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6 FORUM, INC.

7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF SAN FRANCISCO

10 UNLIMITED CIVIL JURISDICTION

11 THE PEOPLE OF THE STATE OF)
CALIFORNIA Ex Rel. San Francisco City)
12 Attorney Dennis J. Herrera,)

13 Plaintiff,)

14 v.)

15 NATIONAL ARBITRATION FORUM,)
INC.; FIA CARD SERVICES, N.A.;)
16 COLUMBIA CREDIT SERVICES, INC.;)
DOES 1-50 inclusive,)

17 Defendants.)

18)

19)

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Case No. CGC-08-473569

Date: July 31, 2008

Time: 9:30 a.m.

Dept: 301

**NOTICE OF HEARING ON
DEMURRER TO COMPLAINT BY
NATIONAL ARBITRATION FORUM,
INC.**

DEMURRER

**MEMORANDUM OF POINTS AND
AUTHORITIES**

REQUEST FOR JUDICIAL NOTICE

Complaint Filed: March 24, 2008

Trial Date: Not Set

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 31, 2008, at 9:30 a.m., or soon thereafter as the matter may be heard, in Department 301 of the above-entitled Court, located at 400 McAllister Street, San Francisco California, a hearing will be conducted on the Demurrer to the Complaint by defendant National Arbitration Forum, Inc.

The Demurrer to the Complaint is based upon this Notice, the accompanying Demurrer and supporting Memorandum of Points and Authorities and Request for Judicial Notice, all pleadings and records in this action and upon such argument and authority as may be presented at the time of hearing.

Dated: May 9, 2008

LOEB & LOEB LLP
MICHAEL L. MALLOW
ALAN WILKEN

By: 
Michael L. Mallow
Attorneys for Defendant
NATIONAL ARBITRATION
FORUM, INC.

1 **DEMURRER TO COMPLAINT BY NATIONAL ARBITRATION FORUM, INC.**

2 Defendant National Arbitration Forum, Inc. demurs to the Complaint as follows:

3
4 **General Demurrer to First Cause of Action**

5 1. The First Cause of Action fails to state facts sufficient to constitute a cause
6 of action against this defendant. C.C.P. § 430.10(e).

7
8 **Special Demurrer to First Cause of Action**

9 2. The First Cause of Action is uncertain. C.C.P. §430.10(f).

10
11 Dated: May 9, 2008

LOEB & LOEB LLP
MICHAEL L. MALLOW
ALAN WILKEN

12
13
14 By: 

Michael L. Mallow
Attorneys for Defendant
NATIONAL ARBITRATION
FORUM, INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **DEMURRER TO COMPLAINT BY NATIONAL ARBITRATION FORUM, INC.**

3
4 **Introduction**

5 The mission of Defendant National Arbitration Forum, Inc. (“Forum”) is to provide
6 access to civil justice to all parties, including consumers and businesses. The United States
7 Supreme Court supports and promotes the use of arbitration for disputes between
8 businesses and consumers as part of our civil justice system. Through its arbitration
9 services, Forum facilitates equal access to this civil justice system for all parties.

10 Forum provides administrative services to arbitrators across the United States with
11 the same fairness and in the same manner as other major ADR providers. Forum is not an
12 arbitrator. It makes no arbitration decisions; instead, its function is similar to a clerk of
13 court. Arbitration administrators like Forum are as essential to successful arbitrations as
14 judicial staff are to successful court trials.

15 Each arbitrator who conducts arbitrations under the Forum Code of Procedure
16 (“Code”) is a neutral former judge or experienced lawyer who is independent of the
17 Forum. Parties can mutually select an arbitrator from Forum’s roster of independent
18 neutrals, or parties can mutually agree to select any other arbitrator. Under the Code, all
19 neutrals must check for conflicts of interest and disclose potential conflicts to assure the
20 parties the arbitrator has no bias nor prejudice. Parties may also strike an arbitrator with or
21 without cause; and, if they do, another arbitrator will be proffered. Further, every
22 arbitration decision may be reviewed by a judge to determine if it is fair and enforceable.
23 These are some of the many important safeguards parties can rely upon to ensure arbitrator
24 fairness and neutrality.

25 Setting aside the fact that the Complaint is replete with inaccuracies, and seemingly
26 copied from a poorly researched press release from a special interest group,¹ California

27 _____
28 ¹ Public Citizen, “The Arbitration Trap: How Credit Card Companies Ensnare Consumers
(September 2007).” *See also* “Ralph Nader, Inc.,” *Forbes Magazine*, September 17, 1990

1 law, federal law and the strong public policy in favor of arbitration require that this case be
2 dismissed on the pleadings. First, in California and throughout the United States,
3 arbitrators and administrators are provided broad immunity for all conduct related to the
4 arbitral process, including administrative actions. Arbitral immunity bars this action
5 against Forum. And rightly so, otherwise arbitrators and administrators, like judges and
6 court clerks, would be regularly subject to improper and unfair attacks such as those
7 alleged with considerable hyperbole in the Complaint.

8 Second, Congress enacted the Federal Arbitration Act, in large part, to ensure that
9 hostility toward arbitration cannot be manifested in state requirements that impede the
10 furnishing of arbitration services. To the very limited extent that any California law
11 alleged in the Complaint applies to Forum, the doctrine of federal preemption bars its
12 enforcement.

13 Finally, analysis of the California statutes cited in the context of the alleged Forum
14 conduct leads to the conclusion that no viable cause of action of any kind is stated against
15 Forum. Further, additional compelling reasons for dismissal are set forth in the body of
16 this brief.

17 The apparent intent of the Complaint is to eradicate consumer arbitration in
18 California. There are those who would benefit from increased use of litigation if
19 arbitration were prohibited.² But that is not a justifiable reason to ignore the law regarding
20 arbitration in America. The law, as explicitly provided for in the Federal Arbitration Act
21 and as applied by the United States Supreme Court, is that arbitration ought to be available
22 to consumers and businesses. One of the principal tenets of Forum is that it follows the
23 law. And it has followed the applicable law in fairly administering arbitrations in
24 California.

