Chapter 51. Douglas H. Meal, Matthew D. LaBrie and Javier A. Silva, Evaluating the Enforceability of Class-Action Waivers in Privacy and Cybersecurity Class Actions: Lessons from the Recent Caselaw (Updated March 13, 2024)

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Douglas H. Meal, Matthew D. LaBrie and Javier A. Silva, Evaluating the Enforceability of Class-Action Waivers in Privacy and Cybersecurity Class Actions: Lessons from the Recent Caselaw (Updated March 13, 2024)

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Appendix A: Reprinted from the PLI Course Handbook, Twenty-Fourth Annual Institute on Privacy and Cybersecurity Law (Item #357789)

I. INTRODUCTION

Putative privacy and cybersecurity class actions frequently arise out of circumstances in which the named plaintiff and the members of the class the named plaintiff is seeking to represent have entered into some sort of agreement with the defendant by means of the defendant's terms of use, user agreement, or other similar agreement. Often, the putative class's claims are predicated on an alleged breach of that agreement or an alleged misrepresentation that allegedly induced the putative class members to enter into that agreement. Frequently, that agreement contains a "class-action waiver" that, if enforceable, would cover the claim that the named plaintiff is seeking to assert on behalf of the putative class. Thus, an issue that frequently arises in the context of putative cybersecurity and privacy class actions is the enforceability of waivers of this sort.

That issue was the subject of our March 2023 article entitled "Evaluating the Enforceability of Class-Action Waivers in Privacy and Cybersecurity Class Actions: Lessons from the Recent Caselaw" (the "March 2023 Article"), which was included in the book for the Practicing Law Institute's Twenty-Fourth Annual Institute on Privacy and Cybersecurity Law.[2] Based on certain events that occurred subsequent to the publication of the March 2023 Article, we believe an update to the March 2023 Article is warranted; this article represents our effort at such an update. For the convenience of the reader, we are attaching the March 2023 Article as an Appendix to this update article, and throughout this update article we assume familiarity with the March 2023 Article.

In the March 2023 Article, we included substantial discussion of *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litigation* ("*Marriott*"), which was then pending before the United States Court of Appeals for the Fourth Circuit on Marriott's Rule 23(f) appeal of the District of Maryland's order granting the plaintiffs' motion for class certification. As discussed in the March 2023 Article, both the District Court's class certification order and Marriott's appeal of that order raised issues regarding (1) when during a litigation enforcement of a class-action waiver should be sought and decided; (2) the circumstances under which a class-action waiver should be found to have been forfeited or waived by the party seeking to enforce it; and (3) whether or not a class-action waiver should

2. *See* Doug Meal, Matthew LaBrie, and Javier Silva, "Evaluating the Enforceability of Class-Action Waivers in Privacy and Cybersecurity Class Actions: Lessons from the Recent Caselaw," Practicing Law Institute's Course Handbook for the Twenty-Fourth Annual Institute on Privacy and Cybersecurity Law, Chapter 41 (March 12, 2023).

be found to be enforceable. *See* March 2023 Article, Parts III.C.2 & IV.C.2. All three of these issues were core issues explored in the March 2023 Article, both generally and in the context of privacy and cybersecurity class actions in particular. *See* March 2023 Article, Parts II (discussing timing of enforcement of class-action waivers), III (discussing forfeiture and waiver of class-action-waiver defenses), & IV (discussing enforceability of class-action waivers).

Since we published the March 2023 Article, two rulings have been rendered in *Marriott* that bear on the issues we discussed in the March 2023 Article, one by the Fourth Circuit in the then-pending appeal, *see In re Marriott Int'l, Inc.*, 78 F.4th 677 (4th Cir. 2023) (the "Fourth Circuit Ruling"), and the other by the District Court following the remand ordered by the Fourt Circuit Ruling, *see In re Marriott Int'l Customer Data Sec. Breach Litig.*, 345 F.R.D. 137 (D. Md. 2023) (the "Post-Remand Ruling"). Moreover, the Fourth Circuit recently granted Marriott's Rule 23(f) petition for leave to appeal the Post-Remand Ruling, and briefing of that appeal is scheduled to be completed in the Spring of 2024. Accordingly, in this update article we summarize and provide our analysis of the conclusions reached in the Fourth Circuit Ruling (*see* Part II below) and the Post-Remand Ruling (*see* Part III below).

II. ANALYSIS OF THE FOURTH CIRCUIT'S CLASS-ACTION-WAIVER RULING IN *MARRIOTT*

A. Summary of the Fourth Circuit Ruling

As previously discussed in the March 2023 Article, Marriott's appeal of the District Court's class certification order included (among many other challenges to that order) a challenge to the District Court's refusal to deny class certification based on the class-action waiver that Marriott had raised in opposition to class certification. In advancing this challenge, Marriott presented three arguments. First, Marriott argued that, contrary to the District Court's ruling below, the enforceability of a class-action waiver ***should*** be determined at the class certification stage, given that enforceability of a waiver is a procedural issue that goes not to the merits of the plaintiffs' claims, but to the procedural right to bring an action as a class action. *See* March 2023 Article, Part III(C)(2). Second, Marriott argued that (1) it had not forfeited its class-action-waiver defense because it had raised the defense in its answer, and (2) it had not waived the defense because it had fully pressed the defense at the appointed time (in opposition to class certification) and had not in the interim engaged in litigation activities

sufficiently inconsistent with its continued reliance on the class-action-waiver defense to establish an intention on Marriott's part to relinquish or abandon that defense. *See id*. Third, Marriott argued that the class-action waiver was not unenforceable under either applicable state law or Federal Rule of Civil Procedure 23. *See id.* at Part IV(C)(2).

In ruling on Marriott's appeal, the Fourth Circuit closely examined the first of the three class-action-waiver issues raised by Marriott, and it ultimately held that the District Court "erred… in certifying damages classes against Marriott without first considering the effect of a class-action waiver signed by all putative class members." *In re Marriott Int'l, Inc.*, 78 F.4th at 680.[3] Accordingly, the Fourth Circuit vacated the District Court's certification orders and remanded for further proceedings consistent with the Fourth Circuit's unanimous opinion. *Id.* The Fourth Circuit Ruling therefore does not reach either the second or third of the class-action-waiver arguments raised in Marriott's appeal.

The Fourth Circuit Ruling began its analysis by reviewing Marriott's class-action-waiver defense arguments. *See id.* at 685. In doing so, the ruling gave a brief overview of the District Court's definition of the certified classes. The District Court certified two sets of classes. First, as to plaintiffs' contract and consumer-protection claims, the District Court certified three state-specific damages classes under Rule 23(b)(3) of the Federal Rules of Civil Procedure. *Id*. Second, the District Court certified four state-specific issue classes under Rule 23(c)(4), limited to the elements of duty and breach. The District Court defined the classes at the certification stage as inclusive of only individuals who were members of the Starwood Preferred Guest Program ("SPG"), despite plaintiffs having proposed classes containing both SPG and non-SPG members. *Id.* at 682. The District Court noted that combined classes containing both members and non-members "raise[d] serious typicality concerns" which was why it elected to redefine all classes against Marriott to include only SPG members. *Id.* The District Court did not further consider the import of the class-

3. The Fourth Circuit Ruling separately considered whether the District Court had properly certified Rule 23(c)(4) issue classes against Accenture, a co-defendant in the *Marriott* litigation, and concluded that, because the existence of certified damages classes against Marriott was a critical predicate for the district court's decision to certify the 23(c)(4) classes against Accenture, the errors that necessitated the decertification of the classes certified against Marriott thus necessitated decertification of the classes certified against Accenture. *See In re Marriott Int'l, Inc.*, 78 F.4th at 680. Because the certification questions related to the Accenture classes do not concern the existence, applicability, or enforcement of class-action waivers, discussion of the issues concerning the Accenture classes are beyond the scope of this Article.

action waiver on its certification decision, noting that while plaintiffs had raised a "strong argument" that Marriott had waived its right to enforce the class-action waiver, it could address the class-action waiver after discovery and at the merits stage of the litigation. *Id.* at 683.

As the Fourth Circuit Ruling noted, however, the issue with the newly defined classes was that the classes were now exclusively comprised of class members who had purportedly signed a class-action waiver by virtue of their SPG membership. *Id.* "As SPG members, every class representative [and member] had signed a 'Terms & Conditions' contract [the "SPG Terms"] with a provision purporting to waive his or her right to pursue class litigation." *Id.* at 682. The SPG members therefore "had a contractual relationship with Marriott that differed critically from that of other [proposed] class members." *Id.*

Thus, the Fourth Circuit Ruling deemed the threshold question on appeal to be "whether the district court erred by certifying classes against Marriott without first addressing this class-action waiver defense[.]" *Id.* at 685. Marriott's position was that class-action waivers must be addressed at the class certification stage of litigation as opposed to the merits stage, as failure to address this issue prior to certification meant that Marriott would be forced to engage in extensive class-action litigation against a group of individuals who may later lose their "class" status by virtue of having signed a class-action waiver. *Id*. at 685-86. As for plaintiffs, they "seem[ed] not to disagree—at least, not by much" with Marriott's argument that class-action waivers must be addressed and enforced at the certification stage. *Id.* at 686. The Fourth Circuit Ruling noted that plaintiffs' brief did not pose an in-depth argument as to the timing question at all, "instead, it jump[ed] straight to the merits of Marriott's defense, arguing that Marriott repudiated or otherwise waived the defense and that the class waiver is in any event unenforceable and largely inapplicable." *Id.* The Court stated that plaintiffs did not make any argument in favor of deferring consideration of a class-action waiver until after certification, and that such argument "may well be forfeited." *Id.*

The Fourth Circuit Ruling ultimately unanimously sided with Marriott and agreed that "the time to address a contractual class waiver is before, not after, a class is certified." *Id.* The ruling recognized that addressing the class-action-waiver defense at the certification state is the "consensus practice[and that c]ourts consistently resolve the import of class waivers at the certification stage—before they certify a class, and usually as the first order of business." *Id.* (citing cases from courts in the Eleventh, Ninth, and Fifth Circuits in support). The Fourth

Circuit Ruling stated that resolving class-action waiver at the certification stage "is the only approach consistent with the nature of class actions and the logic of class waivers" as, by signing a class-action waiver, a plaintiff "exchange[s] for some contractual benefit, the right to proceed by way of an 'actual class action.'" *Id.* (citing *Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 846 (9th Cir. 2020)). Thus, addressing a class-action-waiver defense after class certification defeats the purpose of the waiver and denies the defendant the benefit of the contractual bargain. *Id.*

Additionally, the Fourth Circuit Ruling concluded that a class-action-waiver defense is not a merits issue in the "usual sense": Pursuit of a class action "does not speak to the underlying merits of [a] claim; it speaks to the process available in pursuit of that claim." *Id.* at 687. Yet, even if it were a merits issue, it must be considered during the "rigorous analysis" that must be performed prior to class certification, noting that there is "nothing … counter-intuitive" about requiring consideration of aspects of merits in connection with class certification. *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). Thus, the Fourth Circuit Ruling unanimously concluded that the District Court erred by certifying multiple damages classes consisting entirely of SPG plaintiffs who had signed class-action waivers without addressing the class-action-waiver defense at the class-certification stage. *Id.*

Having resolved that threshold question, the Fourth Circuit Ruling analyzed whether to resolve on appeal the question of whether Marriott repudiated or waived its class-action waiver defense. *Id.* The ruling recognized that the District Court "had characterized plaintiffs' 'waiver of the waiver' argument as a strong one." *Id.* However, the Fourth Circuit Ruling noted that "the district court did not purport to resolve the issue, instead limiting itself to an aside," and further stated that it "ha[d] some questions about the [district] court's commentary." *Id.* The ruling noted that Marriott had raised its class-action-waiver defense in its answer, and again at the certification stage, and that "it is not obvious that more would be required" to preserve and not waive the defense. *Id.* However, because the Fourth Circuit Ruling found the record below was not fully developed on the waiver-of-the-waiver issue, it declined to determine whether Marriott had waived the right to enforce the class-action waiver.

Accordingly, the Fourth Circuit Ruling vacated certification of the Marriott classes and remanded to the District Court. *Id.* at 687-88.

The Fourth Circuit Ruling further ordered that "the district court on remand… consider all arguments related to waiver of the [class-action] waiver provision." *Id.* at 688 (citation omitted).

B. Analysis of the Fourth Circuit Ruling

In the March 2023 Article, we predicted that Marriott would prevail on appeal with respect to its class-action-waiver defense for the following reasons: (1) Class-action waivers (that have been preserved and not subsequently waived) are properly raised and resolved at the class certification stage, as Marriott had argued; (2) Marriott pled its class-action-waiver defense as an affirmative defense in its responsive pleading and thereby preserved that defense; (3) Marriott avoided subsequently waiving its class-action-waiver defense because it took no litigation actions sufficiently inconsistent with its continued reliance on that defense to establish an intention to relinquish or abandon that defense; and (4) Marriott had the far better arguments regarding the enforceability of the class-action waiver. *See* March 2023 Article at 23 and 31-34. And, although the Fourth Circuit Ruling only finally resolved issue 1, it provided some guidance in dicta as to how it thought issues 2 and 3 should be resolved.

First, as to issue 1, we correctly predicted that the Fourth Circuit would determine that the correct time to address the applicability and enforceability of a class-action-waiver defense is at the class certification stage. *See id.*; *In re Marriott Int'l, Inc.*, 78 F.4th at 686. As discussed above, the Fourth Circuit Ruling agreed that the time to address a contractual class-action waiver is before, not after, a class is certified, which typically results in the analysis occurring at the certification stage. *In re Marriott Int'l, Inc.*, 78 F.4th at 686. This comports with the "growing consensus [among federal courts] that the correct time for a class-action defendant to ask a court to enforce a class-action waiver is in its opposition to an individual's motion for class certification under Federal Rule 23." *See* March 2023 Article at 6. Indeed, the Fourth Circuit Ruling relied on many of the same federal cases cited in the March 2023 Article to support its opinion that courts "consistently resolve the import of class waivers at the certification state." *In re Marriott Int'l, Inc.*, 78 F.4th at 686; *see also* March 2023 Article at 6, fn. 6.

Additionally, the Fourth Circuit Ruling noted that this approach is consistent with the nature of class actions because it ensures that

the "'sharp line of demarcation' between 'an individual action seeking to become a class action and an actual class action'" is preserved. *In re Marriott Int'l, Inc.*, 78 F.4th at 686 (citing *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978)). The ruling's approach here is also consistent with our prediction. The March 2023 Article similarly noted that "prior to class certification, any actions taken in a putative class action by the named plaintiff(s) and/or defendants are taken in an ***individual*** action." March 2023 Article at 6. For the Fourth Circuit Ruling to have concluded otherwise here would have blurred the sharp line held by federal courts across the country. Because this determination merely reinforces the legal (and logical) status quo, it will not usher in a sea change, but it does prevent the upheaval and uncertainty the opposite ruling would have caused.

Second, as to issues 2 and 3, while the Fourth Circuit Ruling did not ultimately determine whether or not Marriott had successfully both preserved and avoided thereafter waiving its class-action-waiver defense, *see In re Marriott Int'l, Inc*., 78 F. 4th at 688 (holding that because the District Court had not resolved those issues, the Fourth Circuit must "leave it to the district court on remand to consider all arguments related to waiver of the waiver provision"), the Fourth Circuit Ruling intimated repeatedly that the Fourth Circuit would likely have rejected plaintiffs' "waiver of the waiver" arguments had it reached the merits of those arguments. The Fourth Circuit Ruling openly questioned the District Court's commentary regarding the strength of plaintiffs' waiver arguments and it questioned what "more would be required" for Marriott to preserve the defense other than to assert in its answer and raise at class certification. *Id.* at 687. Thus, while the Fourth Circuit Ruling acknowledged that the court lacked a complete record as to "Marriott's litigation strategy" and thus could not definitively address whether Marriott waived the waiver by engaging in litigation action inconsistent with its reliance on its class-action-waiver defense, *id*., nothing in the substantial record the court ***did have*** regarding Marriott's litigation conduct appears to have raised concerns in the court's mind as to a possible waiver of the waiver on Marriott's part.

