

Case No. 18-11869

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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TROY HUBBARD, MARCUS JOHNSON, ANIBAL  
ALCANTARA, DEBBIE CORT, GERARD McCARTHY,  
JULIO LEATY and MARTIN CONROY,

Defendants-Appellants,

v.

AMERICAN FAMILY LIFE ASSURANCE  
COMPANY OF COLUMBUS,

Plaintiff-Appellee.

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On Appeal from the United States District Court  
for the Middle District of Georgia

**APPELLANTS' INITIAL BRIEF (CORRECTED)**

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to the 11th Circuit Rule 26.1-1, Appellants provide the following certificate of interested persons (“CIP”), which is identical to the initial CIP filed on May 29, 2018, except for the addition of the inadvertently omitted word “Life” to the names of two Aflac corporate entities:

Aflac Incorporated (NYSE: AFL)  
Alcantara, Anibal  
Alston & Bird LLP  
American Family Life Assurance Company of Columbus  
American Family Life Assurance Company of New York  
Cassilly, Lisa  
Conroy, Martin  
Cort, Debbie  
Davis Gillett Mottern & Sims LLC  
Harris, St. Laurent & Chaudhry LLP  
Hubbard, Troy  
Joffe Law P.C.  
Joffe, Dimitry  
Land, Clay (U.S.D.J.)  
Leaty, Julio  
Lexstone Fund II L.P.  
McCarthy, Gerard  
Sims, Jerry  
St. Laurent, Andrew  
Suttle, Brooks  
Versus Funding Partners L.P.

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents important public-policy issues regarding Appellee's ability to compel its numerous sales associates to arbitrate their statutory claims against the company pursuant to the company's standard arbitration agreement upheld by the District Court despite its several unconscionable provisions and contrary to this Court's ruling in *Larsen v. Citibank FSB*, 871 F.3d 1295 (11th Cir. 2017). Appellants respectfully request oral argument, which they believe would assist this Court in resolving these issues.

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## STATEMENT OF JURISDICTION

Appellee initiated this action in the Superior Court of Muscogee County, Georgia. Appellants removed this action pursuant to 28 U.S.C. §§ 1332(a) (1), 1441(a) and 1446, to the United States District Court for the Middle District of Georgia. The District Court had original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a). On January 25, 2018, the District Court entered an order denying Appellants' motion for reconsideration of the Court's order compelling arbitration. Appellants filed their Notice of Appeal on February 15, 2018. This Court's jurisdiction to consider this appeal arises under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

The principal issues on appeal are whether Aflac's Arbitration Agreement is unconscionable and unenforceable pursuant to *Larsen v. Citibank FSB*, 871 F.3d 1295 (11th Cir. 2017) and other Eleventh Circuit's precedents, and whether the District Court erred in enforcing the Arbitration Agreement.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

Appellee commenced this action on December 4, 2017, by filing a verified complaint with the Georgia Superior Court for Muscogee County, making a motion to compel arbitration pursuant to the Georgia Arbitration Act, obtaining an *ex parte* temporary restraining order ("TRO") enjoining Appellants "from filing or

commencing any action against Plaintiff in a court of law pending the resolution of Plaintiff's motion to compel arbitration," and serving those papers on the Appellants' counsel on the same day. Doc. 1-1.<sup>1</sup>

The TRO prompted the following colloquy at the December 28, 2017 hearing on Appellee's motion to compel arbitration after the case was removed by Appellants from the state court to the District Court of the Middle District of Georgia based on diversity jurisdiction on December 15, 2017 and transferred from Judge Abrams to Chief Judge Land on December 18, 2017 (Doc. 21, pgs. 56-57):

THE COURT: Who filed -- which superior court judge signed the TRO in this case?

MS. CASSILLY: Judge Gottfried.

MR. JOFFE: It was a judge from Gwinnett County, actually, not from -

THE COURT: I think that was a mistake.

MR. JOFFE: It was a different judge.

THE COURT: The order indicated the judge on the TRO was from Gwinnett County? Is that what it said?

MR. JOFFE: Yes, Your Honor.

THE COURT: Is that an error?

MS. CASSILLY: It was Judge Gottfried.

THE COURT: They indicate that that was an error. I saw that.

MR. JOFFE: It was an error -- hold on just a second. The TRO says -- the caption is -- and I probably mispronounce -- "mus-ko-GEE" County?

THE COURT: Muscogee.

MR. JOFFE: Muscogee.

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<sup>1</sup> Also on December 4, 2017, Appellee's New York subsidiary American Family Life Assurance Company of New York ("Aflac New York") commenced a parallel action in the District Court for Eastern District of New York (the "New York Action"). On June 4, 2018, the Court granted Aflac New York's motion to compel arbitration, dismissing the unconscionability arguments without a reasoned opinion, which order the defendants therein intend to appeal to the Second Circuit Court of Appeals.

THE COURT: That's here.

MR. JOFFE: And so --

THE COURT: That's Columbus. But under the judge's signature, it indicated Gwinnett --

MR. JOFFE: Superior Court of Gwinnett County.

THE COURT: -- and that was -- Muscogee is not Gwinnett.

MR. JOFFE: I understand. So we are kind of puzzled who issued the TRO.

THE COURT: Well, they say that that is the signature of Judge Gottfried. Correct?

MR. JOFFE: I'll just have to take their word for it. I don't know. I can't-

MS. CASSILLY: It is, Your Honor. And Mr. Joffe was provided copies of all the pleadings including the transference order when the case was transferred to Judge Gottfried.