26 p119, 122 (detailing financial and philosophical links between Public Citizen and trial
27 attorneys); “Party at Ralph’s,” Wall Street Journal, November 7, 2007 available at
<http://online.wsj.com/article/SB119439707749084617.html>.

28 ² *Supra*, note 1.

Background

1
2 The Forum, headquartered in Minnesota, is one of the largest alternative dispute
3 resolution providers (also known as an administrator or sponsor) in the nation. *See*
4 Complaint ¶ 13. Many Forum arbitrators also hear claims for other dispute resolution
5 providers, including the American Arbitration Association, JAMS, NASD (FINRA) and
6 various state and local judicial arbitration panels, including in San Francisco. Forum’s
7 California panel also includes retired federal and state court judges and an attorney
8 recently appointed to the California bench.

9 The Forum administers arbitrations nationwide, including providing rules for
10 arbitrations, and is not affiliated with any party. Complaint ¶ 13. Claims arise from a
11 variety of areas such as consumer credit, insurance, intellectual property and commercial
12 disputes. In each proceeding, the independently contracted arbitrator, not Forum, is the
13 decision-maker. The Complaint consistently disregards this central fact. Complaint ¶ 28.

14 Arbitration holds a “special place” in California’s justice system and can “offer
15 significant benefits in efficiency and access to justice to parties who have contracted to
16 resolve their disputes in this manner.” Complaint ¶ 9. The United States Supreme Court
17 has recognized that “Congress, when enacting [the Federal Arbitration Act], had the needs
18 of consumers, as well as others, in mind. ... Indeed, arbitration’s advantages often would
19 seem helpful to individuals, say, complaining about a product, who need a less expensive
20 alternative to litigation.” *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513
21 U.S. 265, 280 *citing* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).

22 Forum is proud that many courts, including California courts, have reviewed
23 Forum’s claims administration and have lauded its fairness, convenience and efficiency.³

24 ³ *Provencher v. Dell, Inc.* (C.D. Cal. 2006) 409 F.Supp.2d 1196, 1198, 1202
25 (“NAF...is without question an inexpensive, efficient and convenient forum for resolving
26 commercial disputes.”); *Carmack v. Chase Manhattan Bank (USA)* (N.D.Cal. 2007) 521
27 F.Supp.2d 1017, 1027 (“the National Arbitration Forum provides the procedural protection
28 of a neutral arbitrator; plaintiff had the opportunity to challenge the neutrality of her
arbitrator during the course of arbitration, yet she chose not to do so. Moreover, ... the
Ninth Circuit upheld as impartial an arbitration panel with a much more obvious source of

1 Courts have found that “NAF [provides] a reasonable, fair, and impartial forum.” *Marsh v.*
2 *First USA Bank, N.A.* (N.D.Tex. 2000)103 F.Supp.2d 909, *926, and that “there are
3 adequate mechanisms in place under the NAF’s Code of Procedure to ensure that the
4 parties will ultimately select a neutral arbitrator,” *Miller v. Equifirst Corp. of WV*
5 (S.D.W.Va. Sept. 5, 2006) 2006 WL 2571634, 15. Even the United States Supreme Court
6 has described Forum as a “national arbitration organization[.]” with a model of “fair cost
7 and fee allocation.” *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 95 &
8 n.2 (Ginsburg, J.).

9 Like other complaints that have targeted arbitration sponsors, plaintiff alleges that
10 Forum is biased against consumers, making its business practices unlawful. As evidence,
11 the Complaint uses fuzzy math to support an allegation that businesses prevail in
12 “consumer collections” nearly 100% of the time. Complaint ¶ 22. To make this assertion
13 as alleged in paragraph 20, plaintiff omits from its calculation, without explanation, nearly
14 half of the alleged 33,933 claims administered by Forum. Complaint 22. Only this
15

16 bias than the NAF arbitrator here--the arbitrators there were employees and business
17 associates of one of the parties. Here, the only business relationship pleaded by plaintiff is
18 defendant’s regular use of the NAF as an arbitrator in credit card disputes.”); *Marsh*, 103
19 F.Supp.2d at *924-26 (noting Forum’s fairness in the face of allegations that creditor and
20 Forum were in collusion because the creditor “prevailed against its card members in the
21 overwhelming majority of disputes resolved through NAF.”); *Dewberry v. Countrywide*
22 *Home Loans* (W.D. Mo. March 8, 2001) No. 01-0088-CV-W-SOW-ECF, at 3 (“Plaintiff
23 has the same right [under the NAF Code of Procedure] to recover her attorney’s fees as she
24 would in this Court and the expenses associated with arbitration appear to be comparable
25 to or less than litigating the case before this Court.”); *Hale v. First USA Bank* (S.D.N.Y.
26 June 19, 2001) No. 00CIV5406JGK, 2001 WL 687371, at 4, 7, n.5 (“[N]umerous courts
27 have found the NAF to be an adequate and fair arbitral forum and have upheld arbitration
28 provisions requiring arbitration in the NAF...”); *Lloyd v. MBNA Bank, N.A.* (D. Del. Feb.
22, 2001) No. Civ.A. 00-109-SLR, 2001 WL 194300, at 3 (“Plaintiff offers no persuasive
evidence that the National Arbitration Forum is anything but neutral and efficient.”); *Bank*
One v. Coates (S.D. Miss. 2001) 125 F.Supp.2d 819, 834, 835 (“[T]o safeguard fairness,
[the NAF Code of Procedure] provides that each of the parties may exercise one
peremptory strike of a proposed arbitrator and each has unlimited challenges for cause. All
legal remedies and injunctive relief are available to the parties. Any party may request a
written opinion of the arbitrator’s ruling (citations omitted).”).

1 contrived arithmetic allows it to compute the high “win rate” that forms the backbone of
2 the Complaint. Complaint ¶¶ 22.

3 The Complaint continues, alleging that 16,055 of the 18,075 cases plaintiff selected
4 from the total resulted in “default.” Complaint ¶¶ 25. Regardless of the reliability of the
5 Complaint’s statistics, both the manipulated high win rate and the default rate closely
6 mirror the results of similar cases in court, the traditional dispute forum, which has itself
7 been criticized for its handling of debt collection cases.⁴

8 All of the case data was allegedly drawn from Forum’s Section 1281.96 disclosures.
9 Complaint ¶¶ 20. These disclosures have been lauded, even by Forum’s most vociferous
10 critics:

11 McCleery: “The NAF is actually--and I hate to say this really--better than AAA in
12 terms of their disclosures in the California report, in the sense that they have created
13 a consistent data set that allowed us to build a mechanism to dump it into a sortable
14 database.”