Third, as to issue 4, nothing in the Fourth Circuit Ruling provided any indication as to how the Fourth Circuit might be expected to rule on the parties' arguments as to the enforceability of the class-action waiver relied upon by Marriott.

III. ANALYSIS OF THE DISTRICT COURT'S POST-REMAND CLASS-ACTION-WAIVER RULING IN *MARRIOTT*

A. Summary of the Post-Remand Ruling

On remand after the Fourth Circuit Ruling, the District Court received briefing on the effect of the class-action waiver being relied on by Marriott and, in a sharply worded opinion, reinstated the class certification order that the Fourth Circuit Ruling had vacated. *In re Marriott Int'l Customer Data Sec. Breach Litig*., 345 F.R.D. 137 (D. Md. 2023). The District Court based the Post-Remand Ruling on two findings: (1) that Marriott had waived the class-action waiver, *id*. at 142-143, and (2) that standalone class-action waivers such as the one relied upon by Marriott (that is, class-action waivers unaccompanied by arbitration provisions) were unenforceable in federal court because they violate Rule 23 and federal law, *id*. at 144-46. Either finding, according to the Post-Remand Ruling, rendered the class-action waiver incapable of defeating class certification, thus necessitating recertification of the classes against Marriott.[4]

Waiver of the Class-Action Waiver. In the Post-Remand Ruling, the District Court stated that it "disagree[d]" with the Fourth Circuit's view (albeit stated in what was likely dicta) that Marriott had likely both preserved and avoided thereafter waiving the class-action waiver by asserting the class-action waiver as a defense in its answer and by thereafter raising it in its opposition to class certification. *Id*. at 143. Instead, the Post-Remand Ruling found that Marriott had waived the class-action waiver. *Id*. at 142-43. The Post-Remand Ruling hinged its waiver-of-the-waiver finding on Marriott's having waived three of its ***other*** rights under the "Choice of Law and Venue" provision in which the class-action waiver provision appears[5]: namely, its rights to have the plaintiffs' lawsuits (1) "handled individually," (2) "governed by, construed and enforced in accordance with the laws of the State

4. The Post-Remand Ruling also recertified the Accenture 23(c)(4) issue classes, though the ruling provided no rationale for doing so. Post-Remand Ruling at 146.
5. The "Choice of Law and Venue" provision reads as follows: "Any disputes arising out of or related to the [SPG] Terms will he handled individually without any class action, and will be governed by, construed and enforced in accordance with the laws of the State of New York, United States, without regard to its conflicts of law rules. The exclusive jurisdiction for any claim or action arising out of or relating to these… Terms… may be filed only in the State of New York, United States." *See in re Marriott*, Case No. 8:19-md-2879, Dkt. No. 1022-34 at 101.

of New York," and (3) "filed only in the state or federal courts located in the State of New York." *Id*. According to the Post-Remand Ruling, Marriott's waiver of those three rights operated, in turn, to waive Marriott's right under the Choice of Law and Venue provision to have the plaintiffs' lawsuits handled "without any class action." *Id.*

The Post-Remand Ruling's waiver-of-the-waiver finding seems to have principally rested on its conclusion that Marriott had waived its right under the Choice of Law and Venue provision to have plaintiffs' lawsuits "handled individually." To reach that conclusion, the Post-Remand Ruling found that Marriott's request for plaintiffs' lawsuits to be included in a multi-district litigation (or "MDL") was the "antithesis" of the right to have those lawsuits handled "individually," *id.* at 142-43, and that Marriott's agreement to a bellwether approach—whereby Marriott would proceed through litigation against "multiple representative plaintiffs"—as part of the MDL was "wholly inconsistent with handling cases on an individual basis." *Id*. at 143. The Post-Remand Ruling further found that, having by those agreements waived its right under the Choice of Law and Venue provision to have plaintiffs' lawsuits "handled individually," Marriott necessarily had likewise waived its right under that provision to have plaintiffs' lawsuits handled "without any class action," because the provision's phrase "individually without any class action" "is a single phrase—it is a single rule" such that Marriott's waiver of the phrase's "individually" component inherently waived the phrase's "without any class action" component. *Id*.

The Post-Remand Ruling backstopped its waiver-of-the-waiver analysis by noting that the MDL and bellwether processes resulted in Plaintiffs' lawsuits being transferred to Maryland and decided under multiple states' laws. *Id*. According to the Post-Remand Ruling, Marriott's agreement to those processes thus waived Marriott's rights under the Choice of Law and Venue provision to have Plaintiffs' lawsuits decided under New York law and filed in the New York courts. *Id*. The cumulative effect of those waivers, when coupled with Marriott's waiver of its right under the Choice of Law and Venue provision to have Plaintiffs' lawsuits "handled individually," meant that Marriott was "now attempting to invoke one half of one third of the Choice of Law and Venue provision" after "ha[ving] clearly waived 5/6 of the provision." *Id*. Reasoning that "Marriott should not be permitted to cherry-pick the rules from a provision, having waived every other term therein[,]" the Post-Remand Ruling concluded that Marriott's

waivers of its ***other*** rights under the Choice of Law and Venue provision necessarily waived ***all*** Marriott's rights under that provision—including its right to have Plaintiffs' lawsuits handled "without any class action." *Id*.

Validity of the Class-Action Waiver. Although the Post-Remand Ruling's determination that Marriott had waived its right to enforce the class-action waiver was sufficient to recertify the classes against Marriott, the ruling reached the additional question of whether the class-action waiver would have been valid and enforceable had it not been waived. *Id*. at 144. As to that question, the Post-Remand Ruling concluded that Rules 23 and 42 "leave[] no room" for "private agreements among litigants" to a standalone "waiver of consolidated or class-wide adjudication," and, thus, that the class-action waiver was unenforceable as a matter of federal law. *Id*. at 145-46.

To reach this conclusion, the Post-Remand Ruling analogized to precedent that found state laws that imposed procedural requirements conflicting with or in addition to the Rules to be unenforceable in federal court. *Id*. at 144. The Post-Remand Ruling interpreted the Supreme Court's opinion in *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co*., 559 U.S. 393 (2010) to hold that a New York statute precluding a class action to recover certain penalties was invalid because it conflicted with Rule 23. *Id*. at 144. The Post-Remand Ruling also cited a Fourth Circuit decision which held invalid in federal court a West Virginia statute that required pre-filing an expert report in claims for medical malpractice. *Id*. (citing *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021)).

The Post-Remand Ruling sought to distinguish the cases Marriott relied upon to show that federal courts upheld and applied class-action waivers on the grounds that "[m]any of [Marriott's] case [*sic*] dealt with class action [*sic*] waivers in the arbitration context" (*i.e*., were accompanied by mandatory arbitration provisions). *Id*. at 144. The Post-Remand Ruling reasoned that, when a class-action waiver is paired with a mandatory arbitration provision, because the entire proceeding would take place outside the federal judicial system, any private agreements to proceed individually (*e.g*., a class-action waiver) would have no effect on the court's application of the Federal Rules, and, thus, the waiver did not violate the Federal Rules or law. *Id*.

The Post-Remand Ruling also took issue with the specific wording of the class-action waiver relied upon by Marriott. It found that the waiver sought "to limit th[e] Court's own authority by stating that '[a]ny disputes… will be handled individually'" rather than that class

members "will not bring or participate in class actions." *Id.* at 145. The Post-Remand Ruling concluded the wording of the waiver resulted in a direction to the court to "ignore the provisions of Rule 23" rather than in a release of putative class members' rights. *Id*. In support of this analysis, the Post-Remand Ruling relied almost exclusively on *Martrano v. Quizno's Franchise Co., LLC*, 2009 WL 1704469 (W.D. Pa. June 15, 2009) in which Magistrate Judge Lenihan held that standalone class-waivers (that is, waivers that were not paired with mandatory arbitration provisions) could not be enforced because, if enforced, they would require the court to refuse to apply Rule 23 in contradiction of federal law and Supreme Court precedent. *See id.* (quoting *Martrano*, 2009 WL 1704469 at *20 (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("When a situation is covered by [the] Federal Rules... the court has been instructed to apply the Federal Rule[unless] the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."))). Thus, the Post-Remand Ruling concluded, the standalone class-action waiver, even if not waived by Marriott, would, nevertheless, be unenforceable as a matter of federal law and thus would not preclude class certification.

* * *

Having concluded both that Marriott waived the class-action waiver and that the class-action waiver was unenforceable as a matter of federal law in federal court because it conflicted with the Federal Rules, the Post-Remand Ruling recertified the classes against Marriott.[6]

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6. Though the Post-Remand Ruling did not explicitly hold that the class-action waiver was unenforceable because it was unconscionable, the ruling made multiple findings that suggested the District Court considered it so. For example, the Post-Remand Ruling noted the provision contains only two sentences, that "heading of the provision [containing the waiver] makes no reference to individual handling of claims" and characterized the provision as "buried on the last page of the Terms[.]" Post-Remand Ruling at 142. The Post-Remand Ruling also compared the class-action waiver relied upon by Marriott to a class-action waiver upheld by the Southern District of Florida, noting that—unlike Marriott's waiver—the waiver upheld by the Southern District of Florida was referenced in the first paragraph in bolded text, and contained a paragraph "specifically directing [counter-parties] to important terms and conditions." *Id*. 144-45. The Court also refers to the waiver as an "adhesive provision." *Id*. at 146. Although whether the waiver was unconscionable featured heavily in the parties' first round of 23(f) briefing, the Fourth Circuit Ruling determined it did not need to resolve the issue. *In re Marriott Int'l, Inc*., 78 F. 4th at 689. In the ensuing briefing before the District Court that led to the Post-Remand Ruling, Marriott argued that Plaintiffs

Marriott subsequently petitioned the Fourth Circuit to accept a second Rule 23(f) appeal, which petition the Fourth Circuit granted in short order. *In re Marriott International, Inc*., Case No. 23-299 at ECF 30 (4th Cir. Jan. 18, 2024). According to the Fourth Circuit briefing schedule, Marriott's (and Accenture's) opening brief is due March 19, 2024, responses are due April 18, 2024, and replies are due on May 9, 2024. *In re Marriott International, Inc*., Case No. 24-1064 at ECF 29 (4th Cir. Feb. 8, 2024).

B. Analysis of the Post-Remand Ruling

This time around, the Fourth Circuit will not be able to avoid making substantive determinations as to the applicability and enforceability of the class-action waiver relied upon by Marriott. In the Fourth Circuit Ruling, the Court of Appeals ended its analysis by concluding that the District Court should have considered the effect of the class-action waiver prior to determining whether to certify any classes against Marriott. Now, in the Post-Remand Ruling, the District Court has considered the applicability of the waiver and has rejected it on two separately sufficient grounds: first, that Marriott waived the provision and, second, that the provision is unenforceable in federal court. These issues are now squarely in front of the Fourth Circuit.

We believe the Fourth Circuit should reject both conclusions arrived at by the Post-Remand Ruling. To uphold the Post-Remand Ruling would require the Court of Appeals not only to distance itself from its tentative conclusion in the Fourth Circuit Ruling that Marriott had not waived the class-action waiver, but also to disregard the rulings of multiple federal courts—including the United States Supreme Court—that have found standalone class-action waivers to be enforceable in federal court.

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had forfeited any unconscionability argument (*see In re Marriott*, Case No. 8:19-md-2879, Dkt. No. 1138 at 11-12 (D. Md. Oct. 23, 2023)), while Plaintiffs only reference unconscionability in passing in a footnote (*see id*. Dkt. No. 1146 at 13 n.7 (D. Md. Nov. 3, 2023)). Neither side made any unconscionability argument in the ensuing Rule 23(f) briefing, so as matters currently stand Plaintiffs may not intend to make, and in any event may have forfeited, any unconscionability argument in the context of the pending Fourth Circuit appeal of the Post-Remand Ruling.

1. The Post-Remand Ruling Erred in Finding a Waiver of the Class-Action Waiver

Waiver requires manifestation of an intent to relinquish a contractual right. *Dave & Buster's, Inc. v. Mall*, 616 Fed. Appx. 552, at *558 (4th Cir. June 11, 2015). We believe that, upon applying this standard to the *Marriott* facts, the Fourth Circuit should find that Marriott did not waive its right to enforce the class-action waiver.

a. The Post-Remand Ruling erroneously found a waiver of the class-action waiver based on Marriott's supposed waiver of its right to have plaintiffs' lawsuits "handled individually."

For two reasons, we believe the Post-Remand Ruling erroneously found a waiver of the class-action waiver based on Marriott's supposed waiver of its right to have plaintiffs' lawsuits "handled individually": first, there was no Marriott waiver of its right to have plaintiffs' lawsuits "handled individually"; and second, a Marriott waiver of that right would not have operated to waive Marriott's separate right to have plaintiffs' lawsuits handled "without any class action."

i. There was no Marriott waiver of its right to have plaintiffs' lawsuits "handled individually."

Each of the class members agreed to the SPG Terms, which require that "[a]ny disputes arising out of or related to the SPG Program or the[] SPG Program Terms will be handled individually without any class action[.]" *See in re Marriott*, Case No. 8:19-md-2879, Dkt. No. 1022-34 at 21 (D. Md. May 5, 2022). The Post-Remand Ruling held that Marriott had waived its right to enforce this provision because, by agreeing to have plaintiffs' lawsuits included in an MDL (and in a bellwether proceeding conducted as part of that MDL), Marriott had acted inconsistently with its right under this provision to have plaintiffs' lawsuits "handled individually." *In re Marriott*, 345 F.R.D at 143. As discussed below, whatever interpretation might be given to this provision's phrase "handled individually," we believe Marriott cannot be viewed as

having waived its right to have plaintiffs' lawsuits "handled individually."

To the extent "handled individually" means "handled without being consolidated with another lawsuit or joined in by another plaintiff" (which we think is the most reasonable reading[7]) Marriott's agreement to include plaintiffs' lawsuits in an MDL (and in a bellwether proceeding as part of MDL) was not inconsistent with its right to have those lawsuits "handled individually." This is because, when cases are transferred to an MDL, each case retains its individual character, despite being consolidated with the other transferred cases for the purposes of pretrial proceedings. *See* 28 USC § 1407; *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011) ("[I]ndividual cases that are consolidated or coordinated [as an MDL] for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over."). And, when MDL pretrial proceedings are completed "[e]ach

7. The other possible readings of this term seem implausible to us, but even if adopted, they, in our view, would not sustain the Post-Remand Ruling's finding of a waiver of Marriott's right to have plaintiffs' lawsuits "handled individually." Reading "handled individually" to mean "handled without being included in an MDL" would be contractually disfavored, because under that reading Marriott's right to have plaintiffs' lawsuits "handled individually" would be unenforceable. *See In re: Uber Techs., Inc. Passenger Sexual Assault Litigation*, 2023 WL 6456588, MDL No. 3084 at *2 (JPML Oct. 4, 2023) (holding that 28 USC § 1407(c) "grants the [Judicial] Panel [on Multidistrict Litigation ("JPML")] the authority to centralize cases on its own initiative" and is "not bound by" efforts to restrict the JPML's authority via contract). But even if that reading were correct, there was no right to "individual handling" that Marriott could have intentionally relinquished (given the right's unenforceability), so the Post-Remand Ruling's finding of such a waiver would still be wrong. Similarly, reading "handled individually" to mean "handled on a non-class basis" would be contractually disfavored, because that reading would give no independent content or meaning to the phrase "without any class action" that comes immediately after "handled individually." But even if that reading were correct, mere inclusion of a lawsuit in an MDL (or in a bellwether proceeding as part of an MDL) is not an agreement that the litigation can be handled as a class action (*i.e.*, in a representative capacity), as lawsuits do not have to be handled (or "handleable") as a class action to be included in an MDL (or in a bellwether proceeding), so the Post-Remand Ruling would still be wrong in finding that Marriott's agreement to such inclusion was inconsistent with, and therefore waived, Marriott's right to have plaintiffs' lawsuits "handled individually."

action so transferred [is] remanded by the panel… to the district from which it was transferred[.]" 28 USC § 1407(a). Thus, while an MDL can be a convenient tool for coordinating related discovery and motions practice, each litigant must still proceed through his or her own individual trial or reach his or her own negotiated resolution, *i.e.*, be "handled individually," in those original districts.[8] The transfer of plaintiffs' lawsuits to the *Marriott* MDL (and the subsequent inclusion of those cases in a bellwether proceeding as part of the MDL) thus did not result in any of those lawsuits being consolidated with one another pursuant to Federal Rule 42 or in any of the plaintiffs being joined as a co-plaintiff in any of those lawsuits pursuant to Federal Rule 21. Thus, if "handled individually" means "handled without being consolidated with another lawsuit or joined in by another plaintiff" (as we think it should be), by agreeing to include plaintiffs' lawsuits in the *Marriott* MDL and the bellwether proceeding, Marriott did not agree to any of those lawsuits being consolidated with one another or being joined in by any of the plaintiffs and thus did not act inconsistently with (and thereby waive) its right to have those lawsuits "handled individually."

ii. Even if Marriott did waive its right to have plaintiffs' lawsuits "handled individually," that waiver did not operate to waive Marriott's separate right to have plaintiffs' lawsuits handled "without any class action."