THE COURT: Well, it doesn't really matter at this point, since it's now my order that's in place until Friday.

Contrary to Ms. Cassilly's representation to the District Court, Appellants' counsel was *not* provided with any "transference order" among copies of all the pleadings served upon him electronically by email on December 4, 2017, and then in hardcopies by mail on December 6, 2017; nor does any such order appear anywhere in the record below to the best of Appellants' counsel's knowledge.<sup>2</sup>

Beyond these patent irregularities of the TRO itself, Appellee's original papers filed in state court, including its verified complaint and its motion to compel arbitration pursuant to the Georgia Arbitration Act, contained admittedly false

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<sup>2</sup> The TRO provenance mystery thus remains, deepened by the fact that each copy of that TRO -- whether filed with the District Court (Doc. 1-1, pgs. 30-32) or served upon Appellants, whether in electronic or hardcopy form -- sets out what appears to be the whole of the substantive part of order on its title page, the judge's signature block on page numbered "3," and nothing in between those two pages.

factual statements. In particular, Appellee's verified complaint alleges in paragraph 39 that "Aflac has fully complied with the Associate's Agreements, and has taken no steps that are inconsistent with the arbitration provisions therein" (Doc. 1-1, pg. 11), from which premise Appellee proceeded to argue that it had satisfied all the requirements for compelling arbitration pursuant to the applicable Georgia Arbitration Act, O.C.G.A. § 9-9-6(a), including the requirement that Aflac complied with the terms of the Arbitration Agreement. Doc. 1-1, pgs. 46-47.

In fact, the Arbitration Agreement in paragraph 10.2 expressly provides that "all papers filed in court in connection with any action to enforce this Arbitration Agreement . . . shall be filed under seal." Doc. 10.2, pg. 22.<sup>3</sup> However, Appellee commenced the instant action not under seal, as required by paragraph 10.2 of the Arbitration Agreements, but by filing it in open court on public docket, in clear breach of the Arbitration Agreement it sought to enforce.

Because Appellee commenced this action in violation of paragraph 10.2 of the Arbitration Agreement, Appellee's statement made in the verified complaint that "Aflac has fully complied with the Associate's Agreements" (Doc. 1-1, pg. 11) and its contention that Appellee has fully satisfied the Georgia Arbitration Act, O.C.G.A. § 9-9-6(a)'s requirements were demonstrably false.

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<sup>3</sup>The Appellants' Arbitration Agreements are identical, *see* Doc. 10-2, pgs. 8-142.

Moreover, the falsity of those statements was expressly admitted by Appellee on December 14, 2017, when its counsel Ms. Cassilly stated in her affidavit accompanying Appellee's motion to seal the docket made that day before the state court prior to removal: "On December 13, 2017, Defendants' counsel pointed out that the Associate's Agreements which underlie the instant dispute state that 'all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrator's award shall be filed under seal.' Due to exigencies attendant Plaintiff's initial filing, including Plaintiff's Motion for Temporary Restraining Order, I inadvertently neglected to request that the record in this case be sealed. Plaintiff agrees that the record should be sealed consistent with the Associate's Agreements." Doc. 1-1, pg. 59. Appellee also filed a supplemental brief in support of its motion to compel arbitration, now relying on the FAA instead of the Georgia Arbitration Act. *See* Doc. 11.<sup>4</sup>

The District Court granted Appellee's motion to compel arbitration on January 3, 2018 (Doc. 16), and the judgment was entered on January 4, 2018. Doc. 17. Appellants filed a motion for reconsideration on January 8, 2018 (Doc. 18),

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<sup>4</sup> On the same day, December 14, 2017, Aflac New York likewise admitted in the New York Action that "[d]ue to the exigencies attendant Plaintiff's initial filing, Plaintiff's counsel inadvertently neglected to request that the record in this case be sealed."

which was denied on January 25, 2018. Doc. 23. Appellants filed notice of appeal on February 15, 2018. Doc. 24.

## II. FACTUAL BACKGROUND

The Arbitration Agreement at issue is included as Paragraph 10, titled “Arbitration and Other Legal Proceedings,” in Aflac’s standard Associate’s Agreement. *See, e.g.*, Doc. 10-2, pgs. 21-23.

Paragraph 10.1 of the Arbitration Agreement requires the associate to arbitrate “any dispute arising under or relating in any way to this [Associate’s] Agreement,” while expressly carving out from its scope virtually all material contractual claims that Aflac itself may have against its associates. *See id.* (“Except for an action by Aflac to enforce provisions contained in Paragraphs 1.4 [“Aflac Intellectual Property”], 3 [“Confidential and Protected Information”], 8 [“Restricted Conduct”], 10.5 [“Injunctive Relief”] or 10.6 [Covenant Not to Sue”].”). Doc. 10-2, pg. 21.

Indeed, paragraph 10.2 itself includes language that plainly demonstrates that the Arbitration Agreement does not contemplate Aflac as the party that will be initiating any arbitration against its associates. Thus, paragraph 10.2 defines “Complaining Party” as “the party initiating the Dispute,” but in the very next paragraph proceeds to juxtapose the “Complaining Party” against Aflac, demonstrating that the latter is not contemplated to be the former under the

Arbitration Agreement: “The Complaining Party and AFLAC may each name an arbitrator,” and so on for the remainder of the paragraph. Doc. 10-2, pg. 21. More one-sided arbitration agreement is difficult to envision.