14

15 Question: “... what kind of cases did they [NAF] disclose?”

16 McCleery: “It was mainly debt collection cases. Now, AAA doesn’t even
17 complete its records in the California disclosures, so we’ve been trying to build a ...”⁵

18 ⁴ See David Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* (1974)
19 (study shows win rates for debt collection claims brought by businesses of 99, 96 and 96
20 percent in New York City, Chicago, and Detroit, respectively); Sterling & Schrag, *Default*
21 *Judgments Against Consumers: Has the System Failed?*, 67 *Denver U. L. Rev.* 357 (1990)
22 (96% win rate in Washington, D.C.); Urban Justice, “Debt Weight: The Consumer Credit
23 Crisis in New York City and its Impact on the Working Poor,” November 2nd, 2007,
24 available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf (last
25 visited April 7, 2008) (study of 600 consumer debt cases filed in New York City courts
26 revealed that 80% resulted in default judgment). Consumer advocate Bud Hibbs has
27 acknowledged that the lender obtains a default judgment in over 80 percent of the debt
28 collection cases brought in small claims court. Teresa McUsic, *Unpaid Credit-Card Bills*
Giving Rise to Lawsuits, Fort Worth Star-Telegram, Aug. 31, 2007. Similarly, according
to a *Boston Globe* feature on debt collection in small claims court, approximately 80
percent of consumer defendants fail to appear in court. *Dignity Faces a Steamroller:*
Small-Claims Proceedings Ignore Rights, Tilt to Collectors, *Boston Globe*, July 31, 2006,
available at http://www.boston.com/news/specials/debt/part2_main.

⁵ Testimony before the U.S. House Judiciary Committee, Subcommittee on Commercial
and Administrative Law on HR 3010, the “Arbitration Fairness Act of 2007,” Thursday

1 The statistics drawn from these disclosures, like the rest of the allegations in the
2 Complaint, are either false, unsupported assertions of fact, or improper conclusions of law.
3 Regardless of the deficiency of these allegations, they all concern Forum's role as an
4 arbitration sponsor or incorrectly attribute to Forum the actions of neutrals in the course of
5 hearing arbitration cases administered by Forum. For the reasons stated below, all of the
6 allegations against Forum must be dismissed as a matter of law.

7 Summary of Argument

8 Under California, federal and other state law, arbitrators are immune from suit.
9 Immunity applies to arbitrators in private contractual proceedings, and it extends to Forum
10 as an arbitration sponsor. Claims of bias, claims of errors in procedure and claims of
11 errors of law are barred, because arbitral immunity applies to all acts related to the
12 arbitration process.

13 To the limited extent that Forum's actions may be affected by the California
14 Arbitration Act, its enforcement is prohibited by the Federal Arbitration Act under the
15 doctrine of conflict preemption. Other provisions of the California Arbitration Act apply
16 only to international commercial arbitrations not the alleged domestic, consumer
17 arbitrations.

18 The Complaint does not state a cause of action against Forum under the California
19 Fair Debt Collection Practices Act, because Forum is not a "debt collector." Because
20 Forum's activities are not unlawful, they are neither illegal nor unfair business practices.
21 Statements by Forum alleged as false advertising fall within the ambit of arbitral immunity
22 and, if not, are not misleading as a matter of law.

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26 10/25/2007 - 2pm, 2141 Rayburn House Office Building, Webcast video available at:
27 <http://judiciary.house.gov/hearings.aspx?ID=184>. Testimony of Laura McCleery, Director
28 Public Citizen's Congress Watch Division, Washington, D.C. Located at 52:31-57:00 in
the hearing.

1 Finally, alleged violations of Judicial Council Ethics Standards do not state a cause
2 of action against Forum, because, by their terms, the Ethics Standards neither apply to
3 arbitration providers nor create or support any cause of action.

4 **I. ARBITRAL IMMUNITY BARS THIS ACTION.**

5 All of the Complaint’s allegations against Forum address either actions taken by
6 arbitrators in individual proceedings or Forum’s actions as an arbitration administrator.
7 Five individual arbitrations are alleged – involving Komarova, Marcotte, “Roe,” Sheakley,
8 Cornock and Newsom. Complaint ¶¶ 2-7. All other allegations against Forum challenge
9 its procedures and actions as an arbitration administrator. Complaint ¶¶ 1, 8-72.

10 **A. Arbitrators in Private Contractual Proceedings Are Immune from Suit.**

11 It is settled law in California that the acts of private arbitrators are immune to suit:

12 “It long has been recognized that, in private arbitration proceedings, an
13 arbitrator enjoys the benefit of an arbitral privilege because the role that he or
14 she exercises is analogous to that of a judge This rule – immunizing
15 arbitrators in private contractual arbitration proceedings from tort liability –
16 is well established in California.” *Moore v. Conliffe* (1994) 7 Cal.4th 634,
17 650 (citation omitted); *accord: In re Marriage of Assemi* (1994) 7 Cal.4th
18 896, 909; *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1133.⁶

19 Like all other jurisdictions which have considered the issue, California’s courts
20 apply immunity to insulate arbitrators for acts performed in that capacity. *E.g., Stasz v.*
21 *Schwab, supra*, 121 Cal.App.4th at 430-32; *Coopers & Lybrand v. Superior Court* (1989)
22 212 Cal.App.3d 524, 534 (fraud or other misconduct by arbitrator does not affect broad
23 arbitral immunity); *Wasy, Inc. v. First Boston Corp.* (9th Cir. 1987) 813 F.2d 1579
24 (“Arbitrators are immune from civil liability for acts within their jurisdiction arising out of
25 their arbitral functions.”); *Austern v. Chicago Bd. Options Exchange* (2d Cir. 1990) 898
26 F.2d 882, 886 (citing 3rd, 5th, 6th, 7th, 8th & 9th Circuit decisions affirming arbitral
27 immunity). Just as judicial immunity insulates judges and clerks from litigants who are
28 often angry with their results, particularly when a judge must render an unpopular

27 ⁶ From 1986 to 1997, arbitrator immunity was statutory. Civil Code §1280.1.
28 The statute, which stated that it did not supplant but supplemented common law immunity,
was repealed by its terms. *Stasz v. Schwab* (2004) 121 Cal.App.4th 420, 434-36.