While our analysis suggests that Marriott did not waive its right to have plaintiffs' lawsuits "handled individually" and thus could not—employing the District Court's logic—have thereby waived its right to proceed "without any class action," even if Marriott had waived its right to

8. Multiple federal circuit and district courts have enforced class-action waivers in the context of an MDL. *See, e.g.*, *Lombardi v. DirecTV, Inc*., 549 F. App'x 617, 619-20 (9th Cir. 2013); *In re Checking Acct. Overdraft Litig*., 672 F.3d 1224, 1226, 1230 (11th Cir. 2012); *In re H & R Block Refund Anticipation Loan Litig*., 59 F. Supp. 3d 903, 906, 910 (N.D. Ill. 2014); *In re Jamster Mktg. Litig*., 2008 WL 4858506, at *1, *8 (S.D. Cal. Nov. 10, 2008), *amended*, 2009 WL 250089 (S.D. Cal. Feb. 2, 2009).

proceed individually by engaging in the MDL and bellwether process, Marriott still has not waived its right to proceed "without any class action."

As discussed above, there is no inconsistency between (1) agreeing to include lawsuits in and MDL (or in a bellwether proceeding as part of an MDL) and (2) contending that those lawsuits may not be handled as class actions, because lawsuits do not have to be handled (or handleable) as a class action to be included in an MDL (or in a bellwether proceeding as part of an MDL). Thus, even if Marriott's agreement to have plaintiffs' lawsuits included in an MDL (and as part of a bellwether proceeding as part of that MDL) waived Marriott's right to have plaintiffs' lawsuits "handled individually," that agreement cannot have waived Marriott's separate right to have plaintiffs' lawsuits handled "without any class action" because the agreement to proceed with the MDL and bellwether process was in no way inconsistent with Marriott's continued assertion of its right to have plaintiffs' lawsuits handled "without any class action." The defining characteristic of a class action is the ability of a representative plaintiff or plaintiffs to proceed on behalf of an absent class. A plaintiff does not acquire that ability merely by having his or her lawsuit included in an MDL (or in an MDL-related bellwether) proceeding: In such a proceeding, unless and until a class is certified, no plaintiff represents another plaintiff or any absent class members, and each plaintiff proceeds individually on his or her own claims. Thus, the two proceedings—MDLs and class actions—are sufficiently different to preclude a finding that, by intentionally relinquishing its right to oppose the inclusion of plaintiffs' lawsuits in the MDL and the bellwether proceeding, Marriott likewise intentionally relinquished its right to have plaintiffs' lawsuits handled "without any class action."

Furthermore, the SPG Terms contain a "no-waiver" provision under which Marriott's "failure to insist upon strict compliance with [any of the contract's t]erms by any [of the plaintiffs] will not be deemed a waiver of any rights or remedies that [Marriott] may have against that, or any other, [plaintiff]." *See in re Marriott*, Case No.

8:19-md-2879, Dkt. No. 1022-34 at 21 (D. Md. May 5, 2022). No-waiver provisions like this one are enforceable under New York law. *See, e.g.*, *Morrison v. Buffalo Bd. of Educ*., No. 15-CV-255-FPG, 2022 WL 4562047, at *8 (W.D.N.Y. Sept. 29, 2022) (holding "no-waver" clauses" are "uniformly enforced" under New York law); *Park Irmat Drug Corp. v. Optumrx, Inc*., 152 F. Supp. 3d 127, 137 (S.D.N.Y. 2016) (holding "no-waiver clauses are valid and enforceable under New York law") (internal citation omitted). Given the no-waiver provision, it necessarily follows that, even if Marriott's agreement to have plaintiffs' lawsuits included in an MDL (and as part of a bellwether proceeding as part of that MDL) waived Marriott's right to have plaintiffs' lawsuits handled "individually," and even if some inconsistency did exist between Marriott's failure to insist on plaintiffs' strict compliance with ***that*** Marriott right and Marriott's continued assertion of its ***separate*** right to have plaintiffs' lawsuits handled "without any class action," the no-waiver provision would prevent that inconsistency from operating to waive Marriott's separate "without-any-class-action" right.

Finally, the District Court theorized that the SPG Terms' phrase "individually without any class action" creates a "single rule" such that waiver of the "individually" component inherently waives the "without any class action" component. *In re Marriott*, 345 F.R.D at 143. The District Court's "single-rule" theory does not hold water, as it fails to give independent meaning to the terms "individually" and "without any class action." Indeed, as the District Court itself recognized elsewhere in its opinion, the two terms not only must, but plainly do, have independent meanings. *See id*. (noting that the provision "is not merely a class-action waiver" but also "prohibits any collective handling of [plaintiffs'] claims") and (noting that Marriott was seeking to enforce the class-action waiver after having waived all the "other terms" of the Choice of Law and Venue provision). Given that—as the District Court recognized—the two terms have independent meanings that create different rights and impose different prohibitions, waiver of the right

conferred by one of the terms does not inherently operate as a waiver of the right conferred by the other of the terms. But even if Marriott's right to have plaintiffs' lawsuits "handled individually" in and of itself includes a class-action waiver (and the phrase "without any class action" therefore adds nothing to the contract), the contract's no-waiver provision would defeat District Court's theory that, having waived that right once by allowing plaintiffs' lawsuits to be included in the MDL and the bellwether proceeding conducted as part of the MDL, Marriott was precluded from subsequently asserting that right in opposition to plaintiffs' lawsuits being certified as class actions.

b. The District Court Erred in Finding a Waiver of the Class-Action Waiver Based on Marriott's Supposed Waiver of Its Right to Have the Plaintiffs' Lawsuits Decided Under New York Law and Filed in New York

For two reasons, we believe the Post-Remand Ruling erroneously found a waiver of the class-action waiver based on Marriott's supposed waiver of its rights to have plaintiffs' lawsuits decided under New York law and filed in New York (respectively, its "choice of law" and "venue" rights): first, there was no Marriott waiver of its choice of law and venue rights; and second, a Marriott waiver of those rights would not have operated to waive Marriott's separate right to have plaintiffs' lawsuits handled "without any class action."

i. There was no Marriott waiver of its choice of law and venue rights

The Post-Remand Ruling found Marriott waived its choice of law right because, in agreeing to a bellwether proceeding being conducted as part of the MDL, Marriott agreed to the application of the law of states other than New York in that proceeding. *In re Marriott*, 345 F.R.D. at 143. In agreeing to the bellwether proceeding, however, Marriott (with plaintiffs' assent) expressly reserved its contractual choice of law rights. *See in re Marriott*, Case No. 8:19-md-2879, Dkt. No. 368 (D. Md. Aug. 5, 2019).

While the Post-Remand Ruling may be correct that "a reservation of rights is not an assertion of rights," *In re Marriott*, 345 F.R.D. at 143, that statement misses the point, because a reservation of rights most definitely ***is*** a prevention of a waiver of rights—after all that is the whole purpose of the reservation. We accordingly believe the Post-Remand Ruling committed clear error in finding a Marriott waiver of its choice of law right based on Marriott's agreement to the bellwether proceeding.

The Post-Remand Ruling further found that, in agreeing to the MDL and to the transfer of plaintiffs' lawsuits to Maryland for pre-trial proceedings (to the extent they had not already been filed there) Marriott acted inconsistently with, and accordingly waived, its venue right in regard to those lawsuits. *Id.* However, Marriott's venue right merely required plaintiffs' lawsuits to be ***filed*** in New York. *Id*. at 142. That right did not enable either Marriott or plaintiffs to preclude plaintiffs' lawsuits, once filed, from being ***transferred*** to another forum. *Id*. Nor did that right make New York the exclusive jurisdiction in which plaintiffs' lawsuits could be ***maintained***. *Id*. Moreover, to the extent one or more of plaintiffs' lawsuits was not filed in New York, the transfer of those lawsuits to Maryland for pre-trial proceedings as part of the MDL would not have precluded Marriott from enforcing its venue rights (1) by asking the MDL court, at the conclusion of the MDL's pre-trial prtrial proceedings. *See, e.g*., *In re Park West Galleries, Inc., Mktg. & Sales Pracs. Litig*., 655 F. Supp. 2d 1378, 1379 (J.P.M.L. 2009) ("[B]ecause Section 1407 transfer is for pretrial purposes only, [MDL coordination] in no way precludes… seeking enforcement of [a] forum selection clauses for purposes of trial."); *In re SFBC Int'l, Inc., Sec. & Derivative Litig*., 435 F. Supp. 2d 1355, 1356 (J.P.M.L. 2006). Marriott's agreement to having plaintiffs' lawsuits included in the MDL therefore was in no way inconsistent with, and thus cannot have waived, Marriott's venue rights in regard to those lawsuits. We accordingly believe the Post-Remand Ruling also committed clear error

in finding a Marriott waiver of its venue right based on Marriott's agreement to the inclusion of plaintiffs' lawsuits in the MDL.

ii. Even if Marriott did waive its venue rights and/or its choice of law rights in regard to plaintiffs' lawsuits, that waiver did not operate to waive the class-action waiver, i.e., Marriott's right to have plaintiffs' lawsuits handled "without any class action."

In order for the Post-Remand Ruling to have correctly found that Marriott waived its right to enforce its class-action waiver as a result of—supposedly—waiving its choice of law and venue rights with respect to plaintiffs' lawsuits, the Post-Remand Ruling must have correctly concluded first that Marriott's waiver of its choice of law and venue rights was so inconsistent with Marriott's continued assertion of its right to have plaintiffs' lawsuits handled "without any class action" that Marriott must have thereby intentionally relinquished ***that*** right as well. As discussed below, there is in fact no inconsistency between Marriott's relinquishing its choice of law and venue rights, on the one hand, and Marriott's continuing to assert its class-action-waiver right, on the other hand. Accordingly, even if Marriott did waive its venue and choice of law rights with respect to plaintiffs' lawsuits, such waiver is not evidence, and thus does not support the Post-Remand Ruling's finding, that Marriott intentionally relinquished its right to enforce the class-action waiver.

There is no inconsistency between (1) agreeing to plaintiffs' lawsuits being transferred to Maryland and decided (for purposes of the bellwether proceeding) under the law of states other than New York and (2) contending that those lawsuits may not be handled as class actions, because the question whether those lawsuits have to be handled as class actions does not turn on the law that governs plaintiffs' claims or where those claims are filed. Thus, even if Marriott's agreement to plaintiffs' lawsuits being transferred to Maryland and decided (for purposes of the bellwether proceeding) under the law of states other than New York waived Marriott's venue

rights and/or its choice of law rights in regard to those lawsuits, that agreement cannot have waived Marriott's right to have plaintiffs' lawsuits handled "without any class action," because, again, that agreement was not sufficiently inconsistent with Marriott's continued assertion of its right to have plaintiffs' lawsuits handled "without any class action" to permit a finding that Marriott had intentionally relinquished that right by making that agreement.

Moreover, as discussed above, Part III(B)(1)(a)(ii), the SPG Terms include a "no-waiver" provision under which Marriott's "failure to insist upon strict compliance with [any of the contract's t]erms by any [of the plaintiffs] will not be deemed a waiver of any rights or remedies that [Marriott] may have against that, or any other, [plaintiff]." Given that the no-waiver provision is enforceable under New York law, it necessarily follows that, even if Marriott's agreement to plaintiffs' lawsuits being transferred to Maryland and decided (for purposes of the bellwether proceeding) under the law of states other than New York waived Marriott's venue rights and/or its choice of law rights in regard to those lawsuits, and even if some inconsistency did exist between Marriott's failure to insist on plaintiffs' strict compliance with ***those*** Marriott rights and Marriott's continued assertion of its ***separate*** right to have plaintiffs' lawsuits handled "without any class action," the SPG Terms' no-waiver clause would preclude that inconsistency from operating to waive Marriott's separate "without-any-class-action" right.

* * *

Accordingly, for the reasons set forth above, we believe the Fourth Circuit should reverse the Post-Remand Ruling's finding that Marriott waived its right to enforce the SPG Terms' class-action waiver.

2. The Post-Remand Ruling Erred in Finding the Class-Action Waiver to Be Unenforceable in Federal Court

We believe that the Fourth Circuit should reject the Post-Remand Ruling's sweeping determination that a class-action waiver

that is not paired with a mandatory arbitration provision is unenforceable in federal court. This would be a sharp departure from established federal court precedent. Indeed, the weight of authority decidedly contradicts the Post-Remand Ruling's determination. *See, e.g.*, *Crews v. TitleMax of Del., Inc*., 2023 WL 2652242, at *3-4 (M.D. Pa. Mar. 27, 2023); *Dimery v. Convergys Corp*., 2018 WL 1471892, at *6 (D.S.C. Mar. 26, 2018); *Korea Wk., Inc. v. Got Cap., LLC*, 2016 WL 3049490, at *7-11 (E.D. Pa. May 27, 2016); *U1it4Less, Inc. v. FedEx Corp*., 2015 WL 3916247, at *3-4 (S.D.N.Y. June 25, 2015); *Mazurkiewicz v. Clayton Homes, Inc*., 971 F. Supp.2d 682, 692 (S.D. Tex. 2013); *Palmer v. Convergys Corp*., 2012 WL 425256, at *2-3 (M.D. Ga. Feb. 9, 2012) (all holding that federal law does not prohibit, as being at odds with Federal Rule 23, a class-action waiver that is unaccompanied by an arbitration provision). Indeed, even the Supreme Court has concluded—though in the context of evaluating a litigant's rights in arbitration—that Rule 23 does not create a "nonwaivable" right to proceed as a class action. *See Am. Exp. Co. v. Italian Colors Rest*., 570 U.S. 228, 234 (2013).

The Post-Remand Ruling premised its determination that Marriott's class-action waiver was invalid in federal court on the conclusion that the provision attempted to limit the court's authority under Rule 23 rather than contractually waive a plaintiff's right to proceed as a class representative. In coming to this conclusion, the District Court relied predominantly on two cases—*Martrano*, 2009 WL 1704469, and *Shady Grove*, 559 U.S. 393—to conclude that contractual waivers are unenforceable in federal court if they purport to alter how a court might otherwise handle a case in accordance with the federal rules. *In re Marriott*, 345 F.R.D. at 144-146. But *Martrano* is unpersuasive, and *Shady Grove* actually provides no support for this conclusion.