Difficult but not impossible, for Aflac’s Arbitration Agreement itself is even more one-sided because it also requires the associates to arbitrate any dispute not only with Aflac but also with any of Aflac’s “past and present officers, stockholders, employees, associates, coordinators, agents and brokers of Aflac” and “regardless of whether Aflac is a party.” Doc. 10-2, pg. 21. Aflac’s officers and other affiliates, however, are not similarly bound to arbitrate any of their claims against the associate.

Paragraph 10.2 provides that disputes “shall be resolved by a panel of three arbitrators,” and that each party “shall pay all expenses and fees of its selected Party Arbitrator.” Doc. 10-2, pg. 22. Furthermore, “if the Party Arbitrators are unable to agree on a Neutral Arbitrator, then either the Complaining Party or AFLAC may request a panel of qualified arbitrators from the headquarters of the American Arbitration Association. . . . The Complaining Party shall have the choice of having AFLAC pay the fees of the Neutral Arbitrator or, if the Complaining Party prefers, AFLAC and the Complaining Party will equally divide the expenses and fees for the Neutral Arbitrator.” *Id.*

Paragraph 10.2 further provides that “any party may request that the arbitration proceeding, including communications between or among the parties and the arbitrators, information and documents produced by any party, hearing and deposition transcripts and all rulings and decisions of the arbitrators, be kept strictly confidential. In the event that any of the parties elect to keep the arbitration proceedings confidential, all parties agree to enter into an appropriate confidentiality agreement.” *Id.* As shown below, these features of Aflac’s Arbitration Agreement make it substantively unconscionable under this Court’s precedents.

Moreover, Aflac does not give its associates any meaningful choice as to the terms of the Agreement, or any meaningful opportunity to review the Agreement, making it procedurally unconscionable as well.

*First*, as alleged in detail in Appellants’ draft class action complaint, Aflac’s fraudulent recruitment scheme was such that Aflac first lured new recruits with an irresistible albeit false 6-figure first-year, no prior experience necessary, income promise during its “information sessions,” and required them to take insurance classes, pass the test, and obtain a state insurance license, all on their own time and dime, and all prior to presenting them with its standard Associate’s Agreement for execution. *See* Docs. 18-1 – 18-5. The substantial efforts already invested by the would-be associates and the considerable expenditure of time and money they

incur, and other opportunities they forego, in detrimental reliance upon Aflac's false and fraudulent promise prior to ever seeing the Associate's Agreement when Aflac presents it to them on a take-it-or-leave-it basis leave the associates with little real choice but to take it.

*Second*, as shown in the associates' affidavits, whichever manner of the contract execution Aflac chooses to employ – whether on paper; online through its “producerexpress” platform; on electronic touchscreens; or on electronic touchpads – Aflac conducts it invariably in an oppressive, rushed, and obscure manner, taking clear advantage of its associates. Here is how one of the associates, Appellant Debbie Cort, describes her experience, Doc. 18-1, pgs. 1-3:

I was recruited to join Aflac in the Spring of 2015 as its sales associate in New York. I was working at a law firm at that time but was enticed by Aflac's promises of high income potential and decided to join it as its sales associate.

I had first to pay for and take courses to prepare for my insurance license test; I then had to pass the test and obtain state insurance license before signing a contract with Aflac.

Once I had completed my studies and tests and obtained the license, on May 20, 2015, I received an automatic email from “producerexpress@sircon.com,” which was titled “Your invitation to contract with Aflac,” and stated: “You'll soon be contracted to work with Aflac and represent our company to businesses and customers in your area. Congratulations on making it this far! To begin the contracting process, click the link below. . . .” The link below said “Start Contracting”; I clicked on the link and had to go through several more screens, where I had to answer questions about my personal information, criminal background and the like, and when I completed that questionnaire my online application was finished.

I was not sure that I had actually accepted any agreement while clicking through the screens – indeed, I did not have to sign anything at the end,

and the cover email specifically said that I would only “*begin the contracting process*” by completing this contracting packet, and I did not understand it at the time to mean that I was signing the actual contract by clicking through the “Start Contracting” link.

Note that my Associate’s Agreement with Aflac Columbus submitted as Exhibit 4 to the Arrington Affidavit in the Georgia action is *unsigned* – it only has my printed name instead of my signature.

Ms. Cort’s and other associates’ affidavits show that Aflac’s methods of having associates execute the Agreement do not give them any meaningful choice as to the terms of the Agreement or any meaningful opportunity to even review those terms regardless of a particular execution method used.

### III. STANDARD OF REVIEW

The District Court’s order compelling arbitration is reviewed *de novo*. See, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F. 3d 753, 756 (11th Cir. 1993) (“We review *de novo* the district court’s order compelling arbitration.”); see also *Larsen*, 871 F.3d at 1308-09 (“We review each argument [that the arbitration agreement is unconscionable] *de novo*.”).

### SUMMARY OF ARGUMENT

The District Court erred in compelling Appellants to arbitrate their claims against Appellee, including claims alleged in their tentative draft class action complaint “(a) for unfair and deceptive business practices in connection with [Aflac’s] fraudulent recruiting under the statutory and common laws of various states, and (b) for the employment and tax benefits they are rightly entitled to as

the de facto employees of Aflac under the federal Employee Retirement Investment Securities Act ('ERISA'), the Federal Insurance Contributions Act ('FICA'), and the Federal Unemployment Tax Act ('FUTA')." Doc. 10-3.

