Parties agree or the law requires arbitration information to be made public.” *See Pape Decl.*
24 Ex. H (Dkt. # 15) (NAF Rule 4). Thus, assuming any Dell customers had arbitrated computer

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26 ¹ *See Pape Decl. Ex. H (NAF Rule 37(H)) (Dkt. #15)* (explaining that all NAF awards are “summary awards”
unless a party files a notice requesting findings of fact or conclusions of law within 10 days of the date an
arbitrator is selected, and pays a fee).

1 defect claims against Dell,² the corporation would be the only party with access to information
2 about those prior proceedings—and Dell could simply choose not to permit disclosure of that
3 information to other plaintiffs. This limitation is particularly significant given that since NAF’s
4 rules limit discovery to the sum at issue, plaintiffs would not be able to pursue discovery to
5 prove their case. *See* Pape Decl. Ex. H (Dkt. # 15) (NAF Rule 29).

6 The Court next posits that any interested consumer attorney could readily locate
7 numerous Dell customers with these claims, “make known to potential clients her many
8 victories” on behalf of other Dell customers in individual arbitration, and thus “develop the
9 expertise and administrative efficiency to make such a practice profitable.” Order at 10 & 10
10 n.4. For the Court’s proposed business model to work, the consumer lawyer would have to be
11 located by a substantial number of Dell customers who have had this same problem. There is
12 no empirical evidence that this has happened, and the only conceivable way that it might would
13 be if the attorney affirmatively spent the money to do significant advertising that she was
14 handling such claims. Even assuming that this sort of advertisement raises no ethical issues,
15 the cost of a single prominent newspaper advertisement or television spot would be
16 substantially more than many consumers’ cases would be worth. The Court’s assumption that
17 even “a less-established attorney could likely represent such claimants” economically given the
18 “ease with which he or she could attract new clients with successful outcomes,” Order at 12, is
19 speculation. There is no evidence that Dell customers with these claims would locate qualified
20 counsel in the numbers necessary for any significant number of them to receive justice.

21 Furthermore, the Court’s assumptions ignore the fact that the attorney would need to
22 interview each client, open and maintain individual files, draft separate identifying allegations
23 in the complaint, etc. Even given clients with claims based on the same product defect, the
24

25 ² The only information in the record on this issue indicates that one (1) Dell customer has pursued individual
26 arbitration against the company. Mary Pape, a Dell attorney, claimed in her declaration that “NAF arbitration is effective” because a single consumer, a Mr. Sherr, “pursued his remedies in arbitration” in 2006. Pape Decl. ¶ 9 (Dkt. # 15). The declaration does not say whether Mr. Sherr prevailed in his arbitration against Dell.

1 record demonstrates that the complexity of Dell’s consumer contract—including the Texas
2 choice-of-law clause and the NAF Code of Procedure—makes representing a small number of
3 individual clients economically infeasible. *See* Maier Decl. ¶ 14 (Dkt. # 48) at (“[T]hese are
4 expensive questions to answer in a case involving only a few thousand dollars.”).

5 In addition, the arbitration provider chosen by Dell—NAF—has a reputation among
6 consumer advocates as being biased in favor of its corporate clients, which would certainly
7 discourage any attorney from representing a Dell customer. *See id.* at ¶ 14 (“The NAF
8 arbitration process is well known among consumer attorneys nationwide as unfriendly to
9 consumers and biased against them. I would not take a case in which my client would be
10 forced to use NAF arbitration.”). Even if one were to indulge in the most positive assumptions
11 about the NAF, the existence of this widespread reputation reduces the likelihood that
12 consumer lawyers would represent clients before the NAF.

13 Lastly, the Court based its conclusion that attorneys will flock to represent Dell
14 customers on Dell’s submission as to the number of small claims filings in Washington and
15 California. Order at 10 n. 4. Reliance on these figures was improper. First, there is no
16 evidence that any of the cases in that raw number involved consumer claims against
17 corporations, let alone computer product defect claims. Tilden Decl. Ex. A at 10–11 (Dkt. #
18 39). Second, Dell’s arbitration clause—unlike that at issue in *McKee*—does not permit
19 consumers to sue in small claims court. Pape Decl., Ex. A at 11–12 (Dkt. # 15). Accordingly,
20 the fact that some unidentified parties brought claims in small claims court against other
21 unidentified parties for unspecified claims is irrelevant to the question of whether *these* Dell
22 customers can realistically pursue *these* claims in individual arbitration. The only evidence in
23 the record as to whether *Dell* customers ever bring individual claims against *Dell* indicates that
24 only one (1) customer has brought such a claim. Pape Decl. at ¶ 9 (Dkt. # 15).