Martrano—an unpublished opinion by a magistrate judge—determined that a standalone class-action waiver cannot override a court's discretion to order a case to proceed as a class action under Rule 23 (or Rule 42). 2009 WL 1704469 at *21. The *Martrano* court grounded its decision in *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22 (1988), which concluded that a contractual forum selection clause between litigants should not be treated as dispositive when a party seeks to enforce the clause by means of a transfer motion but should be considered as part of the analysis required by 28 U.S.C. § 1404(a) because when a "court has been instructed to

apply [a] Federal Rule," it must. *Id*. at 27, 31. The conclusion in *Stewart Organization*, however, does not require the outcome reached by *Martrano* and in the Post-Remand Ruling that standalone class-action waivers are, as a rule, invalid in federal court. Rather, as further explained by the Supreme Court in a more recent case, *Atlantic Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas*, 571 U.S. 49 (2013), contractual waivers of federal procedural rights do not impose a limitation on a court's authority *per se*, rather, they prevent a litigant from asserting certain arguments that (generally) have the effect of making it impossible for a court to find a litigant meets the threshold required for the court to enforce otherwise applicable procedures provided by the Federal Rules or Title 28.

In *Atlantic Marine*, the Supreme Court again examined the effect of a forum selection clause and explained that "[t]he presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis," specifically:

> [A] court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum…. As a consequence, a district court may consider arguments about public-interest factors only.

Id. at 51, 63-64. Thus, the Supreme Court explained, a contractual forum selection clause (that is otherwise valid and enforceable under state law) is valid and can be enforced in federal court because it does not direct the court not to apply the Federal Rules or Title 28. Rather, it limits the transfer arguments available to the litigants, which, in turn, necessarily affects the court's application of the federal transfer statute to the case at hand. In like fashion, the class-action waivers at issue in and *Marriott* did not direct the court to refuse to apply Federal Rule 23; they merely limited the arguments available to the plaintiffs under Rule 23 in that the plaintiffs are barred from "su[ing]… as representative parties of all class members" and thus are precluded from satisfying Rule 23's gating criterion. Under *Atlantic Marine*, then, because the plaintiffs therein and in *Marriott* had contracted away their ability to qualify for class treatment under Rule 23, the courts in those cases, far from being ***precluded*** from applying Rule 23, should have ***enforced*** Rule 23 by refusing to certify a class.

This analysis comports with the Supreme Court's analysis in *Shady Grove*, on which the Post-Remand Ruling also relied for its unenforceability determination. In *Shady Grove*, the issue facing the Court was whether a New York statute that precluded a class action seeking recovery of statutory penalties thereunder could prevent plaintiffs in federal court from seeking to proceed via a class action. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 397-98 (2010). This, of course, the Court held would "disembowel either the Constitution's grant of power over federal procedure or Congress's exercise of it." *Id. at* 416 (internal quotation omitted). The Court went on to clarify that Rule 23, "[b]y its terms this creates a categorical rule entitling a plaintiff *whose suit meets the specified criteria* to pursue his claim as a class action[,]" and that the New York law effectively sought to add additional criteria to Rule 23. *Id*. at 398 (emphasis supplied). Thus, *Shady Grove* does not compel the Post-Remand Ruling's conclusion that private contracts containing class-action waivers are unenforceable, because a class-action waiver does not seek to add additional criteria to Rule 23 but, again, merely precludes a plaintiff from meeting Rule 23's "specified criteria" by barring the plaintiff, as required by Rule 23, from "su[ing]… as [a] representative part[y] of all class members."

Furthermore, it is worth noting that the class-action waivers at issue in *Martrano* and *Marriott* did not purport to prohibit the court from exercising any authority under Rule 23 that it otherwise could exercise *on its own initiative*. Rule 23 grants district courts permission to certify a case to proceed as a class action only where "a person sues or is sued as a class representative," *see* Fed. R. Civ. P. 23(c)(1)(A); a district court thus cannot mandate that a case be handled as a class action unless an individual litigant has first requested that the case be so handled. The Supreme Court has therefore interpreted Rule 23 to "confer categorical permission" rather than give an instruction to district courts to certify class actions thereunder. *See Shady Grove*, 559 U.S. at 398. Rule 23 is therefore crucially different from 28 U.S.C. § 1407, which expressly allows the Judicial Panel on Multidistrict Litigation to initiate an MDL proceeding "upon its own initiative." 28 U.S.C. § 1407(c)(i). The class-action waivers at issue in *Martrano* and *Marriott* are therefore crucially different from the MDL waiver at issue in *In re: Uber Techs., Inc. Passenger Sexual Assault Litigation*, because,

unlike in the *Uber* MDL waiver, the *Martrano* and *Marriott* class-action waivers did not purport to block the court from undertaking any action that the rule in question otherwise allowed the court to take *on its own*, without first being asked by a party to do so. *See In re: Uber Techs.*, 2023 WL 6456588 at *2 (hinging holding that the *Uber* MDL waiver was unenforceable on the fact that "28 USC § 1407(c) grants the [Judicial] Panel [on Multidistrict Litigation] the authority to centralize cases on its own initiative" and therefore is "not bound by" efforts to restrict the JPML's authority via contract).

Indeed, it cannot be—as the Post-Remand Ruling found—that any contractual waiver that would impinge on how a litigation might otherwise proceed absent such waiver is invalid in federal court. Contractual waivers that alter federal rights and procedures available to litigants—that thus change how a litigation otherwise would be handled by the court in question—are routinely upheld by federal courts. For example, in addition to upholding contractual waivers (via forum selection clauses) of otherwise available grounds for opposing or seeking transfer under 28 U.S.C. § 1404(a) or for challenging venue under 28 U.S.C. § 1391, federal courts have recognized the rights of parties to contract to waive (i) the right to remove a case under 28 U.S.C. § 1441, *see, e.g.*, *Milk 'N' More, Inc. v. Beavery*, 963 F.2d 1342, 1346 (10th Cir. 1992); *Grubb v. Donegal Mut. Ins. Co*., 935 F.2d 57, 59 (4th Cir. 1991), (ii) the Seventh Amendment right to a jury trial, *see, e.g*., *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *Merrill Lynch & Co. v. Allegheny Energy*, Inc., 500 F.3d 171, 188 (2d Cir. 2007); *Pizza Hut L.L.C. v. Pandya*, 79 F.4th 535, 540-41 (5th Cir. 2023), (iii) the right to injunctive relief under Rule 65, *see, e.g*., *Edge Grp. Waiccs LLC v. Sapir Grp. LLC*, 705 F. Supp. 2d 304, 321-22 (S.D.N.Y. 2010) (contemplates parties could contract to provide only liquidated damages and bar specific performance in the event of a breach if such limitation were explicit); *Allegheny Energy, Inc. v. DQE, Inc*., 171 F.3d 153, 165 (3d Cir. 1999) (similar); *In re Udell*, 18 F.3d 403, 409 n.4 (7th Cir. 1994) (similar), (iv) the right to seek or object to joinder under Rule 19, *see Willingham v. Lawton*, 555 F.2d 1340, 1345 (6th Cir. 1977) ("We see no reason why joint owners could not waive by contract any rights they might have to object to joinder."); *Nat'l Acceptance Co. of Am. v. Wechsler*, 489 F. Supp. 642, 645 (N.D. Ill. 1980) ("Despite the importance of Rule 19 joinder, there is no bar to waiver of that right by a party.");

Home Fed. Bank for Sav. v. Daly, Case No. 90-C-1670, 1990 U.S. Dist. LEXIS 9210, at *7 (N.D. Ill. July 25, 1990), and (v) discovery rights, *see Elliott-McGowan Prods. v. Republic Prods., Inc*., 145 F. Supp. 48, 50 (S.D.N.Y. 1956) (waiving certain rights to request production or inspection of documents under Rule 34).

* * *

For the above reasons, we believe that the Fourth Circuit should overturn the Post-Remand Ruling's holding that standalone class-action waivers sought to be enforced in federal court are unenforceable as a matter of law. Such contractual waivers merely limit a plaintiff's ability to meet Rule 23's requirements; they do not restrict a court's authority to apply Rule 23 or prevent a court from taking any action Rule 23 permits a court to take on its own initiative. To affirm this ruling would be inconsistent with the logic underpinning the welter of federal cases that have upheld contractual waivers not only of Rule 23 rights, but of all sorts of other federal procedural rights, even though such waivers affect how the court would otherwise have handled the case before it.

IV. CONCLUSION

In our view, the Fourth Circuit Ruling correctly found that the "correct" time for a district court to rule on the enforceability of a class-action waiver is at class certification. However, we believe the Post-Remand Ruling erroneously found that the class-action waiver at issue in *Marriott* (1) had been waived by Marriott and (2) in any event was unenforceable in federal court.

Appendix A

Evaluating the Enforceability of Class Action Waivers in Privacy and Cybersecurity Class Actions: Lessons from the Recent Caselaw.

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I. INTRODUCTION.

Putative privacy and cybersecurity class actions frequently arise out of circumstances in which the named plaintiff and the members of the class the named plaintiff is seeking to represent have entered into some sort of agreement with the defendant by means of the defendant's terms of use, user agreement, or other similar agreement. Often, the putative class's claims are predicated on an alleged breach of that agreement or an alleged misrepresentation that allegedly induced the putative class members to enter into that agreement. Frequently, that agreement contains a "class action waiver" that, if enforceable, would cover the claim that the named plaintiff is seeking to assert on behalf of the putative class. Thus, an issue that frequently arises in the context of putative cybersecurity and privacy class actions is the enforceability of waivers of this sort.

In the context of putative privacy and cybersecurity class actions, a class action waiver is a clause contained in the operative agreement between an entity and the individual[2] who is bringing

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[2] In the context of a putative privacy or cybersecurity class action, the "individual" is usually a customer of the contracting entity whose personal information is the subject of the claims being asserted in the case. However, putative privacy and cybersecurity class actions can arise out of any number of relationships in which an entity comes to have possession of an individual's personal information, including not just customer relationships, but also (by way of example) employment, subscription, membership, and independent contractor relationships. Accordingly, in this article we use the terms "individual" and "plaintiff" to refer to the person who has entered into an agreement that

the action and whose personal information is the subject of the action, pursuant to which the individual gave up, at least to some degree, whatever right he or she might otherwise have had to bring or participate in a class action. Class action waivers vary in their scope. Some cover only class actions against the entity with whom the individual contracted; others cover class actions against certain, or even all, other individuals and entities, including but not limited to the contracting entity. Some cover any dispute of any kind; others cover a more limited range of disputes, such as only those disputes arising out of or relating to the relationship created by the agreement between the contracting entity and the individual.

Class action waivers also vary with regard to the forum in which the waiver is intended to apply. A so-called "stand-alone class action waiver" applies in any forum in which a dispute covered by the waiver is asserted. Stand-alone class action waivers can and do come in many forms and formulations, and there is no one "correct" way to draft a stand-alone class action waiver, but an illustrative example of a stand-alone class action waiver might read as follows:

> *You and ACME, Inc. agree that any and all claims asserting any dispute between you and ACME, Inc. and/or any other individual or entity that arises out of or relates to the relationship between you and ACME Inc. created by this agreement (each a "Claim") must be brought in the claiming party's individual capacity, and not as a plaintiff or claimant in any purported class action, collective action, private attorney general action, or other representative proceeding (each a "Representative Proceeding"). You and ACME, Inc. each expressly waive the right to have, to bring, or to participate and/or benefit from as a class member or otherwise, any Claim brought in, or heard, administered, or resolved by, any court, arbitrator, or other tribunal or authority (each a "Tribunal") as or in a Representative Proceeding. No Tribunal shall have any authority to hear, administer, resolve, or award any relief regarding any Claim brought as or in a Representative Proceeding.*

includes a class action waiver and intend those terms to refer to the entire range of persons on behalf of whom putative privacy and cybersecurity class actions might be brought.

In contrast, a so-called "arbitration-only class action waiver" applies only in the context of disputes that the agreement between the contracting entity and the individual requires to be arbitrated. Like stand-alone class action waivers, arbitration-only class action waivers can and do come in many forms and formulations, and there is no one "correct" way to draft an arbitration-only class action waiver, but an illustrative example of an arbitration-only class action waiver might read as follows:

> *You and ACME, Inc. agree that any and all claims asserting any dispute that is required by this agreement to be arbitrated (each a "Claim") must be brought in the claiming party's individual capacity, and not as a plaintiff or claimant in any purported class action, collective action, private attorney general action, or other representative proceeding (each a "Representative Proceeding"). You and ACME Inc. each expressly waive the right to have, to bring, or to participate and/or benefit from as a class member or otherwise, any Claim brought in, or heard, administered, or resolved by, any court, arbitrator, or other tribunal or authority (each a "Tribunal") as or in a Representative Proceeding. No Tribunal shall have any authority to hear, administer, resolve, or award any relief regarding any Claim brought as or in a Representative Proceeding.*

Including a class action waiver in a contracting entity's agreement with an individual is one thing; successfully enforcing that waiver is another. A defendant's success in enforcing a class action waiver in a putative privacy or cybersecurity class action will turn on three questions: (1) is the court[3] being asked to enforce the class action waiver at the "correct" stage in the proceedings?; (2) did the defendant appropriately protect its ability to enforce the class action waiver prior to

[3] Throughout this article we assume that a court (rather than an arbitrator) is being asked to enforce the class action waiver in question. In a situation where enforcement of a class action waiver is being sought as to non-arbitrable claims, a court would indeed always be the decision-maker as to the waiver's enforceability. Where, however, enforcement of a class action waiver is being sought as to claims that are arbitrable, the decision-maker would be the arbitrator unless the agreement's arbitration provision reserved that decision to be made by a court. In our view, the enforceability decision and the legal principles that govern that decision should not change merely because an arbitrator rather than a court is asked to enforce a particular class action waiver. However, the enforceability decision and the legal principles that govern that decision could change if enforcement of a class action waiver is being sought in an arbitral forum in which the rules of procedure do not accord to the rules of procedure discussed below in Parts II-IV.

asking the court to do so?; and (3) is the class action waiver enforceable under the law governing the waiver? We consider each of these three questions in turn below.[4] Assuming the defendant is successful in enforcing a class action waiver, the effect of the waiver will be to preclude the court from certifying a class and to force the individual that brought the putative privacy or cybersecurity class action in question to proceed with the claim(s) in question only in his or her individual capacity.

II. WHAT IS THE "CORRECT" STAGE IN A PUTATIVE PRIVACY OR CYBERSECURITY CLASS ACTION FOR THE DEFENDANT TO ASK THE COURT TO ENFORCE A CLASS ACTION WAIVER?

Identifying the "correct" point in a putative privacy or cybersecurity class action for the defendant to ask the court to enforce a class action waiver is of paramount importance. A defendant in such a case that asks the court to enforce a class action waiver at the wrong stage of the case will have expended resources in doing so only to have its request denied as procedurally improper. Worse still, as discussed in Part III below, a defendant in such a case that asks the court to enforce a class action waiver only after the "correct" time for doing so has passed opens itself up to argument by the plaintiff that by its delay the defendant has either forfeited or waived its right to enforce the waiver. We consider below the various stages of a putative privacy or cybersecurity class action that might be thought to be the "correct" stage for asking the court to enforce a class action waiver.[5]

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[4] In considering these three questions, we assume that U.S. law, either state or federal, will provide the rule of decision as to each of them. This article expresses no view as to how any of these three questions would be decided under any non-U.S. body of law.

[5] Throughout Parts II-IV, we assume the case in question is being litigated in federal court under the Federal Rules of Civil Procedure or in a state court that has rules of procedure substantially the same as the Federal Rules on which we rely in Part II. We believe that for the most part state court rules of procedure do not differ from the Federal Rules on which we rely in Parts II-IV, but to the extent such differences do exist, the enforceability decision and the legal principles that govern that decision could change from those discussed in Parts II-IV if enforcement of a class action waiver is being sought in state court.