Aflac's standard Arbitration Agreement at issue here is procedurally and substantively unconscionable, and its unconscionable aspects taint the entire Agreement, making it completely unenforceable and not subject to judicial reformation.

The Agreement is procedurally unconscionable because whichever method Aflac chooses to have its associates execute the Agreement, Aflac invariably conducts it in a manner that gives its associates neither a meaningful choice as to the Agreement's terms nor a reasonable opportunity to review and understand them.

The Agreement is substantively unconscionable because of its (i) prohibitive cost-allocation scheme, which saddles the associates with unaffordable fees and expenses of an arbitrator and therefore effectively denies them an access to a neutral forum to vindicate their federal statutory rights; (ii) severe one-sidedness and lack of mutuality, whereby Aflac is not obligated to arbitrate its material claims against the associates while the associates themselves are forced to arbitrate any and all their claims against not only Aflac itself but against a long list of its

affiliates as well; and (iii) strict confidentiality provision, a milder version of which was found unconscionable by this Court in *Larsen*.

Aflac's Arbitration Agreement with its unconscionable provisions effectively denies its sales associates an access to a neutral forum in which to vindicate their federal rights, thereby shielding its allegedly fraudulent practices from any public or judicial scrutiny, and should be invalidated in its entirety.

### ARGUMENT

1. The FAA permits arbitration agreements to be invalidated for unconscionability.

The Supreme Court has consistently ruled that the FAA savings clause “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 339 (2011); *Doctor's Associates, Inc. v. Casarotto*, 517 U. S. 681, 687 (1996) (same). Most recently in *Epic Systems Corp. v. Lewis*, 584 U. S. \_\_\_, Slip Op. at 6 (2018), the Supreme Court reaffirmed that “[t]he FAA saving clause by its terms allows courts to refuse to enforce arbitration agreements ‘upon such grounds as exist at law or in equity for the revocation of any contract,’” while upholding a class action waiver in employment arbitration agreements.

“Under the FAA, an agreement can be ‘defeated by fraud, duress, unconscionability, or another generally applicable contract defense.’” *Larsen*, 871

F. 3d at 1308, citing *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010)).

In *Larsen*, this Court recently applied the two-prong unconscionability analysis under Washington and Ohio laws, finding unconscionable and severing a confidentiality provision in a consumer arbitration agreement, a broader version of which provision also appears in Aflac's Arbitration Agreement. Georgia state law that governs the Arbitration Agreements at issue is similar. In *Jenkins v. First Am. Cash Advance of Georgia LLC*, 400 F.3d 868, 875-76 (11th Cir. 2005), this Court stated:

Under the FAA, a written arbitration provision is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2000) (emphasis added). This language has been interpreted to mean “[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically.” *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir.2002) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996)). The Supreme Court has recognized that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.” *Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. at 1656. . . .

In deciding claims of unconscionability, Georgia courts generally consider a variety of factors, which have been divided into procedural and substantive elements. *NEC Techs., Inc. v. Nelson*, 267 Ga. 390, 478 S.E.2d 769, 771-72 (1996). “Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves.” *Id.* at 771. Factors relevant to the procedural unconscionability inquiry include the bargaining power of the parties, “the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or

absence of a meaningful choice.” *Id.* (citations omitted). As for substantive unconscionability, courts consider “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns.” *Id.* at 772 (citations omitted).<sup>5</sup>

2. The Agreement is procedurally unconscionable.

“The courts of both Washington and Ohio characterize procedural unconscionability as the absence of ‘meaningful choice’ as to the terms of the agreement in light of all the circumstances surrounding the transaction.” *Larsen*, 871 F. 3d at 1310. Factors include “the manner in which the contract was entered,” “whether each party had reasonable opportunity to understand the terms of the contract,” and “whether the ‘weaker party’ was able to protect his interests.” *Id.*

Under Georgia law, too, “procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves,” with relevant factors for procedural unconscionability including the bargaining power of the parties, “the conspicuousness and

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<sup>5</sup> So is the test under New York law, which governs the New York Action. *See, e.g., Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015) (“Courts do not enforce terms of agreements that are unconscionable,” which determination is made upon “a showing that the contract was both procedurally and substantively unconscionable when made -- *i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. . . . [C]ourts evaluate procedural and substantive unconscionability on a ‘sliding scale.’”) (internal citations omitted).

comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice.” *NEC*, 478 S.E.2d at 771.<sup>6</sup>

As demonstrated in the affidavits of five former Aflac associates, irrespective of a particular manner in which Aflac had them enter into the Arbitration Agreements, Aflac did not give them any reasonable opportunity to review the contractual terms, much less to understand them, let alone for “the ‘weaker party’ . . . to protect his interests.” *Larsen*, 871 F. 3d at 1310.

3. The Agreement is substantively unconscionable.

“A term that is ‘one-sided,’ ‘shocking to the conscience,’ ‘overly harsh,’ ‘monstrously harsh,’ or ‘exceedingly calloused’ may be substantively unconscionable in Washington. These attributes must be examined in light of all the circumstances present at the time the contract was formed.” *Larsen*, 871 F. 3d at 1313-14 (citation omitted). Georgia courts consider “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the

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<sup>6</sup> New York procedural unconscionability test considers similar factors, *see Berkson*, 97 F. Supp. 3d at 391 (“Whether procedural unconscionability exists is determined by what led to the formation of the contract. ‘Procedural unconscionability involves questions about the manner in which the agreement was reached: Did one party adequately explain the content of the agreement to the other? . . . Were there sharp practices or overreaching? Did one party take advantage of the other’s lack of experience or naïveté?’ ‘Procedural unconscionability is broadly conceived to encompass . . . a lack of understanding and an inequality of bargaining power.’”) (internal citations omitted).

allocation of the risks between the parties, and similar public policy concerns” as relevant factors in the substantive unconscionability analysis. *NEC*, 478 S.E.2d at 772 (citations omitted).<sup>7</sup>

As shown below, Aflac’s Arbitration Agreement is rife with unconscionable provisions, all favoring Aflac in substantive dimensions and putting the associates at a severe disadvantage. In short, Aflac plays with a loaded dice.