25 In short, the Court’s Order denying Plaintiffs’ motion for relief was based upon
26 speculation and is directly refuted by the record in this case. The Washington Supreme Court

1 engaged in no such hypotheticals in *McKee*, but instead looked to the actual testimony by
 2 persons qualified as experts. The *only* such testimony in this case is that no lawyer would bring
 3 these cases on an individual basis. This Court’s elevation of hearsay and irrelevant figures over
 4 sworn testimony was improper and is inconsistent with *McKee*.

5 **2. This Court’s Approach to the Question of What Makes a Class Action Ban**
 6 **Exculpatory Departs Sharply From the Approach in *McKee*.**

7 In its analysis of whether the class action bans in *McKee* and *Scott* would function as
 8 exculpatory clauses, the Washington Supreme Court focused on whether individual arbitration
 9 would be sufficient to deter corporate misconduct when that misconduct affects large numbers
 10 of consumers. *See McKee*, 191 P.3d at 858 (noting that in *Scott*, the court had struck down
 11 Cingular’s class action ban because “it effectively, if not explicitly, exculpated Cingular for
 12 potentially widespread conduct”); *id.* at 857 (noting that “without class action suits, the public’s
 13 ability to act as ‘private attorneys general,’ as intended in the Consumer Protection Act, [would
 14 be] eviscerated”). This Court’s focus in its October 15, 2007 Order, in contrast, was not on the
 15 broad economic dynamic presented to the manufacturer, but upon the theoretical availability of
 16 counsel to a single consumer. This approach cannot be reconciled with *McKee*.

17 Here, as in *McKee* and *Scott*, the only relevant evidence in the record demonstrates that
 18 Dell’s customers would *not* be able to pursue their complex product defect cases without legal
 19 representation. *See Selbin Decl.* ¶¶ 9–10 (Dkt # 33) at (explaining that most consumers would
 20 not be able to diagnose, analyze, and prove a computer defect); *Carideo Decl.* ¶ 25 (Dkt. # 31)
 21 (plaintiff’s testimony as to her lack of knowledge about computers); *Candler Decl.* ¶ 27 (Dkt. #
 22 32) (same); *Maier Decl.* ¶ 11 (Dkt. # 48) (explaining that the claims are “too small and too
 23 complex factually and legally” even to be litigated individually by an attorney); *id.* at ¶ 12–15
 24 (testifying that the cost of litigating these product defect claims individually would outweigh
 25 any potential recovery, making individual representation a losing proposition).

26 The evidence further demonstrates that the vast majority of customers would be unable
 to obtain that legal representation. *Maier Decl.* ¶ 15 (Dkt. # 48) (“Not only would I be

1 unwilling to take on such a claim for an individual consumer, but in my opinion it is very
2 unlikely that any other private practice attorney would be willing to do so.”).

3 Given that the only admissible evidence demonstrates that few if any consumer lawyers
4 would handle cases such as this one on an individual basis, the burden of proof should have
5 shifted back to Dell to provide evidence that large numbers of individuals *have* raised claims
6 about this defect in individual arbitration, or that attorneys experienced in representing
7 individual consumers in product defect cases *would* represent the members of the putative
8 class. Dell failed to provide any admissible evidence on either point.