At Class Certification. Although caselaw on this topic is sparse, there seems to be a growing consensus that the correct time for a class-action defendant to ask a court to enforce a class action waiver is in its opposition to an individual's motion for class certification under Federal Rule 23.[6] Indeed, this conclusion follows from the nature of class actions and class action waivers. According to Rule 23, class actions begin at certification. Certification "gives birth to the class as a jurisprudential entity" and "provides [a] sharp line of demarcation between an individual action seeking to become a class action and an actual class action." *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978) (internal quotation marks omitted). Thus, prior to class certification, any actions taken in a putative class action by the named plaintiff(s) and/or the defendants are taken in an individual action.[7]

Additionally, a class action waiver is a procedural issue: It is a "promise to forgo a procedural right to pursue class claims." *Laver v. Credit Suisse Sec. (USA), LLC*, 976 F.3d 841, 846 (9th Cir. 2020) (emphasis added); *see Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174, 179 (2d Cir. 2015) (similar). Thus, unless and until an individual seeks to transform his or her individual

[6] *See, e.g.*, *Kaspers v. Comcast Corp.*, 631 F. App'x 779, 784 (11th Cir. 2015) (holding that where class waiver was "valid," district court correctly declined "to consider the requirements for class certification under Rule 23"); *Lindsay v. Carnival Corp.*, No. C20-982, 2021 WL 2682566, at *4 (W.D. Wash. June 30, 2021) (denying class certification as barred by class waiver); *Ranzy v. Extra Cash of Tex., Inc.*, No. Civ. A. H-09-3334, 2011 WL 13257274, at *8 (S.D. Tex. Oct. 14, 2011) ("Because the loan agreements contain class action waivers …, [plaintiff] may not assert claims on behalf of a class" and "[t]here is no need… to reach the Rule 23 factors."); *Palacios v. Boehringer Ingelheim Pharms., Inc.*, No. 10-22398-CIV, 2011 WL 6794438, at *4 (S.D. Fla. Apr. 19, 2011) (finding that waiver "precludes Plaintiff from serving as a class representative" and that denial of certification motion is warranted "[f]or this reason alone"); *Archer v. Carnival Corp. & PLC*, No. 20-cv-04203, 2020 WL 6260003, at *8 (C.D. Cal. Oct. 20, 2020) (denying class certification as barred by class waiver); *Lankford v. Carnival Corp.*, No. 12-24408-CIV, 2014 WL 11878384, at *4–5 (S.D. Fla. July 25, 2014) (considering and upholding class-action-waiver defense at class certification stage).

[7] This idea is bolstered by the standard established for when a federal appellate court will grant a Rule 23(f) petition to appeal a district court's denial of a putative named plaintiff's motion to certify a class. In evaluating the sufficiency of a Rule 23(f) petition, the appellate courts consider whether the denial of class certification is a "death-knell" for the litigation, effectively ending the litigation for the plaintiff. *See, e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002). The very fact that the appellate court must determine whether the litigation *will continue* despite the denial of class certification reinforces the basic fact that the litigation started as—and but for Rule 23 certification remains—an individual action.

action into a class action and moves for class certification, the contracting entity has no clear reason, and thus should be under no obligation, to ask the court to take what may well turn out to be the wholly unnecessary action of enforcing the class action waiver.

By Means of a Motion to Strike. The defendant conceivably might ask the court to enforce a class action waiver prior to class certification, by means of a motion to strike the complaint's class allegations pursuant to Federal Rule 12(f). As a general matter, courts tend to view motions to strike class allegations with disfavor.[8] Thus, while some courts have acknowledged that one circumstance where striking the class allegations may be appropriate is where a class action waiver clearly precludes the possibility that the plaintiff's claim can be brought on a class wide basis,[9] this is far from a uniform practice, and courts often deny Rule 12(f) motions to strike class allegations based on the existence of a class action waiver because a the proposed class representative can identify questions of fact that could affect the determination of, for example, whether a valid contract including the class action waiver exists between the parties or whether the waiver is unconscionable and, thus, unenforceable.[10] Thus, while it perhaps goes too far to say that the Rule 12(f) stage of the case is always an *incorrect* point at which to ask the court to enforce

[8] *See, e.g.*, *Ironforge.com v. Paychex, Inc.*, 747 F. Supp. 2d 384, 404 (W.D.N.Y. 2010); *Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d 685, 696 (S.D.N.Y. 2015 (collecting cases); *Cholakyan v. Mercedes–Benz USA, LLC*, 796 F. Supp. 2d 1220, 1245 (C.D. Cal. 2011) (noting that "it is in fact rare to [strike class allegations] in advance of a motion for class certification" and collecting cases); *see generally* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil § 1381 (3d ed. Apr. 2022 update).

[9] *See, e.g.*, *Camilo v. Uber Techs., Inc.*, No. 17-cv-9508, 2018 WL 2464507, at *3 (S.D.N.Y. May 31, 2018); *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 652 (2010); *Jeong v. Nexo Cap. Inc.*, No. 21-cv-02392-BLF, 2022 U.S. Dist. LEXIS 150413, at *50 (N.D. Cal. Aug. 22, 2022); *Rejuso v. Brookdale Senior Living Cmtys., Inc.*, No. CV 17-5227-DMG, 2019 U.S. Dist. LEXIS 216169, at *11 (C.D. Cal. May 22, 2019).

[10] *See, e.g.*, *Underwood v. Future Income Payments, LLC*, CV 17-1570-DOC, 2018 U.S. Dist. LEXIS 233539, at *18 (C.D. Cal. Apr. 26, 2018) ("Plaintiff has not had an opportunity to conduct discovery regarding unconscionability. It is rare to strike class allegations before discovery has started."); *Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d 685, 696 (S.D.N.Y. 2015) (denying motion to strike to allow discovery into whether a "meeting of the minds" existed as to the class action waiver).

a class action waiver, it certainly cannot be said that the only *correct* way to make such a request of the court is by means of a Rule 12(f) motion.

By Means of a Motion to Dismiss. Courts that have considered a defendant's class action waiver arguments at a motion to dismiss have generally found that the motion to dismiss stage is not the proper time to ask the court to enforce a class action waiver. *See, e.g.*, *Archer v. Carnival Corp. & PLC*, No. 2:20-CV-04203-RGK-SK, 2021 WL 4798695, at *4, n.3 (C.D. Cal. May 14, 2021) (noting that, while the defendant had advanced its class-action-waiver defense in a motion to dismiss, the court refused to consider the defense at that stage because "the Court… would be better equipped to rule on the enforceability of the [class action] waiver in the context of the motion for class certification"); *Lankford v. Carnival Corp.*, No. 12-24408-CIV, 2014 WL 11878384, at *4–5 (S.D. Fla. July 25, 2014) (considering and upholding class-action-waiver defense at class certification stage after having previously refused to consider the defense on a motion to dismiss because "the waiver issue was improperly raised at that early stage"). These rulings make perfect sense, as a class action waiver is merely a right to avoid the class action procedure; it does not afford the contracting party any *substantive* right to avoid any *claim* the customer may be making in the litigation or to have any such *claim* dismissed.

As a general matter, then, the case law is fairly clear that the class certification stage of the case is not only a "correct" but also the preferred point in time for a defendant to ask the court to enforce a class action waiver. In a putative privacy or cybersecurity class action, then, a defendant who seeks to enforce a class action waiver at the class certification stage of the case should not be found to have chosen a procedurally improper time for doing so.

III. HOW DOES THE DEFENDANT IN A PUTATIVE PRIVACY OR CYBERSECURITY CLASS ACTION APPROPRIATELY PROTECT ITS ABILITY TO ENFORCE THE CLASS ACTION WAIVER PRIOR TO ASKING THE COURT TO DO SO?

Assuming the defendant in a putative privacy or cybersecurity class action asks the court to enforce the class action waiver at a "correct" stage of the proceedings, the question will then become whether the defendant appropriately protected its ability to enforce the waiver prior to asking the court to do so. The answer to this question will turn on whether the defendant either "forfeited" or "waived" the class action waiver prior to asking the court to enforce it.[11] Because the caselaw on forfeiture and waiver of a class action waiver is limited, in the discussion that follows, we will first consider the general principles that govern forfeiture and waiver in the context of other defenses of this sort and then examine how those principles should be applied to determine whether a class action waiver has been forfeited or waived in a putative privacy or cybersecurity class action.

A. General Principles Regarding Protecting the Ability to Enforce a Rule 8(c)(1) Defense.

The defense of "waiver" is expressly included among the "affirmative defenses" that are the subject of Federal Rule 8(c)(1). *See* Fed. R. Civ. P. 8(c)(1). A court, therefore, would likely apply the general principles applicable to Rule 8(c)(1) defenses in deciding whether a defendant in a putative privacy or cybersecurity class action had appropriately protected its ability to enforce a class action waiver. A defendant can lose the right to rely on or assert a Rule 8(c)(1) defense in two scenarios. First, forfeiture of a Rule 8(c)(1) defense can occur if the defendant fails to assert (or "fails to preserve") the defense pursuant to Rule 8(c). Second, waiver of a Rule 8(c)(1) defense can occur if the defendant, despite having preserved the defense, has nevertheless thereafter

[11] "The terms waiver and forfeiture-though often used interchangeably by jurists and litigants-are not synonymous." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S.Ct. 13, 17 n.1 (2017). "Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Id.* (internal quotation marks and brackets omitted).

proceeded through the litigation in a manner sufficient to sustain a finding that the defendant intentionally relinquished or abandoned that defense.

1. Forfeiture: Failure to Preserve a Defense.

In order to assert and preserve a Rule 8(c)(1) defense, Rule 8(c)(1) requires a defendant to "affirmatively state" the defense in its responsive pleading, which, for a defendant, would normally be its answer to the complaint. Courts view the purpose of Rule 8(c) as a means to put the opposing party on notice of the defendant's defenses and provide a chance to rebut them. *See Blonder-Tongue Laby's Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) ("The purpose of such pleading is to give the opposing party notice of the [defense] and a chance to argue, if he can, why the [application of the defense] would be inappropriate."). Thus, a defendant that fails to assert a Rule 8(c)(1) defense in its responsive pleading is often—but not always—considered to have forfeited that defense. *See Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("An affirmative defense, once forfeited, is excluded from the case[.]") (internal quotation marks omitted); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil § 1278 (4th ed. 2022) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver [or forfeiture] of that defense and its exclusion from the case."). Such a forfeiture will not be found, however, where, prior to filing its responsive pleading, the defendant otherwise put the plaintiff on notice of the affirmative defense, such as by filing a motion or providing a discovery response that disclosed the defense. *See, e.g.*, *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855–56 (5th Cir. 1983) ("Where [an affirmative defense] is raised in the trial court in a manner that does not result in unfair surprise… technical failure to comply precisely with Rule 8(c) is not fatal" and does not result in forfeiture.).

Importantly, even if a defendant fails to assert a Rule 8(c)(1) defense in its responsive pleading or to otherwise put the plaintiff on notice of that defense, it may, pursuant to Federal Rule 15(a)(1), amend its pleading once as a "matter of course" within "21 days after serving it" (or, if it is a pleading to which a responsive pleading is required, 21 days after service of a motion under Rule 12(b), (e), or (f)). So, Rule 15(a)(1) gives a defendant the ability to cure "as of right" what otherwise might be a forfeiture of a Rule 8(c)(1) defense by taking action within the time frame specified in Rule 15(a)(1) to amend its responsive pleading to assert the defense. However, after 21 days have elapsed from its responsive pleading, or after its first amendment of that pleading, a defendant may only amend its pleading either "with the opposing party's written consent" or the "court's leave," which Rule 15(a)(2) advises the "court should freely give . . . when justice so requires." The Supreme Court has interpreted Rule 15(a)(2) to require leave "be freely given" "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.[.]" *Foman v. Davis*, 371 U.S. 178, 182 (1962). This comports with the Supreme Court's further admonishment that "the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988).

In line with these interpretations, courts balance a number of factors to determine whether to allow an amendment to a responsive pleading so as to assert a previously unasserted Rule 8(c)(1) defense.[12] As the cases show, in circumstances which a court determines the party opposing the

[12] *See, e.g.*, *Long v. Wilson*, 393 F.3d 390, 401 (3d Cir. 2004) (Whether the plaintiff has been prejudiced "is the ultimate issue" when asserting a statute of limitations defense after an answer has been filed); *Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997) ("We have liberalized the requirement that defendants must raise affirmative defenses in their initial pleadings. . . . [D]efendants may raise an affirmative defense for the first time

amendment will not be unduly prejudiced, the amendment will be allowed, and the defense will be deemed preserved (*i.e.*, not forfeited) in accordance with Rule 8(c). Moreover, under the caselaw, prejudice to the plaintiff from such an amendment will only be considered "undue" where it cannot reasonably be cured and is not outweighed by other factors counseling in favor of the amendment, such as the defendant's reasons for not having asserted the defense in its responsive pleading.

2. Waiver of a Properly Preserved Rule 8(c)(1) Defense.

Despite asserting and thereby preserving a Rule 8(c)(1) defense by asserting that defense in its responsive pleading as required by Rule 8(c)(1) or by otherwise putting the plaintiff on notice of the defense, a defendant can still be found to have waived that defense where, subsequent to the assertion of the defense, the defendant has acted in a fashion sufficient to sustain a finding that the defendant intentionally relinquished or abandoned that defense. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 733 (1993) ("[W]aiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks omitted). Generally, to determine whether a party has waived a Rule 8(c)(1) defense, a court must consider whether the party asserting the defense (1) had knowledge of the right represented by the defense and (2) acted sufficiently inconsistent with continued reliance on that right to sustain a finding that the party intended to relinquish or abandon

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in a motion for summary judgment only if the delay does not prejudice the plaintiff."); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) (in addressing whether a party waived its right to assert a fraud defense, noting that "failure to raise an affirmative defense by responsive pleading does not always result in waiver."); *Grant v. Preferred Rsch., Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) ("Thus, if a plaintiff receives notice of an affirmative defense by some means other than pleadings, 'the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice.'") (quoting *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988)); *Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991) ("It has been held that a 'defendant does not waive an affirmative defense if [h]e raised the issue at a pragmatically sufficient time and [the plaintiff] was not prejudiced in its ability to respond.'") (alterations in original) (*quoting* Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986) (quoting)); *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983) ("Where the matter is raised in the trial court in a manner that does not result in unfair surprise . . . technical failure to comply precisely with Rule 8(c) is not fatal."); *Pierce v. County of Oakland*, 652 F.2d 671 (6th Cir. 1981) (affirmative defense not waived, even though not specifically pleaded, where defense clearly appears on face of the pleading and is raised in motion to dismiss).

that right. *See Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1014-15 (9th Cir. 2023) (citing *Morgan v. Sundance, Inc*., 142 S. Ct. 1708 (2022)).[13] From this body of law, the general rule can be derived that while preservation of a Rule 8(c)(1) defense is a necessary condition for a party to later ask the court to enforce the defense, it is not sufficient if the party thereafter acts in litigation in a manner so inconsistent with a continuing intention to rely on that defense that the party's intention to relinquish or abandon that right is thereby established.

B. Application of the General Principles Governing the Protection of Rule 8(c)(1) Defenses to the Context of Protecting Class-Action-Waiver Defenses in Putative Privacy and Cybersecurity Class Actions.

It follows from the above-discussed general principles that, as is the case with every Rule 8(c)(1) defense, in order for a defendant in a putative privacy or cybersecurity class action to protect its ability to enforce a class action waiver agreed to by the plaintiff, it must (1) first take appropriate action to preserve the defense created by the class action waiver and (2) then not thereafter knowingly act in a manner inconsistent with an intention to rely on that defense. While the first step is fairly straightforward, the second step is less so.