- a. The cost-prohibitive fee allocation  
makes the Agreement unconscionable.

The cost-prohibitive nature of the Arbitration Agreement makes it unconscionable. “This Court had refused to enforce an arbitration agreement that potentially imposed ‘high costs’ on the employee, holding that such an agreement ‘undermines the policies that support Title VII.’ *Paladino*, 134 F.3d at 1062.” *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258 (11th Cir. 2003).

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<sup>7</sup> Under New York law, too, “[s]ubstantive unconscionability involves questions about the fundamental fairness of the agreement or clauses within the agreement.” *Berkson*, 97 F. Supp. 3d at 391-92. An arbitration clause is “unenforceable . . . where minimal procedural unconscionability is present – ‘based on the adhesive nature of the form arbitration agreement and the lack of opportunity. . . to negotiate its terms’ -- and substantive unconscionability is apparent due to arbitration requirement that leaves parties unequal in their ability to pursue their respective claims.” *Id.* at 392 (quoting *Trompeter v. Ally Financial*, 914 F. Supp. 2d 1067, 1073-76 (N. D. Cal. 2012)). If “the arbitration provision [is] severely one-sided in the substantive dimension, even moderate procedural unconscionability renders the arbitration agreement unenforceable.” *Berkson*, 97 F. Supp. 3d at 392 (quoting *Bragg v. Linden Research*, 487 F. Supp. 2d 593 (E. D. Pa. 2007)).

In *Paladino v. Avnet Comp. Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998), this Court stated: “Because Avnet makes no promises to pay for an arbitrator, employees may be liable for at least half the hefty cost of an arbitration and must, according to the American Arbitration Association rules the clause explicitly adopts, pay steep filing fees (in this case \$2000). One circuit has in dicta stated that such ‘fee-shifting’ is a per se basis for nonenforcement. *Cole*, 105 F.3d at 1484. We consider costs of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy. . . . [A] clause such as this one that deprives an employee of any hope of meaningful relief, while imposing high costs on the employee, undermines the policies that support Title VII. It is not enforceable.”

Next year following *Paladino*, this Court decided *Randolph v. Green Tree Fin. Corp.-Alabama*, 178 F.3d 1149, 1158 (11th Cir. 1999), concluding that an arbitration agreement that was silent as to fees and costs was unenforceable because the plaintiff “*might* be required to bear substantial costs of the arbitration” (emphasis added). The Supreme Court reversed, holding that “the arbitration agreement’s silence with respect to such matters [costs and fees] does not render the agreement unenforceable.” *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000). The Supreme Court reasoned, *id.* at 90-92 (emphasis added):

***It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her***

*federal statutory rights in the arbitral forum*. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, “we lack . . . information about how claimants fare under Green Tree’s arbitration clause.” 178 F. 3d, at 1158. The record reveals only the arbitration agreement’s silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The “risk” that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. . . . [W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.

Following the Supreme Court’s ruling in *Green Tree*, this Court revisited the issue in *Bess v. Check Express*, 294 F.3d 1298, 1303 (11th Cir. 2002), holding that a plaintiff seeking to void an arbitration agreement has to demonstrate that he is likely to bear high arbitration costs. Because the arbitration agreement in *Bess* was silent on the matter of costs and fees (just like in *Green Tree*), this Court held that “any discussion of [plaintiff’s] potential costs . . . necessarily is based on speculation and cannot provide an adequate basis for concluding that her costs likely would be prohibitively expensive.” *Id.* at 1304.

Next year in *Musnick v. King Motor Co.*, 325 F.3d 1255, 1260 (11th Cir. 2003), this Court concluded that plaintiff had failed to establish a likelihood of incurring prohibitive costs arising from a “loser pay” provision in the arbitration

agreement. The Court agreed that “at this point Plaintiff has not been assessed with any fees, nor is it certain that he ever will be. Plaintiff’s speculation about prohibitive costs is just that – speculation; this is not enough to invalidate an otherwise enforceable arbitration provision.”

Most recently, this Court considered the arbitration costs factor at length in *Larsen*, 871 F. 3d at 1314-16, where the arbitration agreement at issue gave consumers a choice of a low-cost arbitral forum:

The allocation of costs under the 2009 Arbitration Provision depends in part on the arbitral forum in which the claim is brought. Specifically, any claim brought under the Provision is to be administered by either the American Arbitration Association (the “AAA”) or Judicial Arbitration and Mediation Services, Inc. (“JAMS”) according to the rules in place at the chosen forum “at the time the Claim is filed.” The consumer has complete power to select which organization will administer the arbitration, regardless of whether he initiates the arbitration himself or KeyBank compels arbitration of a claim that he initially filed in court. In either scenario, the 2009 Provision reduces the consumer’s filing-fee burden and limits his expected costs of arbitration. First, it provides that KeyBank will reimburse the claimant “all fees up to \$100.00 charged by the arbitration administrator” once the claimant has paid an amount equivalent to the applicable court filing fee. All the consumer must do is make a written request for reimbursement. Second, it provides that: “[“]If you are required to pay any fees in excess of \$100.00 to the arbitration administrator [], we will consider a request by you to pay all or part of the additional fees. To the extent that we do not approve your request, the arbitrator will decide whether we or you will be responsible for paying any such additional fees.[”]

The Court noted that the JAMS Arbitration Policy “articulates the following ‘minimum standard of fairness’: ‘[T]he only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees.