9 Nonetheless, this Court starts with the implicit approach that if it is possible for *any*
10 consumers to find an attorney to handle a case of this sort, this is sufficient to enforce the
11 Consumer Protection Act. For example, the Court credits “Dell’s willingness to pay nearly all
12 of Plaintiffs’ fees and costs.” Order at 10. While this might offset a costs challenge to Dell’s
13 arbitration clause by the individual named plaintiffs, it would not affect the vast majority of
14 members of the putative class, who would still be required to front the costs of NAF arbitration.
15 Thus, Dell’s offer to pay the costs of Ms. Carideo’s and Ms. Candler’s arbitration has no
16 bearing on whether the vast majority of Dell’s customers would be able to pursue their claims
17 in individual arbitration. Indeed, as the Washington Supreme Court noted in *McKee*,
18 Cingular’s class action ban was exculpatory despite the fact that Cingular’s clause itself
19 provided that the company would pay its customers’ arbitration costs. *McKee*, 191 P.3d at 858
20 (“We rejected Cingular’s argument that relief was practically available because it promised to
21 pay the costs of individual arbitration and because attorney fees could be awarded to the
22 prevailing party.”).

23 Likewise, this Court assumed that the members of the putative class could vindicate
24 their rights in individual arbitration because they would all be aware that their computers were
25 defective. Order at 8 (suggesting that given the “allegedly apparent defect,” “there is no danger
26 that . . . individuals might not realize they have a claim at all”). However, this does not

1 automatically translate into an ability to effectively vindicate their rights. Many consumers,
2 while recognizing that there was a problem with their computers, would not know of their legal
3 rights under the Consumer Protection Act. *See McKee*, 191 P.3d at 858 (citing concern that
4 “without class actions, many consumers might not even know they had a claim”). Even if they
5 suspected they had legal rights, it is unlikely that most Dell customers would be able to
6 locate—let alone retain—one of the few lawyers who handles cases of this sort. *See Maier*
7 Decl. ¶ 15 (Dkt. # 48).

8 Moreover, even assuming that some customers did recognize they had a legal claim and
9 were able to obtain representation—and even assuming an NAF arbitrator determined that Dell
10 had engaged in an unfair or illegal practice—nothing in Dell’s contracts requires Dell to stop
11 that practice with regard to others, or to notify its customers of the arbitrator’s determination.
12 Thus, if 10,000 consumers are cheated, and the company is forced to give refunds to 20 of
13 them, it will not be deterred from future deceptive acts, because the company will still have
14 retained the wrongful profits from 9,980 consumers. Such a system would clearly “exculpate[]
15 [Dell] for potentially widespread conduct.” *McKee*, 191 P.3d at 858.

16 In sum, this Court’s reliance upon speculation rather than sworn evidence in the record,
17 and the use of an incorrect legal standard that would judge Dell’s class action ban to not be
18 exculpatory as long as a few customers might be able to pursue their claims in individual
19 arbitration, is at odds with the Washington Supreme Court’s approach in *McKee*. The
20 admissible evidence in the record demonstrates that Dell’s class action ban is exculpatory, as
21 the Washington Supreme Court viewed that question in *McKee*. Therefore, this Court should
22 reverse its prior holding that Dell’s class action ban is enforceable under Washington law.

23 **B. Under *McKee v. AT&T*, Dell’s Texas Choice-of-Law Clause is Unenforceable.**

24 As this Court recognized, if Dell’s class action ban is unconscionable, enforcement of
25 Dell’s Texas choice-of-law clause would violate a fundamental public policy of Washington.
26 Order at 4, 6. While this Court did not reach the question of whether Washington has a

1 materially greater interest than Texas in resolving the enforceability of Dell's class action ban,
 2 *McKee* made clear that Washington's interest in ensuring that its consumers can obtain relief
 3 "materially outweighs" the "limited interest" the state in which a corporation is based might
 4 have in insulating its corporate residents from liability to Washington consumers. *McKee*, 191
 5 P.3d at 852. Therefore, under *McKee*, Dell's choice-of-law clause cannot be enforced.

6 **C. Because the NAF Does Not Conduct Class Arbitrations, the Court Should Strike**
 7 **Dell's Entire Arbitration Clause.**

8 In invalidating Dell's class action ban, the Court should strike Dell's arbitration clause
 9 in its entirety and permit Plaintiffs to proceed in court. In the alternative, if the Court
 10 determines that class arbitration is appropriate, the court should sever Dell's class action ban
 11 and compel arbitration by an arbitration provider that conducts class arbitrations.