1. Preserving the Defense Created by a Class Action Waiver.

In order to decide whether the right to enforce a class action waiver has been preserved, rather than forfeited, by a defendant in a putative privacy or cybersecurity class action, the court will likely employ the general principles discussed above and inquire whether the defense has been asserted in the defendant's responsive pleading or otherwise disclosed to the plaintiff and, if not, whether the defendant should be permitted to amend its responsive pleading to assert the defense. *See supra* Part III.A. There are any number of reasons why a defendant in a putative privacy or

[13] Prior to the Supreme Court's decision in *Morgan*, most courts also considered a third factor when determining whether a party had waived a Rule 8(c)(1) defense: Whether the other party was prejudiced by the party's inconsistent actions. In *Morgan*, however, the Supreme Court found that the "prejudice requirement is not a feature of federal waiver law." *Morgan*, 142 S. Ct. at 1712.

cybersecurity class action may not have asserted a class-action-waiver defense in its responsive pleading. For example, if the defendant is a beneficiary of the class action waiver, but not the entity with which the plaintiff contracted in agreeing to the class action waiver, the defendant may not even have been aware of the class action waiver, or that it was covered by the waiver, when it served its responsive pleading. Or even if the defendant knew of the class action waiver and/or its scope when it served its responsive pleading, it may not have been clear at the time of such service that the class action waiver applied to the plaintiff and/or its claims against the defendant. For example, and among other things, the defendant may require discovery to determine whether the class action waiver applies to the plaintiff; whether the plaintiff accepted the agreement containing the class action waiver in a legally binding manner; whether the plaintiff's claims are covered by the class action waiver; and/or whether the class action waiver is legally enforceable under the law applicable to the class action waiver. Under the general principles discussed above, in a putative privacy or cybersecurity class action where a class action waiver has not been asserted in the defendant's responsive pleading and not otherwise disclosed to the plaintiff in a manner sufficient to put the plaintiff on notice of the defense, the court should grant the defendant leave to amend its responsive pleading to assert and thereby preserve that defense unless doing so would unduly prejudice the plaintiff. *See supra* Part III.A.1. In a putative privacy or cybersecurity class action, it normally will be the case either that the plaintiff suffered no prejudice from the defendant's failure to assert the class-action-waiver defense in its responsive pleading or that any such prejudice either can be cured or is outweighed by the factors counseling in favor of allowing the amendment and thus would not be "undue."[14] It would accordingly be rare indeed that leave to

[14] For example, if the plaintiff has failed to take discovery that it otherwise would have taken as to the applicability and/or the enforceability of the class action waiver, he or she can be afforded time to take such discovery, and if on the other hand the plaintiff has expended resources in pursuing class certification that he or she would not have

amend to assert a class-action-waiver defense should be denied in a putative privacy or cybersecurity class action where the class action waiver in question has not been asserted in the defendant's responsive pleading or otherwise preserved.

2. Avoiding Waiver of the Defense Created by a Class Action Waiver.

In order to determine whether the right to enforce a class action waiver has been waived by a defendant in a putative privacy or cybersecurity class action, the court will likely apply the general principles discussed above and inquire whether, despite having preserved the defense, the defendant has acted in a fashion sufficient to sustain a finding that the defendant thereafter intentionally relinquished or abandoned that defense. *See supra* Part III.A.2. In arriving at that decision, the court likely will consider whether the defendant (1) had knowledge of the defense represented by the class action waiver and (2) possessed of such knowledge, acted in the course of the litigation in a manner so inconsistent with a continued intention to rely on that defense to sustain a finding that the defendant had chosen to relinquish or abandon the defense. *See id.* The knowledge element of this two-pronged inquiry will normally be satisfiable based on whatever action the defendant has taken to preserve the class-action-waiver defense. Accordingly, in most cases of the sort under consideration here, the waiver inquiry will turn on whether, subsequent to having preserved a class action waiver defense, the defendant in a putative privacy or cybersecurity class action engaged in litigation actions that the court considers to be sufficiently "inconsistent" with the defendant's intention to rely on the class-action-waiver defense to sustain a finding that the defendant had intentionally relinquished and abandoned that defense. Below is an analysis of the various litigation actions that a defendant might engage in, subsequent to asserting a class-

expended had the class-action-waiver defense been asserted in the defendant's then-operative responsive pleading, he or she can be compensated for the unnecessary expenditure.

action-waiver defense but prior to asking the court to uphold that defense, that the plaintiff might point to in asking the court to make a finding that the defendant had waived that defense.

Failing to Make a Rule 12 or Rule 56 Motion Asking the Court to Enforce the Class-Action-Waiver Defense. Because a class-action-waiver defense need not even be asserted until the defendant's responsive pleading, *see* Rule 8(c), courts have determined that the defense is not waived by the decision of the defendant not to try to have the defense enforced by means of a Rule 12(b) pre-answer motion to dismiss. *See In re Yahoo! Litig.*, 251 F.R.D 459, 464 (C.D. Cal. 2008) (holding defendant does not waive its right to enforce a class action waiver by failing to include that defense in a motion to dismiss); *see also Lankford v. Carnival Corp.*, No. 12-24408-CIV, 2014 WL 11878384, at *4–5 (S.D. Fla. July 25, 2014) (considering and upholding class-action-waiver defense at class certification stage after having previously refused to consider the defense on a motion to dismiss because "the waiver issue was improperly raised at that early stage"). Logically, this reasoning applies equally to Rule 12(f) motions to strike, as such motions likewise must be filed before the defendant's responsive pleading is served. *See* Fed. R. Civ. P. 12(f). Moreover, as discussed above, it is highly questionable whether either a Rule 12(b) motion or a Rule 12(f) motion is even a "correct" vehicle for trying to have a class-action-waiver defense upheld. There accordingly is no "inconsistency" between intending to rely on a class-action-waiver defense, on the one hand, and not trying to have that defense enforced by means of a pre-answer Rule 12 motion, on the other. It would therefore be anomalous in the extreme for a court to find in a putative privacy or cybersecurity class action that the defendant's failure to seek to have a class-action-waiver defense upheld by means of a pre-answer Rule 12 motion establishes an intention on the defendant's part to abandon and relinquish that defense even before its deadline for first asserting that defense.

Nor would there be any basis for a court to find that such an intention on the defendant's part was established by the defendant's failure to seek to have the defense upheld by means of a post-answer Rule 12(c) or Rule 56 motion. By its terms, Rule 12(c) only allows a party to seek and the court to award "judgment on the pleadings." *See* Fed. R. Civ. P. 12(c). Likewise, Rule 56 permits an award of summary judgment only where "the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). A ruling enforcing a class action waiver would not be a "judgment" within the meaning of the Federal Rules; however, *see* Fed. R. Civ. P. 54(a), so such a ruling could not properly be sought be means of Rule 12(c) or Rule 56. Moreover, even as to Rule 8(c)(1) defenses that theoretically can be enforced by means of a Rule 12(c) motion or a Rule 56 motion, courts have refused to find such defenses waived by a defendant's failure to seek to have them upheld by means of such a motion. *See, e.g.*, *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994) (finding a preserved affirmative defense was not waived if not reasserted in a subsequent summary judgment motion); *Dawson v. Archambeau*, No. 21-1307, at *4 (10th Cir. Aug. 26, 2022) (concluding that the defendant did not waive his preserved exhaustion defense by failing to raise it in a timely motion for summary judgment); *Weller v. Dykeman*, No. 5:10-CV-181, U.S. Dist. LEXIS 159776, at *15-16 n.11 (D. Vt. Oct. 10, 2012) (holding a preserved affirmative defense was not waived by failing to raise it in motion for judgment on the pleadings).[15] That being the case, it follows *a fortiori* that a court should not find waiver of a class-action-waiver defense by reason of the defendant's failure to seek to have that defense upheld by means of a Rule 12(c) motion or a Rule 56 motion, because such a failure is not inherently inconsistent with an intention on the defendant's part to continue to rely on that defense.

[15] Note, however, that "[t]he failure to raise a[preserved] affirmative defense in response to a summary judgment motion constitutes a waiver of that defense" where the defense would have defeated the motion. *Marine Polymer Techs, Inc. v. HemCon, Inc*., 659 F.3d 1084, 1094 n.4 (Fed. Cir. 2011) (emphasis added) (collecting cases).

Stipulating to a Class-Certification-Related Scheduling Order. The proposed class representative in a putative privacy or cybersecurity class action might argue that a defendant's mere stipulation to a case management order that sets a class certification discovery or briefing schedule is sufficiently inconsistent with the defendant's class-action-waiver defense to establish the defendant's intentional relinquishment or abandonment of, and consequent waiver of, that defense. This argument should easily be dismissed by the court: Unlike what might be the outcome where a defendant who has asserted a jury-trial-waiver defense agrees to a schedule for a "jury trial" of the action in question, a defendant who agrees to a class certification briefing schedule does not thereby agree to proceed with the litigation as a certified class action and thus does not thereby waive any class-action-waiver defense the defendant may have asserted. Quite the contrary, by so agreeing the defendant is merely agreeing to the process by which it will *contest* the plaintiff's right to proceed with the litigation on a class-wide basis. Thus, far from being inherently inconsistent with the defendant's continued reliance on its class-action-waiver defense, such an agreement is instead entirely consistent with such continued reliance and thus could not sustain a finding that the defense had been waived.

Participation in Discovery. The proposed class action representative in a putative privacy or cybersecurity class action might argue that the defendant's agreement to and/or participation in either merits or class-certification-related discovery without objecting on the grounds of the class action waiver is action sufficiently inconsistent with its class-action-waiver defense to sustain a finding that the defendant had intentionally relinquished, and thereby waived, that defense. With respect to the defendant's participation in merits discovery, caselaw in similar contexts supports the conclusion that proceeding to litigate issues unrelated to a Rule 8(c)(1) defense is not conduct inconsistent with that defense, at least when that defense is not a complete bar to any litigation

whatsoever, and thus cannot operate to waive that defense. *See InfoSpan, Inc. v. Emirates NBD Bank PJSC*, 903 F.3d 896, 901 (9th Cir. 2018) (collecting cases and noting waiver did not result from "vigorous litigation of its other claims or defenses" unrelated to the affirmative defense at issue). Enforcement of a class action waiver would not cause the litigation to end; instead, the litigation would continue as an individual litigation on the merits of the named plaintiff's claims. The defendant's participation in discovery into and other litigation of the merits of the proposed class representative's claims is thus not in any way inconsistent with, and accordingly should create no basis for finding a waiver of, a defendant's right to enforce a class action waiver.

Nor should a defendant's participation in class-certification-related discovery be found to operate to waive a class-action-waiver defense that the defendant had asserted. A defendant may have any number of perfectly valid reasons for participating in class-certification-discovery rather than asking the court to bar such discovery by enforcing the class action waiver. For one thing, the defendant may reasonably conclude that for reasons of efficiency, all of its arguments against class certification should be presented to the court simultaneously, rather than via seriatim applications, which conclusion would require the defendant to participate in class-certification-related discovery before raising any of its grounds for opposing class certification, including the class-action-waiver defense. For another thing, as discussed above the defendant could reasonably conclude that the only available procedural vehicle by which to ask the court to enforce the class action waiver is by asserting the waiver in opposition to the named plaintiff's motion for class certification, which conclusion would make the defendant's participation in class-certification-related discovery a necessary prerequisite to asserting its class-action-waiver defense. Additionally, if the class-certification-related discovery concerns at least in part the validity, enforceability, or application of the class action waiver, a defendant that wants to enforce the class

action waiver has no practical choice other than to participate in that discovery. *See Kafka v. Melting Pot Rests, Inc.*, No. 4:17-CV-00683-HFS, 2019 WL 718830, at *3-4 (W.D. Mo. Jan. 9, 2019) (considering discovery as to the validity of a class action waiver to militate against the finding of waiver of the waiver). For all these reasons, a defendant's participation in class-certification-related discovery, far from being inherently inconsistent with the defendant's continued reliance on a class-action-waiver defense previously asserted by the defendant, will instead normally be perfectly consistent with such continued reliance on the defendant's part. That being the case, such participation normally would not support a conclusion that the defendant had intentionally relinquished or abandoned, and thereby waived, its class-action-waiver defense.

Failing to Assert the Class Action Waiver in Opposition to Plaintiff's Motion for Class Certification. In a situation where the defendant in a putative privacy or cybersecurity class action has preserved a class-action-waiver defense by asserting the defense in its responsive pleading or otherwise disclosing the defense, *see supra* Part III.A.1, the defendant will likely be found to have waived the defense if it does not raise the class action waiver in opposition to the plaintiff's class certification motion. Given the caselaw recognizing the defendant's class certification opposition as being the "correct" point in time at which to ask the court to enforce a class action waiver, *see supra* Part II, a defendant's failure to raise a previously asserted class-action-waiver defense at that juncture would, on its face, appear to be inherently inconsistent with the defendant's having a continued intention of relying on that defense. Such a finding would be consistent with the above-noted principle that a Rule 8(c)(1) defense will be deemed waived where the defense would have been defeated, but was not raised in opposition to, a motion filed by the plaintiff. *See supra* note 15. Thus, unless the defendant is able to offer an explanation for its failure that negates its having had any such intention, a defendant that fails to oppose class certification by raising a previously

asserted class-action-waiver defense will likely be found to have thereby intentionally relinquished and abandoned, and accordingly waived, that defense.

C. Case Studies from the Privacy and Cybersecurity Context.

Although caselaw is scarce regarding at what stage a defendant in a putative privacy or cybersecurity class action should ask the court to enforce a class action waiver and whether the defendant appropriately protected its ability to enforce a class action waiver prior to asking the court to do so, two recent cases provide detailed analyses of the various considerations: *Flores-Mendez v. Zoosk, Inc.*, No. C 20-04929 WHA, 2022 WL 2967237 (N.D. Cal. July 27, 2022) (J. Alsup), and *In re Marriott International, Inc., Customer Data Security Breach Litigation*, 341 F.R.D. 128, 149 n.26 (D. Md. 2022).

1. *Flores-Mendez v. Zoosk, Inc.*

The *Zoosk* litigation arose from a third-party criminal cyberattack that Zoosk, an online dating site, suffered in January 2020 (the "Intrusion"). In July 2020 plaintiff Flores-Mendez and another plaintiff filed a putative class action in the Northern District of California, claiming data they had provided to Zoosk was stolen in the Intrusion and making Intrusion-related claims on behalf of themselves and a putative nationwide class of other individuals whose information was compromised in the Intrusion. Over the 19 months that followed, Flores-Mendez filed three amended complaints. Zoosk moved to dismiss or otherwise opposed each amended complaint and answered the first amended complaint (the only one of those four complaints that ultimately required an answer). In that answer, Zoosk asserted as a defense that Flores-Mendez and the other named plaintiff (and the putative class) had agreed to a class action waiver and that, accordingly, the action could not proceed as a class action.

Throughout this 19-month period, merits and class-certification-related discovery proceeded. In February 2022, Flores-Mendez withdrew from seeking to represent the putative class, acknowledging that he was unqualified to be a class representative under Rule 23 as he was susceptible to unique defenses. One month later, in March 2022, the court dismissed the only other named plaintiff with prejudice for failure to prosecute her claim, thus rendering what had been a putative class action merely an individual action brought by Flores-Mendez. Another month later, in April 2022, Flores-Mendez filed a fourth amended complaint, which added a new plaintiff and putative class representative: Greenamyer. Zoosk filed its answer to the fourth amended complaint two weeks later and again asserted as a defense that Flores-Mendez and Greenamyer (and the putative class) had agreed to a class action waiver and that, accordingly, the action could not proceed as a class action.

In May 2022, in response to Greenamyer's subsequent motion for class certification, Zoosk opposed class certification by, among other reasons, asserting its rights under and asking the court to enforce the class action waiver. Greenamyer claimed Zoosk had waived the waiver because it had acted inconsistently with its class-action-waiver defense by litigating the action for two years and stipulating to multiple class certification briefing and hearing schedules, "and never once raising the issue." *Zoosk*, 2022 WL 2967237, at *1. In point of fact, Zoosk did "raise the issue" of the class action waiver by pleading it as an affirmative defense in both responsive pleadings that it filed. *See id.* However, prior to asking the court to enforce the class action waiver as part of its class certification opposition, Zoosk made no such request of the court, either in any of its several motions to dismiss or in its various oppositions to plaintiffs' motions for leave to amend the complaint or by filing a motion to strike class allegations.