1 decision, “arbitral immunity is essential to protect the decision-maker from undue
2 influence and protect the decision-making process from reprisals by dissatisfied litigants.”
3 *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982).

4 The doctrine of arbitral immunity compels dismissal of all claims in the Complaint
5 that arise from actions taken in connection with an arbitration.

6 **B. Common Law Immunity Extends to Forum as an Arbitration Sponsor.**

7 California and other jurisdictions have extended the immunity of the arbitrator to
8 the sponsoring arbitral organization. *E.g.*, *Stasz v. Schwab*, 121 Cal.App.4th at 433-34,
9 *quoting American Arbitration Assn. v. Superior Court* (1992) 8 Cal.App.4th 1131, 1133-34:

10 “[A] refusal to extend immunity to the sponsoring organization would make
11 the arbitrator’s immunity illusory. Stated otherwise, it would shift liability
12 rather than extinguish it [¶] . . . [¶] As a practical matter, a grant of
13 immunity to the arbitrator must be accompanied by a grant of the same
14 immunity to the AAA, an entity as indispensable to the arbitrator’s job of
15 arbitrating as are the courts to the judge’s job of judging.” (Citations
16 omitted.)

17 *Accord: Thiele v. RML Realty Partners* (1993) 14 Cal.App.4th 1526, 1529 (“[C]ourts on
18 the whole extended arbitral immunity to sponsoring organizations.”); *Olney v. Sacramento*
19 *County Bar Assn.* (1989) 212 Cal.App.3d 807, 814 (“Extension of arbitral immunity to
20 encompass boards which sponsor arbitration is a natural and necessary product of the
21 policies underlying arbitral immunity”)

22 California’s extension of immunity to arbitration organizations, such as Forum,
23 conforms to the scope of immunity recognized by other major jurisdictions. *E.g.*, *Corey v.*
24 *N.Y. Stock Exchange* (6th Cir. 1982) 691 F.2d 1205, 1211; *Hawkins v. Nat’l Assn. of Sec.*
25 *Dealers* (5th Cir. 1998) 149 F.3d 330, 332; *New England Cleaning Services v. American*
26 *Arbitration Assn* (1st Cir. 1999) 199 F.3d 542, 545; *Austern v. Chicago Bd. Options*
27 *Exchange* (2d Cir. 1990) 898 F.2d 882, 886.

28 **C. Forum’s Actions Are Immune to Suit.**

The Complaint alleges that Forum acts solely as an arbitration sponsor, providing
administrative services to businesses and consumers. Complaint ¶13. All claims against

1 Forum arise exclusively out of its sponsorship. As an administrative organization, Forum
2 has arbitral immunity, barring all claims against it as a matter of law.⁷

3 Generally, plaintiff asserts four categories of misconduct by Forum – (1) bias in
4 favor of one party, particularly businesses (Complaint ¶¶ 1, 20-27, 42); (2) errors of
5 procedure, including disregard of rules (Complaint ¶¶ 28-41); (3) inadequate reporting of
6 arbitration results (Complaint ¶¶ 43-48); and (4) misleading statements on its website and
7 in other materials (Complaint ¶¶ 49-53). Examination of each of these categories in light
8 of the judicial decisions applying arbitral immunity reveals that the claims are not novel
9 but are precisely the classes of conduct for which both arbitrators and arbitration
10 administrators have been held to be immune, lest they be discouraged from conducting or
11 sponsoring arbitrations in the future.

12 **1. Bias: Arbitrators and Sponsors Are Immune to Suit for Bias.**

13 Bias is a predisposition to favor a party or class of parties. Under the law of
14 California and other jurisdictions, both arbitrators and their administrators are immune to
15 liability for bias.

16 In *Stasz v. Schwab, supra*, an arbitration party alleged that the sponsoring American
17 Arbitration Association was biased, in part, from AAA’s sale of memberships to law firms,
18 including the firm of adverse counsel. 121 Cal.App.4th at 427 n 2. After an extended
19 analysis of arbitrator immunity for bias, the Court concluded:

20 “In short, California and other jurisdictions recognize that arbitral
21 immunity applies where one of the parties to the arbitration seeks to impose
22 liability based on the alleged bias of the arbitrator or the sponsoring
23 organization.” 121 Cal.App.4th at 441.

24 The *Stasz* court relied extensively on the guidance provided by federal courts:

25 ⁷ As an arbitration sponsor, Forum has been held to be immune from suits
26 asserting claims very similar to the action at bar. *Ross v. MBNA Bank*, 2005 WL 2334297
27 (E.D. Tenn. 2005) (Forum immune from suit for credit card arbitration decision); *Fischer*
28 *v. MBNA America Bank, N.A.*, No. Civ.A.3:04 CV 520 S, 2005 WL 1168388 (W.D. Ky.
2005) (Forum immune from suit when litigant alleged no arbitration agreement existed)
(advisory opinion); *Kelly v. MBNA America Bank* (D. Del. 2006) No. Civ.A.06-228 JJF,
2006 WL 2993268 (Forum immune from suit alleging fraud and 24 other claims).

1 “As federal courts have held, an arbitrator is immune from liability for
2 ‘partiality,’ or bias. But that is not to say that an aggrieved party is without
3 recourse. By statute, federal law mandates that an arbitration award be
4 vacated in the event of bias. Thus, ‘[a] party alleging a due process violation
5 in the conduct of the [arbitration] proceedings, fraud, misconduct, a violation
6 of public policy, . . . etc., by arbitrators should pursue remedies against the
7 ‘real’ adversary through the . . . process [of challenging the arbitration
8 award]. To allow a collateral attack against arbitrators and their judgments
9 would also emasculate the . . . provisions of the federal Arbitration Act.’
10 The remedy for arbitrator bias or misconduct is a civil action seeking to
11 vacate the arbitration award.