All other costs must be borne by the company including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services.” *Larsen*, 871 F.3d at 1314-15. The Court concluded: “Even if the AAA rules imposed a prohibitive cost-allocation framework, the consumer deciding whether to pursue his claim would be empowered and properly incentivized to choose JAMS instead” because “the cost of using the JAMS arbitral forum is absolutely capped at the initial filing fee,” and therefore “the cost-sharing aspects of the . . . Arbitration Provision cannot be characterized as harshly one-sided or prohibitive under Washington law.”

Here, Aflac's standard Arbitration Agreement saddles its sales associates with high arbitration costs, which are prohibitive for Appellants. The Arbitration Agreement on its face provides that disputes “shall be resolved by a panel of three arbitrators” and each party “*shall pay all expenses and fees of its selected Party Arbitrator.*” Agreement ¶10.2 (emphasis added), Doc. 10-2, pg. 22.

*First*, there is nothing speculative, contingent, uncertain, or remote about the likelihood of incurring such fees and expenses by plaintiffs. Unlike the “loser pay” provision contingent upon plaintiffs' losing their case at issue in *Musnick*, the Aflac associate's obligation to pay “all expenses and fees” of the arbitrator is a certainty, according to the plain language of the Arbitration Agreement. The Court also observed in *Musnick*, 325 F.3d at n.7, that even though “[t]he agreement

provides that the arbitrator ‘shall’ award costs and fees to the prevailing party,” nevertheless “the arbitrator may determine whether contractual limitations on remedies are enforceable,” making the likelihood of incurring such fees even more remote. Here, by contrast, pursuant to Aflac’s Arbitration Agreement, the associates cannot refuse to pay their arbitrators’ fees and expenses. Aflac’s sales associates are required to pay those costs to pursue their federal claims – or else they must abandon those claims, according to Aflac’s Arbitration Agreement.

*Second*, these costs are well known to be significant; as Appellants submitted in the brief in support of their motion for reconsideration, citing Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. Miami Bus. L. Rev. 39, 46 (2014):

In arbitration, the employee may be required to pay fees in advance of the proceedings, as well as substantial costs at the conclusion of the process, which would be unheard of in a courtroom. For example, arbitrators charge the parties an hourly rate or per diem fee, whereas a judge’s salary would never be invoiced to the parties. In addition to the arbitrator’s fees, parties to an arbitration proceeding are required to pay for room rentals, stenography, administrative fees, and the arbitrator’s travel expenses. By the time the matter is resolved, arbitration costs and fees can amount to thousands of dollars, as one estimate shows the average cost of arbitrating an employment claim is approximately \$20,000.00. In contrast, while litigation can be expensive, there are no required fees beyond the initial filing fee, and thus employee-claimants likely will not experience the same cost barriers in litigation as they may in arbitration.

*See also Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (finding that an employee utilizing Ernst & Young’s arbitration

program would likely have to spend \$200,000 to recover only \$1,867.02 in overtime pay and an equivalent amount in liquidated damages; “Only a ‘lunatic or a fanatic’ would undertake such an endeavor.”) (cited in Justice Ginsburg’s dissent in *Epic Systems*); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1480 (D.C. Cir. 1997) (“The parties stipulated that arbitrators’ fees are commonly \$500 to \$1000 or more per day.”); *see also id.* at n.8 (“AAA cites \$700 per day as the average arbitrator’s fee. Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, Daily Lab. Rep. (BNA) No. 31, at A-12 (Feb. 15, 1996). JAMS/Endispute arbitrators charge an average of \$400 per hour. *See* Alleyne, 13 Hofstra Lab.J. at 410 n.189. However, fees of \$500 or \$600 per hour are not uncommon. *See* Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, Wall St. J., July 27, 1996, at A1; David Segal, *Have Name Recognition, Will Mediate Disputes*, Wash. Post, Dec. 16, 1996, Wash. Bus. at 5. CPR Institute for Dispute Resolution estimates arbitrators’ fees of \$250-\$350 per hour and 15-40 hours of arbitrator time in a typical employment case, for total arbitrators’ fees of \$3,750 to \$14,000 in an ‘average’ case. *See* CPR Inst. for Dispute Resolution, *Employment ADR: A Dispute Resolution Program for Corporate Employees* I-13 (1995).”

*Third*, Aflac’s sales associates submitted affidavits below attesting that they would not be able to afford the arbitration costs which could run into many

thousands of dollars. *See* Docs. 18-1 through 18-5. Appellants are former sales associates of Appellee complaining about its fraudulent recruitment and employment misclassification practices that left many in financial distress after their careers with Aflac, and it is entirely plausible and probable that arbitrator’s fees and expenses running into many thousands of dollars are unaffordable and prohibitive for them, and for many, if not the majority, of hundreds of thousands of other former Aflac sales associates. Moreover, Appellants’ sworn statements are undisputed and not contradicted by any other evidence on the record.