The district court found that because Zoosk had "raised this affirmative defense in its answer to plaintiffs' first amended complaint . . . and in its answer to the operative complaint . . . Zoosk has not waived the defense." *Zoosk*, 2022 WL 2967237, at *1. Although the court did not elaborate nor did it engage in the doctrinal differences between forfeiture and waiver, inherent in its decision is the necessary conclusions that Zoosk both (1) preserved the defense by asserting it in its answers and (2) did not thereafter waive the defense by the various litigation actions it took prior to opposing class certification (such as engaging in nearly two years of merits and class-certification-related discovery and stipulating to various class-certification-related scheduling orders). These conclusions make perfect sense under the principles discussed above, which fully support the propositions that a class-action-waiver defense is preserved by being asserted in the defendant's responsive pleading (*see supra* Parts III.A.1 and III.B.2) and is not thereafter waived by the defendant's engaging in litigation activity of the sort pointed to by the *Zoosk* plaintiffs (*see supra* Parts III.A.2 and III.B.2).[16]

2. *In re Marriott International, Inc., Customer Data Security Breach Litigation*

As in *Zoosk*, the *Marriott* litigation, which is currently pending before the Fourth Circuit, arose from a third-party criminal cyberattack, this time against Marriott in November 2018. Multiple putative class actions were filed against Marriott by consumers, generally alleging the

[16] Because both of the initial named plaintiffs in *Zoosk* could not serve as a class representative, the litigation was without a proposed class representative and thus was not even proceeding as a *putative* class action when Greenamyer was added to the case in April 2022 via the fourth amended complaint. Only six weeks elapsed between Greenamyer's being added to the case and Zoosk's request that her class certification motion be denied based on the class action waiver. Zoosk argued that only the actions Zoosk took during that six-week period could be considered in evaluating whether Zoosk had waived its class-action-waiver defense, Zoosk's theory being that Zoosk could not have waived its class-action-waiver defense as to Greenamyer before she was even a party to the case. Greenamyer argued that Zoosk's actions throughout the entire course of the litigation were relevant to the waiver analysis, on the theory that Zoosk's waiver of its class-action-waiver defense as to any proposed class representative would operate as a waiver of that defense as to every proposed class representative, even one who was not a named plaintiff when the waiver occurred. The court's ruling rejecting Greenamyer's waiver argument did not address this issue.

cyberattack had exposed their personal information and seeking to recover for breach of contract, consumer fraud, and negligence. The multiple putative class actions were funneled into one large multidistrict litigation in the District of Maryland. When Marriott eventually filed its answer, it included as a defense the existence of a class action waiver.

At the class certification stage, Marriott opposed certification because, among many other reasons, certain members of the putative class—the members of Marriott's Starwood Preferred Guest (or "SPG") program—had entered into agreements with Marriott that included class action waivers. The proposed class representatives objected, claiming that Marriott had waived its right to assert the class action waivers as a defense by (1) failing to raise the defense during the negotiations over bellwether actions, during dozens of scheduling conferences, or in any of the motion practice prior to class certification and (2) by engaging in years of merits- and class-certification-related fact and expert discovery.[17]

The district court found that the proposed class representatives had "raise[d] a strong argument" that Marriott had waived its right to enforce the class action waiver, but decided that because it was certifying *only* a class of SPG members, it "need not rule on this issue" at the class certification stage, concluding that the waiver was an affirmative defense now common to the entire class that should be resolved at the merits stage of the litigation. *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 341 F.R.D. 128, 149 n.26 (D. Md. 2022).

Marriott subsequently filed a Rule 23(f) petition with the Fourth Circuit, seeking leave to appeal the district court's decision to certify the class. The Fourth Circuit granted Marriott's Rule 23(f) petition on July 14, 2022. With respect to the district court's ruling regarding the class action

[17] Plaintiffs also argued that because the class-action-waiver provision was part of the same clause in the parties' agreement that contained provisions concerning choice of law and venue, and because Marriott had waived its right to enforce both the choice of law and the venue provisions, it had also waived the class action waiver.

waiver, Marriott's appellate briefs argued that the ruling was contrary to caselaw (much of which is cited in this article) holding that the enforceability of a class action waiver should be determined at the class certification stage given that the enforceability of the waiver is a procedural issue that goes not to the merits of the plaintiffs' claims, but, instead, to their procedural right to bring the action as a class action. Marriott also argued that (1) it had not forfeited its class-action-waiver defense because it had raised the defense in its answer, and (2) it had not waived the defense because it had fully pressed the defense at the appointed time (in opposition to class certification) and had not in the interim engaged in litigation activities sufficiently inconsistent with its continued reliance on the class-action-waiver defense to establish an intention on Marriott's part to relinquish or abandon that defense.

In response, the proposed class representatives argue, again, that Marriott waived its right to enforce the class action waiver because the waiver provision is included in the same provision of the parties' agreement as the choice of law and venue provisions, which provisions the proposed class representatives claim Marriott had already waived. Brief of Plaintiffs-Appellees at 17-18, *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litig.*, 341 F.R.D. 128 (D. Md. 2022) (22-1745), ECF No. 36. Additionally, the proposed class representatives claim Marriott waived its right to enforce the waiver by engaging in months of written discovery, depositions, and expert discovery without raising the class action waiver (aside from in its answer). *See id.* at 19-22.

At the time of this writing, the parties had fully briefed the appeal, and oral argument was scheduled for the first week of May 2023. Under the principles discussed above, Marriott should prevail on the question of whether it waived its class-action-waiver defense, as Marriott, exactly as called for by those principles, (1) asked at the "correct" point in time that the class action waiver be enforced by the district court, by doing so in opposition to class certification; (2) pled its class-

action-waiver defense as an affirmative defense in its responsive pleading and thereby preserved (rather than forfeited) that defense; and (3) thereafter avoided waiving its class-action-waiver defense because it took no litigation actions sufficiently inconsistent with its continued reliance on that defense to establish an intention on Marriott's part to relinquish or abandon that defense.

Whether the Fourth Circuit agrees with the principles discussed above or the above analysis of their application to the class action waiver at issue in *Marriott* remains, of course, to be seen.

IV. WHEN IS A CLASS ACTION WAIVER ENFORCEABLE IN A PUTATIVE PRIVACY OR CYBERSECURITY CLASS ACTION?

The unenforceability argument that a proposed class representative in a putative privacy or cybersecurity class action is most likely to raise[18] regarding a class action waiver is that the waiver is unconscionable under whatever law governs the enforceability issue.

Generally, the law requires that the party asserting that a contractual provision (like a class action waiver) is unconscionable bears the burden of proving unconscionability, which requires showing that the terms were both "procedurally" and "substantively" unconscionable.[19] *See Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016) (California law requires that "[b]oth procedural and substantive unconscionability must be present in order for a clause to be

[18] This article assumes that the class action waiver in question is contained in an agreement that the plaintiff accepted in a contractually binding fashion. The case law on when an individual will and will not be found to be bound by an online agreement is therefore beyond the scope of this article.

[19] Note, however, that some jurisdictions only require a showing of *either* procedural or substantive unconscionability. *See Zhao v. CIEE Inc.*, 3 F.4th 1, 9 (1st Cir. 2021) ("[Under Maine law], [t]he party alleging unconscionability bears the burden of establishing either [substantive or procedural unconscionability].)"; *Larsen v. Citibank FSB*, 871 F.3d 1295, 1309 (11th Cir. 2017) ("Under Washington law, however, an agreement may be invalidated on a showing of either substantive or procedural unconscionability."). Thus, in any given case the starting point for determining the enforceability of a class action waiver will be to determine what body of law governs the enforceability issue. For cases pending in federal court, as will be the case for most putative privacy and cybersecurity class actions, that determination will turn on (1) whether federal or state law provides the rule of decision on the enforceability of the class action waiver in question; and (2) whether, in cases where state law does provide that rule of decision, (a) the enforceability issue is substantive or procedural for *Erie* purposes and (b) the enforceability issue, if substantive for *Erie* purposes, is substantive or procedural for state-law choice of law purposes. This article expresses no view on any of those questions.

unconscionable."); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010) (Under New York law, "there must be a showing that such a contract is both procedurally and substantially unconscionable."); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1309 (11th Cir. 2017) ("Ohio law requires [a contractual provision to be] both procedurally and substantively unconscionable before it can be struck down."); *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 516 (1st Cir. 2020) ("Rhode Island law requires the party opposing arbitration to prove both procedural and substantive unconscionability[.]"); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–73 (2010) (noting that Nevada law requires a showing of both procedural and substantive unconscionability).

A. Procedural Unconscionability.

In order to show that a contractual provision is procedurally unconscionable, courts require a showing that there has been "'oppression' or 'surprise' due to unequal bargaining power." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011); *see also Tompkins*, 840 F.3d at 1023. "Oppression occurs where a contract involves lack of negotiation and meaningful choice." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1317 (2005). Lack of negotiation or negotiating power therefore is not by itself sufficient to sustain a finding of procedural unconscionability. *See Ironbeam, Inc. v. Evert*, 417 F. Supp. 3d 1031, 1037 (N.D. Ill. 2019) (as related to procedural unconscionability, "[s]imply a lack of opportunity to negotiate terms or a disparity in bargaining power will not create [an unenforceable] contract of adhesion"); *M.A. Mortenson Co. v. Saunders Concrete Co.*, 676 F.3d 1153, 1158 (8th Cir. 2012) ("The mere fact that a party had no opportunity to negotiate a form contract is not sufficient under New York law to render the provision procedurally unconscionable.") (internal quotation marks omitted); *MacIntyre v. Moore*, 335 F.Supp.3d 402, 415 (W.D.N.Y. 2018) (noting that "disparity in

bargaining power [is] insufficient to undermine the enforceability of any contract."). Rather, a lack of negotiation must be coupled with a lack of meaningful choice, such as where the enforcing entity's conduct during contract formation included "high pressure tactics or deceptive language," *Filho v. Safra Nat'l Bank of N.Y.*, No. 10 Civ. 7508, 2014 WL 12776165, at *10 (S.D.N.Y. Mar. 11, 2014), or where the party resisting enforcement had no reasonable market choice to reject the contract, *see Dominguez v. T-Mobile USA, Inc.*, No. CV-1601429J-GBD-TBX, 2017 WL 8220598, at *6 (C.D. Cal. Jan. 18, 2017).

Courts generally apply these principles in deciding whether a contract of adhesion of the sort that regularly is at issue in putative privacy and cybersecurity putative class actions is procedurally unconscionable. Courts have noted that while "adhesion contracts often are procedurally oppressive, this is not always the case. Oppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives." *Adkins v. Facebook, Inc.*, No. C 18-05982 WHA, 2019 WL 3767455, at *2 (N.D. Cal. Aug. 9, 2019); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long past."). For example, where "the challenged term is in a contract [of adhesion] concerning a nonessential recreational activity, the consumer always has the option of simply forgoing the activity." *Adkins*, 2019 WL 3767455, at *2 (internal quotation marks omitted); *see also George v. eBay, Inc.*, 71 Cal. App. 5th 620, 632 (2021) (finding no unconscionability where "appellants do not allege they were unable to avoid eBay's allegedly unconscionable policies by, for example, selling on other online marketplaces").

Thus, courts usually reject finding a contract of adhesion procedurally unconscionable unless the contract is for a critical service for which there is no alternative supplier (perhaps,

electricity or medical services in a remote area) or agreement to the contract of adhesion is secured by deceptive means. For example, courts have found contracts of adhesion that impose arbitration agreements to be procedurally unconscionable if individuals are forced to waive their rights to secure essential services or meet basic human needs. *See, e.g.*, *McCormick v. Resurrection Homes*, 956 N.Y.S.2d 844, 847 (Civ. Ct. 2012) (finding a residential contract which forced residents to give up legal protections to be an "unconscionable contract of adhesion" because it was "drafted by a party with superior bargaining power" and because there was no "option of negotiating the terms"); *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205, 215-17 (2016) (finding a mobilehome residential arbitration agreement was a procedurally unconscionable contract of adhesion because the residents were "primarily low-income mobilehome owners, most of whom cannot afford other housing options" and "were under severe pressure to sign the agreements"). For similar reasons, adhesion contracts in the employment context have often been found procedurally unconscionable. *See, e.g.*, *Carbajal v. CWPSC, Inc.*, 245 Cal. App. 4th 227, 247 (2016) (concluding that an employment agreement was procedurally unconscionable based on "its adhesive nature," "the employment context in which it arose," and the agreement's "failure to identify [relevant] governing . . . rules"); *see also OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 127 (2019) (noting that "courts must be 'particularly attuned' to the danger of oppression and overreaching" in employment contexts). Likewise, deceptive or misleading adhesion contracts tend to be vulnerable to a finding of procedural unconscionability. *See In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 251 (S.D.N.Y. 2005) ("A court may find unconscionability where a non-drafting party has no way of knowing a material fact.").

However, as described above, when there is an alternative option or the ability to forgo the activity altogether (*i.e.*, where the activity is a nonessential recreational activity) and there is no

evidence that agreement to the contract of adhesion was procured through deception or fraud, courts have not found that a disparity of bargaining power between parties or a lack of negotiation will constitute procedural unconscionability. *See, e.g.*, *Pendergast v. Sprint Nextel Corp.*, No. 08-20551-CIV, 2009 WL 10668270, at *3 (S.D. Fla. Jan. 13, 2009) (holding that a class action waiver was not procedurally unconscionable where a party had "a meaningful alternative" to choose to "subscribe to a [mobile phone] wireless company without a class action waiver" but elected not to), aff'd, 691 F.3d 1224 (11th Cir. 2012); *Adkins v. Facebook, Inc.*, No. C 18-05982 WHA, 2019 WL 3767455, at *2 (N.D. Cal. Aug. 9, 2019) (finding limitation-of-liability clause was not procedurally unconscionable because the plaintiff had "reasonable market alternatives" to "Facebook's social media services," which the court found was "not one of life's necessities" (internal quotation marks omitted)).

As one would expect from the foregoing principles, there is no general rule that class action waivers either are or are not procedurally unconscionable. Instead, a case-by-case inquiry is necessary to decide the procedural unconscionability of class action waivers, with the focus of that inquiry being whether the agreement containing the class action waiver in question involved both a lack of meaningful negotiation and a lack of meaningful choice on the part of the individual against whom the class action waiver should be enforced. *See, e.g.*, *Pendergast*, 2009 WL 10668270 at *3 (stating that procedural unconscionability of a class action waiver requires a showing of disparate bargaining power and absence of meaningful choice); *Ordosgoitti v. Werner Enters., Inc.*, No. 8:20-CV-421, 2022 WL 874600, at *6 (D. Neb. Mar. 24, 2022) (holding that a class action waiver was not automatically procedurally unconscionable due to an imbalance in bargaining power given the conspicuous nature of the provision and a lack of evidence that the plaintiff had no alternative contract options).

B. Substantive Unconscionability.

While the procedural element of unconscionability concerns the circumstances attendant to the formation of a contract, substantive unconscionability "looks to the content of the contract." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121-22 (2d Cir. 2010); *see also Eisen v. Venulum Ltd.*, 244 F. Supp. 3d 324, 341 (W.D.N.Y. 2017). Specifically, "[s]ubstantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012).

Courts have generally concluded that a merely imbalanced benefit will not necessarily render a class action waiver substantively unconscionable. "[R]ather, the term [of the contract] must be so one-sided as to shock the conscience." *Id.* (internal quotation marks omitted). "Contract terms are substantively unconscionable when they are *unreasonably* balanced in favor of one party over the other." *Eisen*, 244 F. Supp. 3d at 342 (emphasis added); *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 911 (2015) (noting that the "various intensifiers" used by California courts—"*overly* harsh,' '*unduly* oppressive,' '*unreasonably* favorable,"—underscores the degree of unreasonableness required (emphasis in original)).