12 * * * *

13 California courts often look to federal law in deciding arbitration
14 issues under state law. Like federal law, California law provides that
15 arbitrator bias is grounds for vacating an arbitration award. A suit against an
16 arbitrator is nothing more than a collateral attack on the arbitration award.
17 And, under state law, the exclusive means of attacking an award is by way of
18 a petition to vacate the award, as provided in the California Arbitration Act.
19 Finally, under *Baar*[v. *Tigerman* (1983) 140 Cal.App.3d 979], any bias on
20 the part of an arbitrator or sponsoring organization is akin to ‘misconduct in
21 arriving at a decision’ – misconduct for which, as *Baar* recognized, ‘courts
22 have clothed arbitrators with immunity.’ ‘[B]y its own terms, *Baar* does not
23 apply to the facts of this case, where the allegation is of error in reaching a
24 result, not in the total failure to reach a decision.’

25 Accordingly, we hold that bias in the arbitration process should be
26 remedied by challenging the arbitration award, not by seeking to impose
27 liability on the arbitrator or the sponsoring organization.” 121 Cal.App.4th at
28 438-40 (citations and footnote omitted).

29 The *Stasz* court also noted that “[o]ther state courts have come to the same
30 conclusion.” 121 Cal.App.4th at 440-41, discussing *L&H Airco, Inc. v. Rapistan Corp.*
31 (Minn. 1989) 446 N.W.2d 372 and *Blue Cross Blue Shield of Texas v. Juneau*
32 (Tex.Ct.App. 2003) 114 S.W.3d 126, and citing *John Street Leasehold, L.L.C. v. Brunjes*
33 (App.Div. 1996) 650 N.Y.S.2d 649, 649-50 and *Rubenstein v. Otterbourg* (Sup.Ct. 1973)
34 357 N.Y.S.2d 62.

35 The analysis in *Stasz* and the federal and state authorities it cites apply with equal
36 force to the Complaint. They uniformly bar all claims against Forum for bias. As a result,
37 plaintiff’s allegations of bias fail to state a cause of action.
38

1 2. **Conduct: Immunity Extends to All Acts Related to the Arbitral**
2 **Process.**

3 All of the Forum conduct alleged in the Complaint, including the alleged failure to
4 follow CCP § 1281.96,⁸ is immune from suit because all of its actions are part of the
5 arbitral process. *Thiele v. RML Realty Partners, supra*, 14 Cal.App.4th at 18; *Stasz v.*
6 *Schwab, supra*, 121 Cal.App.4th at 431-32; *American Arbitration Assn. v. Superior Court,*
7 *supra*, 8 Cal.App.4th at 1133 (sponsoring organization immune from suit for reopening
8 proceeding after serving notice of closing with prejudice).

9 In *Thiele*, the American Arbitration Association was sued for the act of releasing its
10 award. After an arbitration hearing, plaintiff had given notice to AAA of a settlement and
11 instructed it not to deliver an award. AAA served the award, which was less than the
12 settlement; and the opposing party took the position that no settlement had occurred.
13 Plaintiff sued AAA for negligence and breach of contract. 14 Cal.App.4th at 416-17.

14 After holding that the immunity of the arbitrator extended to the arbitration
15 association, the Court addressed the contention that the claim fell beyond the ambit of
16 immunity because

17 “the act complained of here – sending out the award contrary to express
18 instructions – was administrative and was not part of the decision-making
19 process. Consequently, it was not within the scope of arbitral immunity.”
14 Cal.App.4th at 418.

20 The Court rejected that contention, finding the Second Circuit’s rationale in *Austern v.*
21 *Chicago Bd. Options Exchange, Inc., supra*, convincing. There,

22 “appellants argued the acts of improper notice and scheduling of the
23 arbitration hearing and improper selection of arbitrators were ministerial or
24 administrative in nature and, therefore, were outside the scope of arbitral
immunity. Essentially, appellants attempted to distinguish judicial or
discretionary duties from ministerial or administrative activities. In rejecting

25 _____
26 ⁸ In summary, Section 1281.96 requires “any private arbitration company that
27 administers, or is otherwise involved in, a consumer arbitration,” to “collect, publish at
28 least quarterly, and make available to the public in a computer-searchable format,” details
about the parties, arbitrator, and award for every arbitration, including arbitrator and non-
consumer party names, its result, the number of appearances by the non-consumer party,
the fees paid and other facts.

1 appellants' argument, the court stated 'semantically categorizing the
2 challenged acts as 'ministerial' or administrative, as opposed to
3 'discretionary,' in large part misses the mark, since the scope of arbitral
4 immunity is 'defined by the *functions* it protects and serves.'" Arbitral
5 immunity shields all functions which are 'integrally related to the arbitral
6 process.' The court in *Austern* concluded the acts complained of were
7 sufficiently associated with the adjudicative phase of the arbitration to justify
8 immunity.

9 We find the rationale in *Austern* convincing. Furthermore, we find the
10 act of sending out the arbitral award to be in the same category as the notice
11 and scheduling activities *Austern* held to be 'integrally related to the arbitral
12 process.' Accordingly, we reject appellant's argument this act was
13 administrative, and hold the sending out the arbitral award was sufficiently
14 associated with the adjudicative phase of the arbitration to justify immunity."
15 14 Cal.App.4th at 418 (citations omitted; emphasis by the Court).

16 The administrative activities by Forum alleged in the Complaint are within the same
17 class of conduct as AAA's delivery of its award and, under *Thiele*, are immune from suit.

18 *Stasz v. Schwab, supra*, requires the same result. In one of three consolidated
19 actions, an arbitration association was alleged to be liable for its decision to proceed with
20 an arbitration hearing, while a judicial appeal was pending:

21 "Stasz also argues against immunity on the theory that the AAA should not
22 have gone forward with the arbitration proceeding while her appeal in *Stasz I*
23 – which challenged the validity of the arbitration provision – was pending in
24 this court. As Stasz sees it, the arbitration was automatically stayed during
25 the appeal." 121 Cal.App.4th at 430.

