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Federal Case Challenges Mass Arbitration "Shakedown" Amid Recent Amendments to AAA Rules

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A recent complaint against plaintiffs' firm Zimmerman Reed directly challenges the law firm's mass arbitration tactics and alleged "weaponization" of a California privacy statute. The complaint comes as arbitration authorities grapple with how to handle the influx of mass arbitration, including the American Arbitration Association's ("AAA") recent amendments to its newly branded Mass Arbitration Supplementary Rules.

Mass Arbitration

Mass arbitration is a process by which plaintiffs' lawyers simultaneously file (or threaten to file) hundreds or thousands of nearly identical arbitration demands, often to extract a quick settlement from a company that would otherwise face exorbitant upfront arbitration fees. Under most arbitration authorities' governing rules, arbitral filing fees are non-refundable and due shortly after demands are filed, even if the underlying claims ultimately prove meritless or arbitral jurisdiction is found lacking. The mass arbitration trend has skyrocketed in recent years, causing concern for those seeking to enforce arbitration agreements with employees and consumers.

L'Occitane, Inc. v. Zimmerman Reed LLP et al.

On February 9, 2024, skincare retailer L'Occitane filed suit against Zimmerman Reed and thousands of its clients, asking for declaratory and injunctive relief to stop the defendants' mass arbitration efforts under the California Invasion of Privacy Act ("CIPA"), Cal. Penal Code § 630 *et seq*.[1] L'Occitane alleges that Zimmerman Reed has threatened to levy 3,144 separate arbitration demands arising from L'Occitane's alleged CIPA violations.[2] L'Occitane seeks a declaratory judgment that CIPA is unconstitutional under the First, Fifth, and Fourteenth Amendments or, in the alternative, that Zimmerman Reed's own use of website tracking technologies violates CIPA; and injunctive relief preventing the defendants from proceeding with their arbitration demands.[3]

The procedural history will be familiar to any company that has faced the threat of mass arbitration. According to L'Occitane, in September 2023, Zimmerman Reed sent a pre-filing notice of dispute on behalf of approximately 2,250 clients, alleging that data analytics and fraud prevention tools on L'Occitane's website were collecting consumers' personal information in violation of CIPA.[4] L'Occitane denied the merits of these claims and insisted that Zimmerman Reed and its clients abide by pre-arbitration procedures set forth in its website terms and conditions.[5] In November 2023, Zimmerman Reed notified L'Occitane of its intent to file 3,144 arbitration demands.[6] In January 2024, Zimmerman

Reed filed an initial 103 individual demands with AAA, and the AAA issued L'Occitane an invoice for $32,825.00. In February 2024, Zimmerman Reed filed another 1,980 individual demands.[7]

L'Occitane now takes the offensive, alleging that Zimmerman Reed has encouraged clients to "visit[] L'Occitane's website" with the intention of "manufacturing arbitration claims *en masse*."[8] The Complaint further alleges that the defendants did not follow conditions precedent to filing the arbitration demands, have not substantiated their claims, and either cannot invoke L'Occitane's arbitration provisions because they did not purchase any relevant product, or cannot proceed under CIPA because they are not California residents.[9] L'Occitane says that by devising and filing the arbitration demands, Zimmerman Reed has engaged in "an unlawful conspiracy to continue manufacturing frivolous arbitration claims" and has "knowingly and willfully manufactured putative CIPA claims and other potential claims for the purpose of extorting an *in terrorem* settlement or other monetary payment(s) from L'Occitane, and ha[s] communicated threats to continue accessing L'Occitane's website without authorization and with the intent to continue manufacturing extortionary CIPA claims."[10]

The facts as chronicled in L'Occitane's complaint highlight the perils of actual and threatened mass arbitration, and L'Occitane is not the first to act proactively to prevent a mass arbitration "shakedown." Both Postmates and Uber have unsuccessfully challenged mass arbitrations by seeking injunctions and/or declaratory relief.[11] L'Occitane's claims also echo concerns from groups like the Civil Justice Association of California, who sounded the alarm about the "potential ethical issues arising in the context of mass arbitration filings" in a July 2023 letter to the State Bar of California.[12]

Recent Amendments to the AAA Mass Arbitration Rules

L'Occitane's complaint comes less than a month after AAA announced amendments to its Supplementary Rules for Multiple Case Filings—now renamed the Mass Arbitration Supplementary Rules—to address the rise in mass arbitration. The amendments apply to all arbitrations filed on or after January 15, 2024, that feature "twenty-five or more similar Demands for Arbitration filed against or on behalf of the same party or related parties . . . where representation of all parties is consistent or coordinated across the cases."[13] Highlights of the amendments include:

- **Attorneys must sign all pleadings**: Claimants' attorneys must now file "an affirmation that the information provided for each individual case is true and correct to the best of the [lawyer]'s knowledge."[14] This rule mirrors Federal Rule of Civil Procedure 11 and may serve as a deterrent to filing false and/or unverified claims.