12 In this Court's October 15, 2007 Order, the Court noted in dicta that "the NAF Code
 13 appears to permit class arbitration 'as required by applicable law.'" Order at 13 n. 7 (citing
 14 NAF Code, Rule 19(A)).³ The NAF did not have any procedures in place for conducting class
 15 arbitrations at the time of this Court's Order.⁴ Although it appears that the NAF has since
 16 adopted procedures purporting to provide for a narrow type of class arbitration in exceptionally
 17 limited circumstances, these procedures have not meaningfully altered the NAF's longstanding
 18 position of refusing to administer class arbitrations.⁵ Specifically, the NAF's Class Arbitration
 19 Procedures require every absent consumer to affirmatively file a statement indicating that she
 20 wants to be in the case: "[M]embers of the class shall consist only of those members who
 21 respond to the notice in writing or by email by stating they agree to (i) be a class member, (ii)
 22 submit to the jurisdiction of the arbitrator, and (iii) expressly waive any right or opportunity

23 ³ NAF Rule 19(A) does not actually mention class actions. It provides only for "joinder" or "consolidation" if
 24 both parties agree "or as required by applicable law." Pape Decl. Ex. H. (Dkt. # 15).

25 ⁴ See *Lockman v. J.K. Harris & Co.*, 2007 WL 734951, at *2 (W.D. Ky. Mar. 6, 2007) ("the National Arbitration
 26 Forum does not permit class arbitration").

⁵ See W. Mark C. Weidemaier, *Arbitration & the Individuation Critique*, 49 Ariz. L. Rev. 69, 112 (Spring 2007)
 (noting that "[NAF] rules do not expressly address class arbitration, but the NAF has marketed its services in the
 past as one way for businesses to avoid class litigation altogether")

1 they may have to bring an individual claim or defense in arbitration . . . or other legal action.”
 2 *See* Bailey Decl., Ex. A (Procedure B(5)(a)).⁶ Essentially, then, at most the NAF only permits
 3 “opt-in” class arbitration. As courts have recognized, imposing a duty on class members to
 4 “opt in” prior to the establishment of liability “undermines the purpose of class actions.”
 5 *Hypertouch, Inc. v. Super. Ct.*, 128 Cal. App. 4th 1527, 1536 (Ct. App. 2005); *see id.* at 1542
 6 (“Requiring plaintiffs to affirmatively ‘opt-in’ will inevitably—and sometimes significantly—
 7 reduce the size of the class, and may therefore be seen as simply another device” by which a
 8 defendant can avoid liability to unnamed plaintiffs) (internal citations omitted). Even where all
 9 the putative class members have already been identified, courts have recognized that the
 10 difference between a normal class action and an “opt-in” class action is “exponential.” *De*
 11 *Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 310–11 (3d. Cir. 2003). Therefore, because an
 12 order compelling class arbitration before NAF would not be given effect, the Court should
 13 strike Dell’s arbitration clause in its entirety. Alternatively, if the Court disagrees, the Court
 14 should sever the class action ban and NAF provision and compel class arbitration before a
 15 provider that actually conducts class arbitrations. *See, e.g., Kinkel v. Cingular Wireless LLC*,
 16 857 N.E.2d 250, 277–78 (Ill. 2006). Both of the two other major U.S. arbitration providers do.
 17 *See* Bailey Decl. at ¶¶ 5–6 & Exs. B & C.

18 III. Conclusion

19 This Court should hold that Dell’s class action ban and Texas choice-of-law clause are
 20 unenforceable under *McKee* and grant relief from its Order compelling individual arbitration.
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25 ⁶ Because NAF’s procedures are extremely difficult to locate on its web site, a declaration authenticating the
 26 document is attached. The class arbitration procedures of the other two major arbitration providers, AAA and
 JAMS, are also included. Courts regularly take judicial notice of the rules of arbitration providers. *See, e.g.,*
Barbieri v. K-Sea Transp. Corp., 2006 WL 3751215, at *2 n.5 (E.D.N.Y. Dec. 19, 2006); *Chris Myers Pontiac-*
GMC, Inc. v. Perot, 991 So.2d 1281, 1284 (Ala. 2008).

1 DATED this 20th day of March, 2009.

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CERTIFICATE OF SERVICE

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