26 As in *Thiele*, the *Stasz* court also rejected any distinction between discretionary and
27 administrative or ministerial acts as determining whether a sponsoring organization's
28 conduct is protected by arbitral immunity. 121 Cal.App.4th at 431-32. The *Stasz* court also
29 looked to the federal rule:

30 "Under federal law, '[a]rbitral immunity protects all acts within the
31 scope of the arbitral process.' '[A]rbitrators in contractually agreed upon
32 arbitration proceedings are absolutely immune from liability in damages for
33 all acts within the scope of the arbitral process.'

34 Federal courts have held that, as with judicial immunity, arbitral
35 immunity applies unless there is a clear absence of jurisdiction or the
36 arbitrator engaged in acts that fall outside his or her arbitral capacity. Even
37 corrupt or biased acts are subject to immunity." 14 Cal.App.4th at 432,
38 *citing, inter alia, Olson v. Nat'l Assn of Sec. Dealers* (8th Cir. 1996) 85 F.3d
39 381, 383 ("A sponsoring organization is immune from civil liability for
40 improperly selecting an arbitration panel, even when the selection violates
41 the organization's own rules.").

1 The *Stasz* court concluded:

2 “Simply put, Stasz’s remedy for an alleged violation of [C.C.P. §] 916 was to
3 seek a stay of the arbitration proceedings and, possibly, to petition the trial
4 court to vacate the award on that ground, not to seek to impose liability on
5 the AAA.” 121 Cal.App.4th at 443.

6 Only a narrow exception to the broad immunity that protects all functions related to
7 the arbitral process has been recognized. Immunity does not apply to the arbitrator’s
8 failure to make any decision at all. *Morgan Phillips, Inc. v. JAMS/ENDISPUTE* (2006)
9 140 Cal.App.4th 795, 801. The exception has no application here.

10 Pursuant to these authorities, a spectrum of procedural or administrative actions that
11 are attenuated from the arbitrator’s actual decision - the incorrect selection of the arbitrator
12 (*Austern*), inadequate notice (*Austern*), the improper scheduling of hearings (*Austern* and
13 *Stasz*) and improper release of an award (*Thiele*) - have been held to be immune from suit,
14 because they are integral to the arbitral process.⁹ For the same reasons, Forum is immune
15 to suit for all alleged conduct.

16 **II. PREEMPTION BARS CLAIMS BASED ON §§ 1281.96 and 1284.3.**

17 Plaintiff alleges that Forum is liable under § 17200 because it has failed to meet the
18 arbitration data reporting requirements of Code of Civil Procedure § 1281.96 and because
19 it permits fee shifting prohibited under §1284.3. Complaint ¶¶ 30, 45-47, 55.

20 Enforcement of C.C.P. §§ 1281.96 and 1284.3 are preempted by the Federal
21 Arbitration Act (“FAA”). 9 U.S.C. § 2 *et seq.* The FAA was enacted to “shake off the old
22 judicial hostility to arbitration” and to place arbitration agreements “upon the same footing

23 ⁹ Other jurisdictions have also held that administrative conduct is immune
24 from suit. *E.g., New England Cleaning Services v. American Arbitration Assn., supra*, 199
25 F.3d at 545 (selection of arbitrators, billing for arbitration services and scheduling of
26 hearings immune); *Jason v. American Arbitration Assn., Inc.* (5th Cir. 2003) 62 Fed.Appx.
27 557 (violation of internal rules for disqualification of arbitrator “immaterial” to immunity);
28 *Barton v. Horowitz* (D. Colo. 1999) No. Civ. A 97 N 1980, 1999 WL 502151 (immunity
protects arbitrators and organizations who diverge from established arbitration rules, such
as acting without jurisdiction or conducting proceedings in an improper venue).

¹¹ What is a “consumer arbitration” is not defined by Section 1281.96 nor by
any other part of Title 9 of the Code of Civil Procedure.

1 as other contracts, where it belongs.” *Kulukundis Shipping Co. v. Amtorg Trading Corp.*
2 (2d Cir. 1942) 126 F.2d 978, 985; *see Rodriguez de Quijas v. Shearson/American Express,*
3 *Inc.* (1989) 490 U.S. 477. C.C.P. §§ 1281.96 and 1284.3 revive the old hostility to
4 arbitration in the “consumer” context¹¹ and, by imposing operational burdens and
5 heightened exposure to liability on arbitration sponsors (as evidenced by this Complaint)
6 and treating fee shifting in consumer arbitration agreements differently than non-
7 arbitration agreements, undermines the FAA’s policies and goals.

8 Under the doctrine of conflict preemption, the FAA preempts any state law that
9 “would undermine the goals and policies of the FAA.” *Volt Information Sciences, Inc. v.*
10 *Board of Trustees of Leland* (1989) 489 U.S. 468, 478. As an example, a state statute that
11 imposes a notice requirement for arbitrations that does not apply to contracts generally is
12 preempted by the FAA. *Doctor’s Assoc. v. Casarotto* (1996) 517 U.S. 681.

13 Section 1284.3 literally prohibits administration of a consumer arbitration if the
14 agreement to arbitrate provides for contractual fee shifting to the losing party. As such
15 contractual fee shifting is permitted outside of arbitration, § 1284.3 is clearly preempted.

16 As recently as February 2008, the United States Supreme Court expanded FAA
17 preemption in a decision involving the California Talent Agencies Act, barring the
18 enforcement of statutes that permit arbitration but impede it in some way. *Preston v.*
19 *Ferrer* (2008) 128 S.Ct. 978, 986 (California statute requiring initial reference of dispute to
20 Labor Commissioner before contractual arbitration hinders speedy resolution and is
21 preempted by the FAA).

22 Like the statutes preempted in *Casarotto* and *Preston*, Section 1281.96 does not
23 prohibit arbitration but impedes and discourages it by burdening arbitration providers with
24 unique disclosure and reporting duties as well as potentially massive civil liability. Like
25 the notice requirement in *Casarotto* and the jurisdictional requirement in *Preston*, Section
26 1281.96 subjects arbitration contracts to burdens not mandated for other contracts.
27 Decreasing the comparative efficiency and attraction of arbitrations, as Section 1281.96
28 does by imposing unique recordkeeping and disclosure costs, is prohibited. *Preston*,

1 *supra*, 128 S.Ct. at 986 (statute that “merely postpones arbitration” contravenes
2 Congressional intent “to move the parties to an arbitrable dispute out of court and into
3 arbitration as quickly and easily as possible.”)