- **Process Administrator**: Respondents may now request a Process Arbitrator to decide threshold administrative decisions without having to wait for an arbitrator to be assigned, whereas a Process Arbitrator previously could be appointed only if the non-refundable filing fees for all cases had been paid. The Process Arbitrator can then hear challenges to the propriety of the filings, including not only compliance with the AAA's filing requirements but also "filing requirements in the parties' contract[s]" and "any applicable conditions precedent" under those contracts.[15]

- **Revised fee schedules**: The new rules also protect businesses against the inundation of administrative fees resulting from mass arbitration demands. The new fee structure caps the fee that a respondent must pay at the outset, called the "Initiation Fee," at $11,250 before a Process Arbitrator may be appointed, no matter how many cases are filed.[16] Under the prior rules, AAA would assess a filing fee ($325), a case management fee ($1400), and a hearing fee ($1,500 for a paper ruling; $2,500 for an in-person hearing) and required that such fees

be paid for all claimants prior to assigning an arbitrator. Filing fees remain for cases that survive review by the Process Arbitrator or if the Parties do not request a Process Administrator.

- **Expanded mediation**: Parties must engage in a global mediation within 120 days from the due date for the answers to the Demands for Arbitration, unless they unilaterally opt out.[17] Additionally, the AAA may, "in its sole discretion, appoint a mediator to facilitate discussions between the parties on processes that may make resolution of the cases more efficient."[18]

Companies who use arbitration clauses with employees, customers, and business partners should be encouraged by these developments, which aim to preserve the integrity of the arbitral process while curbing abuse of its streamlined filing process and fee structures. It is critical that such companies implement and enforce pre-arbitration dispute resolution requirements and act quickly to invoke these new procedures when arbitration demands are filed.

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[1] *L'Occitane, Inc. v. Zimmerman Reed LLP and 3,144 Of Its Purported Clients*, No. 23-cv-1103 (C.D. Cal.), ECF No. 1 (filed Feb. 8, 2024).

[2] *Id.* ¶ 26, 31.

[3] *Id.* at Prayer for Relief. L'Occitane's constitutional challenge stems primarily from the Ninth Circuit's recent decision in *Project Veritas v. Schmidt*, 72 F.4th 1043 (9th Cir. 2023), in which the court invalidated Oregon's wiretapping law on First Amendment grounds. In *Project Veritas*, the Ninth Circuit held that the Oregon law's content-based exceptions did not "leave open ample alternative channels for communication." *Id.* at 1068. L'Occitane alleges that CIPA likewise expressly exempts only the services of public utilities, rather than the services of information service providers, thus favoring the former.

[4] *L'Occitane*, ECF No. 1, ¶¶ 25–26.

[5] *Id.* ¶¶ 27–29.

[6] *Id.* ¶ 32.

[7] *Id.* ¶¶ 33–35, 37–39.

[8] *Id.* ¶ 1.

[9] *Id.* ¶¶ 22-24, 26-30, 34, 39.

[10] *Id.* ¶ 141.

[11] *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019); *Adams v. Postmates, Inc.*, 823 F. App'x 535, 536 (9th Cir. Sept. 29, 2020); *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783 PSG (JEMx), 2021 WL 540155, at *3 (C.D. Cal. Jan. 19, 2021); *Abadilla v. Uber Techs.*, No. 18-cv-07343, Dkt. 1 (N.D. Cal. filed Dec. 15, 2018); see also *In re Centurylink Sales Pracs. & Sec. Litig.*, No. 17-CV-2832, 2020 WL 3513547, at *4 (D. Minn. June 29, 2020); *Intuit Inc. v. 9,933 Individuals*, No. 20STCV22761 (Sup. Ct. L.A. Cnty. Oct. 6, 2020) (denying request for preliminary injunction staying approximately 9,933 individual arbitration claims to allow claims to be heard in an alternate forum); *Uber Techs., Inc. v. Am. Arb. Ass'n, Inc.*, 204 A.D.3d 506, 506, 167 N.Y.S.3d 66, 67 (2022) (denying request for preliminary injunction requesting relief from "excessive [AAA] fees" for 31, 500 arbitration demands).

[12] https://instituteforlegalreform.com/wp-content/uploads/2023/07/Cal-Bar-Letter-re-Mass-Arbitration-July-202315.pdf

[13] *Mass Arbitration Supplementary Rules*, AM. ARBITRATION ASS'N at 5, Rule MA-1(b) (Jan. 25, 2024).

[14] *Id.* at 5.

[15] *Id.* at 6, Rule MA-6(c)(i–ii).

[16] *Id.* at 6, Rule MA-6(a).

[17] *Id.* at 9, Rule MA-9.

[18] *Id.*