For example, courts have found contracts to be substantively unconscionable where there is excessive imbalance impacting one party's ability to bring claims or otherwise invoke litigation or arbitration but not the other's. *See, e.g.*, *Carbajal v. CWPSC, Inc.*, 245 Cal. App. 4th 227, 248 (2016) (finding there was substantive unconscionability where the agreement "require[d] the employee to arbitrate the claims he or she is most likely to bring, but allow[ed] the employer to go to court to pursue the claims it is most likely to bring."); *Trompeter v. Ally Fin., Inc.*, 914 F. Supp. 2d 1067, 1073–76 (N.D. Cal. 2012) (finding that substantive unconscionability is apparent due to

arbitration requirement that left the parties unequal in their ability to pursue their respective claims); *see also Zullo v. Superior Ct.*, 197 Cal. App. 4th 477, 487 (2011) (noting that substantive unconscionability may exist absent "reasonable justification for a one-sided arrangement"); *Brower v. Gateway 2000*, *Inc.*, 676 N.Y.S.2d 569, 574 (1998) (finding that "the excessive cost factor" imposed by the arbitration agreement "serve[d] to deter the individual consumer from invoking the process" and was thus substantively unconscionable).

When it comes to class action waivers, courts have generally not found them to be substantively unconscionable, the reason being that they do not prevent the would-be class representative from pursuing his or her claim as an individual plaintiff even though proceeding by means of a class action might be more economically attractive for that plaintiff. *See, e.g.*, *Niiranen v. Carrier One, Inc.*, No. 20-CV-06781, 2022 WL 103722, at *8 (N.D. Ill. Jan. 11, 2022) (finding the class action waiver not substantively unconscionable because pursuing claims via class action did not "provide[] the only reasonable, cost-effective means for Plaintiffs to obtain a complete remedy for their claims"); *Hennessey v. Kohl's Corp.*, 571 F. Supp. 3d 1060, 1074 (E.D. Mo. 2021) ("Enforcing the agreement as to the class action waiver, therefore, does not lead to economic infeasibility and an unconscionable result."); *Korea Wk., Inc. v. Got Cap., LLC*, No. CV 15-6351, 2016 WL 3049490, at *10 (E.D. Pa. May 27, 2016) (finding that a class action waiver is not substantively unconscionable because "[p]laintiffs do not lose any statutory right to pursue their [individual] damages under [statute]."). Indeed, given the high bar set by the above-discussed general principles regarding substantive unconscionability, it is difficult to imagine a circumstance where a class action waiver would appropriately be found substantively unconscionable upon

application of those principles. This is particularly so with respect to class action waivers that cover arbitrable claims, in view of the Supreme Court's decision in *Concepcion*.[20]

C. Case Studies from the Privacy and Cybersecurity Context.

1. *Flores-Mendez v. Zoosk, Inc.*

At the class certification stage in *Zoosk*, Zoosk opposed the proposed class representative's motion for class certification on the ground that by agreeing to Zoosk's Terms of Use, she had accepted a class action waiver that barred her from bringing a class action asserting claims arising from the services outlined in the Terms of Use. *See Flores-Mendez v. Zoosk, Inc.*, No. C 20-04929 WHA, 2022 WL 2967237, at *1 (N.D. Cal. July 27, 2022). As to the enforceability of the class action waiver, Zoosk argued that the Terms of Use were not procedurally unconscionable because the challenged provision concerned a nonessential recreational activity—online dating—and, thus, the proposed class representative clearly had the option to forgo either the use of Zoosk's services

[20] In *Concepcion*, the Supreme Court held that the Federal Arbitration Act ("FAA") prohibits a class action waiver that covers claims that are arbitrable under the FAA from being found unconscionable under the test for the unconscionability of such waivers adopted by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *Concepcion*, however, does not expressly state that the FAA *never* permits such a class action waiver to be found unconscionable or, if it does permit such a finding in certain circumstances, what the appropriate test is for the unconscionability of such a class action waiver, so those questions theoretically may remain open even after *Concepcion* in the context of class action waivers that cover claims that are arbitrable under the FAA. *Compare Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011) (noting *Concepcion* may leave open the possibility that an arbitration agreement with a class action waiver may still be found unconscionable) *with Alfia v. Coinbase Glob., Inc*., No. 21-CV-08689-HSG, 2022 WL 3205036, at *4 (N.D. Cal. July 22, 2022) ("The Supreme Court has affirmed the enforceability of class-action waivers [in *Concepcion*]."). As a practical matter, however, courts generally seem to be comfortable relying on *Concepcion* to enforce class action waivers that cover such claims with little to no analysis of their substantive unconscionability. *See, e.g.*, *Zawada v. Uber Techs., Inc.*, No. 16-CV-11334, 2016 WL 7439198, at *8 (E.D. Mich. Dec. 27, 2016) ("The Supreme Court has held that class-action waivers in FAA-governed arbitration agreements are enforceable."), *aff'd*, 727 F. App'x 839 (6th Cir. 2018); *Chen-Oster v. Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 251 (S.D.N.Y. 2020), ("[As] the Supreme Court has held, arbitration clauses are not unconscionable merely because they preclude class-wide action or relief." (citing *Concepcion*, 563 U.S. at 351-52)), *objections overruled*, No. 10-CIV-6950-ATR, 2021 WL 4199912 (S.D.N.Y. Sept. 15, 2021); *Sena v. Uber Techs. Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 1376445, at *7 (D. Ariz. Apr. 7, 2016) (similar); *Fensterstock v. Educ. Fin. Partners*, No. 08-CIV-3622-TPG, 2012 WL 3930647, at *7 (S.D.N.Y. Aug. 30, 2012) (finding a class action waiver in an arbitration provision not substantively unconscionable simply because the "one-sided effect of the class action waiver . . . does not necessarily lead to harsh or one-sided results in the ultimate arbitration" (citing *Concepcion*, 563 U.S. at 341)); *Simpson v. Pulte Home Corp.*, No. C-11-5376-SBA, 2012 WL 1604840, at *5 (N.D. Cal. May 7, 2012) (similar).

(in exchange for other online dating services) or the use of online dating services altogether. Further, Zoosk argued that the class action waiver was not substantively unconscionable because the waiver was not so harsh or one-sided as to "shock the conscience."[21]

The court found that after *Concepcion* (*see supra* note 20) California law applies the two-part test discussed above (*see supra* Part III.B) to decide the unconscionability of class action waivers[22] and accordingly required the court to evaluate both the procedural and substantive unconscionability of the Zoosk Terms of Use containing the class action waiver. *See Zoosk, Inc.*, 2022 WL 2967237, at *1. In its analysis of procedural unconscionability, the court concluded that adhesion contracts are "not always" procedurally unconscionable and agreed with Zoosk that the proposed class representative "could have avoided Zoosk's alleged unconscionable policies by simply opting out of its dating service." *Id.* With respect to substantive unconscionability, the court applied the "shocks the conscience" test discussed above (*see supra* Part IV.B) and held that the proposed class representative had not satisfied that test. *Id.* In so holding, the court noted that,

[21] The proposed class representative in *Zoosk* argued only that Zoosk had waived its right to enforce the class action waiver by various actions it took in the course of the litigation. *See supra* Part III.C.1. She did not argue that the class action waiver was either procedurally or substantively unconscionable. The court highlighted the plaintiff's failure to argue unconscionability in concluding she had failed to carry her burden. *See Zoosk, Inc.*, 2022 WL 2967237, at *2.

[22] Because courts have had little opportunity to date to address the post-*Concepcion* enforceability under California law of class action waivers that cover non-arbitrable claims, there may be some room to argue that California's pre-*Concepcion* rule established by *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148 (2005) still applies to such class action waivers, notwithstanding *Concepcion's* express prohibition of the application of the *Discover Bank* rule to class action waivers that cover arbitrable claims, as discussed *supra* in note 20. The *Discover Bank* rule holds that class action waivers are unconscionable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individual small sums of money." *Id.* The California Supreme Court has yet to decide whether the *Discover Bank* rule still applies to class action waivers that cover non-arbitrable claims, and the decisions from other courts regarding this issue are a mixed bag. *See, e.g.*, *Meyer v. Kalanick*, 185 F. Supp. 3d 448 at 455-458 (S.D.N.Y. 2016) (applying California law) (finding that *Concepcion* did not overrule the *Discover* rule with respect to whether class action waivers are unconscionable); *Carter v. Rent-A-Ctr., Inc.*, 718 F. App'x 502, 504 (9th Cir. 2017) (unpublished) ("We have interpreted *Concepcion* as foreclosing any argument that a class action waiver, by itself, is unconscionable under state law[.]"). The *Zoosk* court expressly held that *Concepcion* pre-empts the *Discover Bank* rule as to all class action waivers, both those that cover arbitrable claims and those that do not. *See Zoosk, Inc.*, 2022 WL 2967237, at *1.

in *Concepcion*, the Supreme Court found that the FAA precluded a nearly identical class action waiver from being invalidated under otherwise applicable principles of state law. *Id.* Evidently the court drew the logical conclusion that since, as per *Concepcion*, the FAA affords class action waivers substantial if not total protection from invalidation in an arbitral setting, such waivers *a fortiori* cannot be so inherently offensive as to "shock the conscience" because that would mean that the FAA and the *Concepcion* decision likewise necessarily "shock the conscience" by the protection against invalidation that they afford to class action waivers.

Thus, the court found the class action waiver at issue in *Zoosk* was neither procedurally nor substantively unconscionable and accordingly enforced the class action waiver by denying the proposed class representative's motion for class certification. *Id.*

2. *In re Marriott International, Inc., Customer Data Security Breach Litigation*

a. Unconscionability Arguments.

In the *Marriott* litigation discussed above, *see supra* Part III.C.2, the procedural and substantive unconscionability of the class action waiver involved by Marriott is squarely at issue in Marriott's Rule 23(f) appeal currently set for oral argument at the Fourth Circuit. There, the proposed class representatives argue that the class action waiver is unenforceable because it is included in "an exculpatory contract of adhesion" that is both procedurally and substantively unconscionable. Brief of Plaintiffs-Appellees at 28, *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litig.*, 341 F.R.D. 128 (D. Md. 2022) (22-1745), ECF No. 36. They argue that the contract is procedurally unconscionable because (1) they—unsophisticated consumers—were presented with the contract in clickwrap without the opportunity for negotiation by a sophisticated corporation; and (2) Marriott reserved the right to alter the contract's terms "unilaterally at any

time and without notice." *Id.* at 30. The proposed class representatives then argue that the class action waiver is substantively unconscionable because, by preventing class treatment even as to claims that are non-arbitrable (as all stand-alone class action waivers do), it imposes "overly harsh or one-sided terms" that "effectively preclude relief." *Id.* at 31, 32. Stand-alone class action waivers, the proposed class representatives argue, are substantively unconscionable when they are applied to non-arbitrable claims because they are not "insulate[d]" by an arbitration provision that provides "a cheap and informal process for a plaintiff to pursue her rights." *Id.* at 32-33.

In reply, Marriott argues that the class action waiver is not procedurally unconscionable because disparities in bargaining power are not enough to find procedural unconscionability. *See* Reply of Defendant-Appellant Marriott Int'l, Inc. at 15, *In re Marriott Int'l, Inc. Customer Data Sec. Breach Litig.*, 341 F.R.D. 128 (D. Md. 2022) (22-1745), ECF No. 54. In so arguing, Marriott distinguishes the cases the proposed class representatives rely on by pointing out that, in those cases, the plaintiffs were forced to waive their rights to a class action without opportunity for negotiation in the context of essential contracts for employment and housing ("the primary basis of people's livelihoods"), whereas, in this situation, the absence of an "opportunity for negotiation" is by itself insufficient to establish procedural unconscionability as the service at issue is recreational and nonessential: booking hotel rooms. *Id.* at 16. With respect to the proposed class representatives' substantive unconscionability arguments, Marriott simply disagrees, citing a phalanx of cases in which courts "routinely approve class waivers independent of arbitration clauses." *Id.* at 18.

Under the principles discussed above, Marriott's arguments regarding the procedural and substantive unconscionability of the class action waiver at issue should prevail. As to procedural unconscionability, the proposed class representatives have not shown that they had "no meaningful

choice" other than to book a room at a Marriott hotel. As to substantive unconscionability, a class action waiver that is enforceable as to non-arbitrable claims does not prevent those claims from being pursued individually and thus is not so hugely imbalanced as to "shock the conscience." To conclude otherwise would compel the further conclusion that the failure of Federal Rule 23 and its state law analogs to make the class action remedy available where the stringent requirements for class certification cannot be met, as well as the failure of the overwhelming majority of legal regimes around the world to afford the class action remedy *at all*, are likewise "conscience shocking" by reason of their failure to afford a class action remedy in every circumstance where a plaintiff would find it economically advantageous to pursue his or her claim as a class action rather than individually.

Of course, whether the Fourth Circuit agrees with the principles discussed above or the above analysis of their application to the procedural and substantive unconscionability of the *Marriott* class action waiver remains to be seen.

b. Rule-23-Based Arguments.

The proposed class representatives in the *Marriott* litigation have alternatively argued that class action waivers are unenforceable across the board in federal court because private contractual agreements are superseded by the Federal Rules of Civil Procedure. According to this argument, Rule 23 sets out an exhaustive test for whether a litigation may proceed as a class action and that a "lack of a class action waiver" is not one of the Rule's enumerated prerequisites for class certification. Brief of Plaintiff-Appellees at 23. The proposed class representatives argue the Supreme Court has held that Rule 23 sets out a "categorical rule" that, if the criteria set forth in Rule 23(a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation) and Rule 23(b) are met, a plaintiff is "entitl[ed]" to pursue his or her claim as a class action. *Id.* (*citing*

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010)). Therefore, they argue, if the requirements of Rule 23 are met, a private contractual agreement cannot preclude a federal court from exercising the power given to it by the federal rules to certify a class. *Id.*

In response, Marriott argues that a class action waiver contained in a private contract does not contract around Rule 23, nor does it seek to add additional elements to the requirements of class certification. Reply of Defendant-Appellant Marriott Int'l, Inc. at 11. Rather, Marriott argues, a class action waiver serves to "defeat class certification by rendering its requirements impossible for the parties to meet," allowing a court to forgo Rule 23's class-action mechanism altogether. *Id.* Marriott counters with its own Supreme Court precedent "reject[ing] th[e] proposition" that "federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23," and holding there is no "entitlement to class proceedings." *Id.* at 12 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013).

Marriott has much the better of this argument. The Federal Rules are chock-full of provisions that authorize federal courts to grant some sort of relief upon the request of a party: for example, conducting jury trials, ordering discovery, entering injunctions, awarding damages, dismissing for lack of personal jurisdiction or improper venue, joining additional parties—the list is truly endless. As to all of these types of relief, a party can (and parties routinely do) waive by "private contract" their right to ask a federal court to award such relief, and federal courts can and routinely do uphold such waivers. There is no reason why a party's waiver of its right to request that a federal court certify an action as a class action should be treated any differently.

V. CONCLUSION.

The enforceability of class action waivers in putative privacy and cybersecurity class actions is an evolving area of law, but the courts seem to be headed in the direction of (1) refusing

to find class actions waivers unconscionable, and therefore enforcing such waivers, regardless of whether they are embedded in arbitration provisions and (2) expecting a defendant to seek enforcement of its class-action-waiver defense at the class certification stage by raising the defense as a ground for opposing the proposed class representative's motion for class certification. In light of the likely enforceability of class action waivers when enforcement is sought at the class-certification stage of the case, the bigger question going forward in putative privacy and cybersecurity class action litigation with respect to class action waivers will likely be whether the party seeking to enforce the waiver at the class certification stage has, through the course of the litigation up to that point, appropriately protected its ability to seek such enforcement. The answer to that question will turn on the actions that party took first to preserve (rather than forfeit), and then to avoid waiving, its class-action-waiver defense. While the Fourth Circuit will likely provide important guidance on this issue in its ruling on the Rule 23(f) appeal in the *Marriott* litigation, this area of law is likely to evolve rapidly with the ever-increasing volume of putative privacy and cybersecurity class actions rooted in online agreements that include class action waivers.

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