4 The State of California does not compel public disclosures by parties to non-
5 arbitration contracts nor are non-arbitration businesses required to compile, post and
6 maintain on the Internet the details of their adjudicated controversies. There is no liability
7 on non-arbitration entities for the reporting mistakes or omissions that are alleged against
8 Forum here. All the burdens of Section 1281.96 are imposed exclusively on arbitrations.

9 Finally, plaintiff’s strategy of trying to use Business & Professions Code § 17200
10 to obtain massive cumulative civil penalties against Forum – \$2,500 for each of thousands
11 of arbitrations – based on a failure to report transforms Section 1281.96 into a weapon
12 against arbitration punishing arbitration sponsors and participants, discouraging its use.
13 Plaintiff employs this strategy despite the explicit language of Section 1281.96(d)
14 prohibiting such an attack. Section 1281.96(d) provides, “No private arbitration company
15 shall have any liability for collecting, publishing, or distributing the information required
16 by this section.” The effort to punish arbitration sponsors by bootstrapping Section
17 1281.96 to a Business & Professions Code § 17200 violation, and thereby imposing a civil
18 penalty never intended by the legislature, leaves little doubt that the actual effect of the
19 statute is to discourage arbitration.

20 Enforcement of Section 1281.96 imposes on parties to arbitration contracts both
21 expense and liability not shared by parties to other contracts. By rendering arbitrations
22 more burdensome and less efficient, Section 1281.96 discourages arbitration in the
23 consumer context. Because its enforcement “would undermine the goals and policies of
24 the FAA,” (*Volt, supra*), Section 1281.96 fails under federal preemption to state a cause of
25 action against Forum.

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1 **III. CLAIMS OF UNFAIR COMPETITION DO NOT STATE A CAUSE OF**
2 **ACTION.**

3 Plaintiff improperly relies on conduct that is immune under California common law
4 or is subject to federal preemption as the trigger for its Business & Professions Code §
5 17200 claim. Complaint ¶¶ 27, 30, 37-41, 46, 48-52, 57, 64, 68. Assertion of this different
6 theory does not result in any different outcome.

7 **A. Unlawful: Forum’s Actions Are Not Illegal.**

8 The “unlawful” prong of Section 17200 requires that the business conduct
9 complained of violate other laws. *E.g., Daro v. Superior Court* (2007) 151 Cal.App.4th
10 1079, 1093 (tenants have no standing to assert unlawful practice when alleged injury
11 resulted from conduct lawful under other statute.)

12 As pointed out in Parts I and II, above, the public policies expressed by the
13 doctrines of arbitral immunity and federal preemption bar finding that the alleged conduct
14 is illegal. Lacking “illegality” as a predicate, plaintiff’s claim that Forum can be liable for
15 the same conduct as an unlawful business practice fails to state a cause of action.

16 **B. Unfair: Actions Permitted by Law Cannot Be Unfair.**

17 Plaintiff also attempts to circumvent the impact of broad arbitral immunity and
18 federal preemption by alleging that, while not illegal, Forum’s conduct is unfair. But, a
19 business practice that is permitted by law cannot be unfair. *E.g., Lazar v. Hertz Corp.*
20 (1969) 69 Cal.App.4th 1494, 1505. For the same reasons that Forum’s conduct may not be
21 alleged as illegal, its conduct may not be alleged as unfair.

22 **IV. VIOLATION OF C.C.P. § 1297.11 ET SEQ. DOES NOT STATE A CAUSE**
23 **OF ACTION.**

24 As predicates for an unlawful business practice, plaintiff also alleges violations of
25 Code of Civil Procedure §§ 1297.11 *et seq.* Complaint ¶¶ 20-29, 31-34, 40.

26 Sections 1297.11 through 1297.432 are Title 9.3 of the Code of Civil Procedure.
27 Violations of Sections 1297.11 *et seq.* fail to state a cause of action for two reasons. First,
28

1 as discussed in Part I, above, arbitral immunity applies. Second, Title 9.3 applies only to
2 international commercial arbitrations.

3 In Title 9.3, Article I, “Scope of Application,” Section 1297.11 provides:

4 “This title applies to international commercial arbitration and
5 conciliation, subject to any agreement which is in force between the United
6 States and any other state or states.”

7 There is no allegation that any activity placed in issue by the Complaint concerns
8 international commercial arbitration. To the contrary, the Complaint is expressly focused
9 on domestic, consumer arbitrations. Complaint ¶¶ 1-7, 23-31, 33, 34, 36-41, 45-48, 50-51,
10 57, 59, 65 (all mentioning “consumer”).

11 Because Code of Civil Procedure §§ 1297.11 *et seq.* does not apply to California
12 consumer arbitrations, none of the allegations based on them state a cause of action.

13 **V. VIOLATION OF THE CALIFORNIA FAIR DEBT COLLECTION**
14 **PRACTICES ACT DOES NOT STATE A CAUSE OF ACTION.**

15 The Complaint also attempts to predicate Forum’s liability upon violations of Civil
16 Code §§1788 *et seq.*, the California Fair Debt Collection Practices Act (“FDCPA”).
17 Complaint ¶¶ 36-39.

18 The FDCPA applies only to debt collectors. Section 1788.2 defines a debt collector
19 as a person who “regularly ... engages in debt collection.” The Complaint alleges that
20 Forum “does business in California and sponsors arbitrations in California involving
21 California residents.” Complaint ¶ 13. There is no allegation, either as a specific fact or as
22 a mere conclusion, that Forum is a debt collector.

23 Because Forum’s actions are not within the scope of the FDCPA, the allegations
24 based on the Act fail to state a cause of action.

25 **VI. THERE IS NO FALSE ADVERTISING AS A MATTER OF LAW.**

26 The Complaint alleges that Forum falsely advertises on its website and elsewhere
27 that, for example, its “processes . . . provide both parties with an equal opportunity to
28 prevail,” that it “ensures all parties a fair, unbiased dispute resolution process” and that
arbitration decisions are reviewed by a judge to determine if “the procedures used, the

1 hearing conducted, and the award issued were fair and just under the applicable law.”
2 Complaint ¶¶ 49, 51-52. The Complaint also alleges that Forum has liability for
3 statements on its website about an Ernst & Young study of arbitration user satisfaction.
4 Complaint ¶ 50.