*Fourth*, there is no alternative to this “prohibitive cost-allocation” provision in Aflac’s Agreement comparable to the JAMS option that saved the clause in *Larsen*; accordingly, this feature of the Agreement deprives Aflac’s associates of their “substantive rights and a reasonable right of access to a neutral forum,” *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (“[W]e hold that Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator’s fees and expenses.”). Aflac’s Arbitration Agreement plainly requires its sales associates to do just that – *i.e.*, to “pay all expenses and fees of its selected Party Arbitrator.” Agreement ¶ 10.2, Doc. 10-2, pg. 22.

In sum, this is not a case of “the arbitration agreement’s silence on the subject” of costs, as in *Green Tree* and *Bess*, which silence makes the risks of

incurring high costs “too speculative to justify the invalidation of an arbitration agreement,” *Green Tree*, 531 U.S. at 91. Nor is this a case of the “loser pay” clause, which makes such costs contingent and uncertain, as in *Musnick*.

This is rather a case contemplated by the Supreme Court in *Green Tree* where “the existence of large arbitration costs could preclude a litigant such as [Appellants] from effectively vindicating [their] federal statutory rights in the arbitral forum.” 531 U.S. at 90. Here, the Arbitration Agreement imposes on its associates even larger arbitration costs than the cost allocation schemes found unconscionable in *Paladino*, 134 F.3d at 1062 (“Because Avnet makes no promises to pay for an arbitrator, employees may be liable for at least half the hefty cost of an arbitration . . . . We consider costs of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy.”).

In *Cole*, 105 F.3d at 1468, the D.C. Circuit Court of Appeals held that “because public law confers both the substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated . . . employees cannot be required to pay for the services of a ‘judge’ in order to pursue their statutory rights.” The Court relied on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), where the Supreme Court stated that by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute because “[s]o long as the prospective litigant effectively may vindicate [his

or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function” (quoting *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). Aflac’s Arbitration Agreement, by contrast, effectively forecloses for its associates “a reasonable access to a neutral forum in which [their statutory] rights can be vindicated.” *Cole*, 105 F.3d at 1468.

Finally, Aflac’s Arbitration Agreement leaves its associates without any low-cost option, which was the key to upholding the arbitration agreement in *Larsen*. Here, the Agreement fee allocation scheme spells out “*unaffordable justice*” for its associates in no uncertain terms, black on white.

Accordingly, the Appellants have satisfied their burden of showing a high likelihood – indeed, a certainty – of incurring large arbitration costs and, therefore, substantive unconscionability of the Arbitration Agreement under this Court’s precedents. The District Court’s order enforcing the Arbitration Agreement with its prohibitive fee allocation scheme therefore constitutes a clear error of law under these precedents and ought to be reversed for that reason alone.

b. The Agreement is unconscionably one-sided in Appellee’s favor.

This Court observed in *Larsen* that “[a] term that is ‘one-sided’ . . . may be substantively unconscionable,” 871 F. 3d at 1313 (applying Washington law). The severe one-sidedness of the Agreement in Aflac’s favor makes it substantively

unconscionable. As a threshold matter, the Agreement carves out from its scope virtually all material contractual claims that Aflac may have against its associates - the associates, on the other hand, must arbitrate any and all of their claims against Aflac, *see* Agreement 10.1, Doc. 10-2, pg. 22. Indeed, the Arbitration Agreement does not even contemplate Aflac as a “Complaining Party” initiating disputes under the Agreement.

Secondly, the Agreement requires the associate to arbitrate any dispute not only with Aflac itself but also with any of Aflac’s “past and present officers, stockholders, employees, associates, coordinators, agents and brokers of Aflac” and “regardless of whether Aflac is a party.” *Id.* Aflac’s officers and other affiliates are not similarly bound to arbitrate any of their claims against the associate, making the Agreement even further one-sided and lacking mutuality.

Accordingly, as in *Trompeter*, 914 F. Supp. 2d at 1073-76, “substantive unconscionability is apparent due to arbitration requirement that leaves parties unequal in their ability to pursue their respective claims.” If “the arbitration provision [is] severely one-sided in the substantive dimension, even moderate procedural unconscionability renders the arbitration agreement unenforceable.” *Berkson*, 97 F. Supp. 3d at 392 (quoting *Bragg v. Linden Research*, 487 F. Supp. 2d 593 (E. D. Pa. 2007)).

c. The confidentiality provision is unconscionable.

The Eleventh Circuit invalidated as unconscionable the requirement to “keep confidential any decision of an arbitrator,” which it found to give “obvious information advantage” to the company in *Larsen*, 871 F. 3d at 1319:

We agree that under Washington law, KeyBank’s confidentiality clause would likely be considered substantively unconscionable under the reasoning of *Zuver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 103 P.3d 753 (2004). In that case, the Washington Supreme Court invalidated a confidentiality clause covering “[a]ll arbitration proceedings” between an employer and its employees. *Id.* at 765, 765 n.9. We acknowledge that *Zuver* is not perfectly analogous to the case at hand. First, *Zuver* dealt with arbitration of an employment discrimination claim, rather than a consumer dispute in the commercial context. Second, the clause at issue in *Zuver* purported to shroud the entire arbitral process in secrecy. By contrast, KeyBank’s clause prohibits disclosure only of ultimate decisions by an arbitrator. KeyBank’s clause “does not prevent consumers from sharing discovery, fact patterns, or briefing from other similar arbitrations.” Thus, the provision at issue in *Zuver* ensured far more secrecy than the provision here. The court’s reasoning in *Zuver* does, however, highlight a core public-policy concern that applies with equal force to this case. The court explained:

[“]The effect of the provision here benefits only [the employer]. As written, the provision hampers an employee’s ability ... to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee’s confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid [] claim. . . .[”]

The obvious informational advantage KeyBank holds at the outset of a dispute may therefore have the effect of discouraging consumers from pursuing valid claims. We thus conclude that under Washington law, the confidentiality clause here is substantively unconscionable. *See Zuver*, 103 P.3d at 765.