5 **A. The Alleged Statements Are Not Actionable as a Matter of Law.**

6 Misleading advertising under Business & Professions Code § 17500 requires that
7 “members of the public are likely to be deceived.” *E.g., Committee on Children’s*
8 *Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210.

9 Forum’s statements on its website, including its re-publication of an Ernst & Young
10 study, are not likely to deceive as a matter of law. All of the statements are within that
11 class of “generalized, vague, and unspecified assertions [that] constitute ‘mere puffery’
12 upon which a reasonable consumer could not rely, and hence are not actionable.”
13 *Anunziato v. eMachines, Inc.* (C.D. Cal. 2005) 402 F.Supp.2d 1133, 1140-41. Other
14 examples of non-actionable statements that are not actionable as a matter of law include
15 evaluating nursing home care services as “high quality” (*Corley v. Rosewood Care Center,*
16 *Inc. of Peoria* (7th Cir. 2004) 388 F.3d 990), describing a product as “reliable” (*Summit*
17 *Technology, Inc. v. High-Line Medical Instruments, Co.* (C.D. Cal. 1996) 933 F.Supp.
18 918), characterizing a satellite system as offering “crystal clear digital” video (*Consumer*
19 *Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351), and claiming “high
20 performance criteria” for a product (*Avery v. State Farm Mutual Automobile Insurance Co.*
21 (2005) 216 Ill. 2d 100).

22 In addition, a statement cannot be misleading, if it is true. As an example, Forum’s
23 description of judicial review for arbitration awards is true. Code of Civil Procedure
24 §1286.2 (providing for judicial review and for vacating awards). More generally:

25 “[A]n arbitration award is subject to review by the Court. The Supreme
26 Court has declared that ‘although judicial scrutiny of arbitration awards
27 necessarily is limited, such review is sufficient to ensure that arbitrators
28 comply with the requirements of the [Federal Arbitration Act].’” *Marsh v.*
First USA Bank, N.A. (N.D. Tex. 2000) 103 F.Supp.2d 909, 926, *citing*
Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 232.

1 **B. Liability for Misrepresented Fairness or Undisclosed Bias Is Barred by**
2 **Arbitral Immunity.**

3 Plaintiff alleges that Forum’s statements about the fairness of its arbitrations are
4 misleading and deceptive, because Forum is actually biased. To prove liability, plaintiff
5 must prove bias.

6 But, as explained by the many authorities discussed in Part I, above, the existence
7 of bias on the part of an arbitrator or a sponsoring organization cannot be a predicate for
8 liability because of arbitral immunity. The objective of immunity is to foster independent
9 decision-making by prohibiting collateral attacks on arbitration results. *E.g., Thiele v.*
10 *RML Realty Partners*, 14 Cal.App.4th at 1531. The allegation that an arbitration
11 organization is deceptive when it describes the process as “fair” is just such a collateral
12 attack, because it requires that parties litigate the fairness of arbitrator decisions.

13 If arbitrators and administrators can be held liable for stating that they are “fair,”
14 then the public policy objective of arbitral immunity would be thwarted. To give effect to
15 the public policy underlying arbitral immunity, arbitrators and sponsors must be immune
16 to claims that misrepresented “unfairness” or undisclosed “bias” is a ground for civil
17 liability.

18 Because arbitral immunity insulates the arbitrator and the administrator from
19 liability for misrepresented fairness or undisclosed bias, and because statements by Forum
20 about customer satisfaction are non-actionable as a matter of law, the Complaint’s false
21 advertising allegations fail to state a cause of action.

22 **VII. VIOLATION OF JUDICIAL COUNCIL ETHICS STANDARDS DOES NOT**
23 **STATE A CAUSE OF ACTION.**

24 The Complaint also alleges that Forum’s advertising is unlawful, because it
25 “violate[s] the Judicial Council’s Ethics Standards for Neutral Arbitrators in Contractual
26 Arbitration, which forbid advertisements that imply favoritism toward any party to an
27 arbitration.” Complaint ¶ 53. This allegation fails to state a cause of action, because the
28

1 Ethics Standards by their terms do not apply to Forum and because they do not create a
2 cause of action.

3 First, the Ethics Standards “apply to all persons who are appointed to serve as
4 neutral arbitrators.” Ethics Standards 3 (Request for Judicial Notice (“RJN”), ¶ 1 & its Ex.
5 “A,” at 5). They do not apply to arbitration sponsors. See Comment to Standard 3:
6 “Arbitration provider organizations, although not themselves subject to these standards,
7 should be aware of them when performing administrative functions that involve arbitrators
8 who are subject to these standards.” RJN, Ex. “A,” at 6.

9 Second, Ethics Standards do not have the force of law, and violation of them is not
10 a civil wrong. Ethics Standards 1(d); RJN, Ex. “A,” at 1: “These standards are not
11 intended to affect any existing civil cause of action or create any new civil cause of
12 action.”

13 For these reasons, violation of the Ethics Standards fails to state a cause of action.

14 **VIII. CONCLUSION**

15 For these reasons, the Complaint fails to state a cause of action against Forum on
16 any claim, and the Demurrer should be sustained.

17

18 Dated: May 9, 2008

LOEB & LOEB LLP
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20
21 By: 

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Attorneys for Defendant
NATIONAL ARBITRATION
FORUM, INC.

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**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER TO
COMPLAINT BY NATIONAL ARBITRATION FORUM, INC.**

In support of its Demurrer, defendant National Arbitration Forum, Inc. requests judicial notice pursuant to Evidence Code §§ 451 *et seq.* of the following:

1. Ethics Standards for Neutral Arbitrators in Contractual Arbitration, a copy of which is attached as Exhibit "A."

Dated: May 9, 2008

LOEB & LOEB LLP
MICHAEL L. MALLOW
ALAN WILKEN


By: 
Michael L. Mallow
Attorneys for Defendant
NATIONAL ARBITRATION
FORUM, INC.

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