The Court of Appeals for the D.C. Circuit sounded similar public-policy concerns in *Cole*, 105 F.3d at 1477: “a lack of public disclosure may systematically favor companies over individuals. Judicial decisions create binding precedent that prevents a recurrence of statutory violations; it is not clear that arbitral decisions have any such preventive effect. The unavailability of arbitral decisions also may prevent potential plaintiffs from locating the information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by particular companies.”

So is the case here; if anything, the confidentiality provision in Aflac’s Arbitration Agreement is much broader in its scope than the one found unconscionable in *Larsen*, as here “any party may request that the arbitration proceeding, including communications between or among the parties and the arbitrators, information and documents produced by any party, hearing and deposition transcripts and all rulings and decisions of the arbitrators, be kept strictly confidential. In the event that any of the parties elect to keep the arbitration proceedings confidential, all parties agree to enter into an appropriate confidentiality agreement.” ¶10.2. *Cf. Larsen*, 871 F.3d at 1320 (“The confidentiality clause in this case is limited in its scope: it purports only to shield arbitrators’ decisions from disclosure, while other information concerning the

arbitral process may be disclosed. Severing this clause will not ‘significantly alter’ the tone or nature of arbitration between Johnson and KeyBank.”).

It stands to reason that Aflac’s filing of the instant and the New York actions to enforce arbitration publicly rather than under seal, in breach of the Agreement, brings some additional advantage to Aflac, as it broadcasts Aflac’s willingness to enforce its Arbitration Agreement with swift legal actions and TROs, further deterring its associates from resorting to courts to challenge Aflac’s employment and business practices.

4. The unconscionable terms pervade the Agreement.

Finally, unconscionable aspects of the Arbitration Agreement, both procedural, such as the lack of a meaningful choice or an opportunity to review the Agreement; disparity of the bargaining powers of the parties; and the mandatory nature of the agreement as a condition of employment; as well as substantive, such as its severe one-sidedness in Aflac’s favor and in favor of Aflac’s affiliates; its prohibitive cost allocation scheme; and its strict confidentiality -- each one heavily favoring Aflac -- “pervade an arbitration agreement such that severance would ‘significantly alter’ the tone and nature of arbitration,” and the Court should thus “declare the entire agreement void.” *Larsen*, 871 F. 3d at 1320. “[T]he presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just

subject to judicial reformation.” *Paladino*, 134 F.3d at 1058 (citing E. Allan Farnsworth, *Farnsworth on Contracts* § 5.8, at 70 (1990) (severance is inappropriate when the entire provision represents an “integrated scheme to contravene public policy”)).

Here, the confidentiality provision itself is much broader than that found unconscionable by this Court in *Larsen*; moreover, the Agreement contains other no less unconscionable provisions, such as the severe lack of mutuality and the cost-prohibitive fee allocation, making severance inappropriate and rendering the entire Agreement unenforceable. “Taken together, the lack of the mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes . . . demonstrate that the arbitration clause is not designed to provide . . . an effective means of resolving disputes . . . . Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden’s favor. Through the use of an arbitration clause, Linden ‘appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices.’ . . . Finding that the arbitration clause is procedurally and substantively unconscionable, the Court will refuse to enforce it.” *Bragg*, 487 F. Supp. 2d 593 at 611.

Indeed, it strongly appears that Appellee has likewise insulated its fraudulent practices from any meaningful challenge, and from any judicial and public scrutiny, by the expedient of its unconscionable Arbitration Agreement.

### CONCLUSION

Appellants respectfully submit that this Court's recent precedents should lead to a reversal of the District Court's order to compel arbitration for the reasons set out above. Aflac's Arbitration Agreement imposes *larger* arbitration costs on its associates, and with a *higher* degree of certainty, than the arbitration agreements deemed unconscionable by this Court and by other courts, and is more one-sided than those agreements. It also contains an even *broader* confidentiality provision than the one deemed unconscionable by this Court in *Larsen*. Accordingly, the Agreement represents an "integrated scheme to contravene public policy" as it denies Aflac's associates an access to a neutral forum in which to vindicate their federal statutory rights, and shields Aflac's allegedly fraudulent employment and business practices from public and judicial scrutiny. Appellants respectfully submit that the Arbitration Agreement should be invalidated in its entirety.

June 18, 2018

Respectfully Submitted,

A handwritten signature in cursive script, reading "Dimitry Joffe", with a long horizontal flourish extending to the right.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMIT, TYPEFACE AND TYPE-STYLE REQUIREMENTS

I, Dimitry Joffe, counsel for Appellants, certify that this document complies with the word limit requirements of FRAP 32 because it contains 8773 words, and complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: June 18, 2018

/s/ Dimitry Joffe  
Dimitry Joffe  
*Counsel for Appellants*

CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 18th day of June 2018, I caused a copy of the Appellants' motion for leave to file a corrected brief and a copy of the proposed corrected brief to be sent electronically to the registered participants in this case through the ECF system.

/s/ Dimitry Joffe

Dimitry Joffe

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