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By Hand

The Honorable Roderick L. Ireland
Chief Justice
Supreme Judicial Court for the
Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400
Boston, Mass. 02108

Re: ***Feeney, et al. v. Dell, Inc., et al.*, No. SJC-11133**

Dear Chief Justice Ireland:

Pursuant to Mass. R. App. P. 27, defendants-appellants Dell Inc., Dell Marketing L.P., Dell Catalog Sales L.P., QualxServ LLC, and BancTec Inc. respectfully petition the Court for rehearing on the ground that this Court's opinion dated June 12, 2013 ("Feeney II") has been overruled by the subsequent decision of the Supreme Court of the United States in American Express Co. v. Italian Colors Restaurant, 2013 WL 3064410 (June 20, 2013).

Feeney II rested on the premise that the Federal Arbitration Act does not require enforcement of an arbitration agreement that "effectively precludes consumers from obtaining a remedy to which they are lawfully entitled . . . ." 465 Mass. 470, 2013 WL 2479603 at *15. Proceeding from that premise, this Court reasoned that, if a plaintiff can prove that his or her claim is not remediable in individual arbitration, a court may refuse to compel arbitration of a state law claim. Id. at *19-21. Expressly relying upon the Second Circuit's decision in American Express (which the Supreme Court has now reversed), this Court then found that the plaintiffs had met this burden because their claims under c. 93A "require[] advanced knowledge of the tax codes," their claimed damages are "nominal," their arbitration agreements do not mandate payment of attorneys' fees or a bounty, and the "voluminous record . . . speaks to the complex nature of the claims involved." Id. at *22.

The Supreme Court in American Express, however, explicitly overruled the premise of Feeney II that the Federal Arbitration Act does not mandate enforcement of agreements to arbitrate if the claim is not remediable in arbitration. "[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low value claims. The latter interest . . . is 'unrelated' to the FAA. Accordingly, the FAA does . . . favor the

absence of litigation when that is the consequence of a class-action waiver, since its 'principal purpose' is the enforcement of arbitration agreements according to their terms." American Express, 2013 WL 3064410 at *6 n.5. The Supreme Court rejected the notion of a "judicially created superstructure" required to enforce an arbitration agreement, such as the comparison of proceeding costs and available damages that the Second Circuit had proposed (and that Feeney II had adopted). Id. at *7. "Such a preliminary litigating hurdle," the Supreme Court reasoned, "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." Id.

Specifically, American Express held that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." Id. at *5. The Court thus reversed the denial of arbitration even though, as the dissent noted, the maximum damages award was a small fraction of the cost of a necessary expert report and the cost of that report could not be shifted to the defendant. Id. at *10-11 (Kagan, J., dissenting). This Court's holding that the attorney's fees associated with proving a complex claim for small individual damages justified refusal to enforce the parties' arbitration agreement has thus been overruled.

The American Express Court noted that any "effective vindication" exception to the enforceability of an arbitration clause is limited to at most two circumstances. Id. at *5. But even if state rather than federal law claims were subject to an "effective vindication" exception (all participating Supreme Court Justice agreed that they are not), the plaintiffs here may not avoid their agreement to arbitrate based on either circumstance. First, Dell's agreement does not "forbid[] the assertion of certain statutory rights." Id. To the contrary, the parties' agreements each expressly authorized the arbitrator to award "any remedy or relief allowed by applicable substantive law." A52 (National Arbitration Forum (NAF) rule 20D); see A29-30 (Feeney arbitration agreement incorporating NAF rules); A36 (Dedham Health agreement; same).

Second, here the "filing and administrative fees attached to arbitration" are not "so high as to make access to the forum impracticable." American Express, 2013 WL 3064410 at *5. Neither the late Mr. Feeney nor Dedham Health and Athletic Complex (a for-profit corporation that purchased over three dozen service contracts from Dell, see A3135-3279) ever presented any evidence that they were unable to pay the fees of the National Arbitration Forum. In fact, when they (unsuccessfully) pressed their claims in the arbitration, they did pay such fees (which would have been vastly smaller had they not, contrary to the parties' agreements, pursued class claims and related discovery in the arbitration, see A3479-80).

The NAF fees, moreover, could not have rendered the plaintiffs' claims non-remediable because, unlike the agreement in American Express, Mass. Gen. Laws c. 93A, §§ 9 and 11, mandated an award of the NAF fees as well as attorneys' fees if they prevailed. See A248 (opinion of Single Justice enforcing parties' agreement to arbitrate because, "[i]f [the plaintiff] prevails, reasonable attorney's fees and expenses are awarded"); Kraft Power Corp. v. Merrill, 464 Mass. 145, 159 n.20 (2013) (Under c. 93A, § 11, "reasonable

attorney's fees and costs must be awarded upon a finding that the defendant violated G.L. c. 93A, § 2 . . . .") (emphasis added); Smith v. Jenkins, 818 F. Supp. 2d 336, 345 (D. Mass. 2011) (same for claim under c. 93A, § 9); Drywall Systems, Inc. v. ZVI Construction Co., Inc., 435 Mass. 664, 672-73 (2002) (award of attorneys' fees under c. 93A, § 11, to prevailing plaintiff is "require[d]" in arbitration); LaRoche v. Flynn, 55 Mass. App. Ct. 419, 421 (2002) (prevailing party in arbitration "could have applied to the arbitrator for an award" of arbitration costs under Mass. Gen. Laws c. 251, § 10, which authorizes arbitrator to award "arbitrator's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration"). Such an award was also explicitly contemplated by the rules governing the parties' arbitration. See A64 (NAF rule 37C authorizing award of fees and costs to "any Party as permitted by law") and A68 (NAF rule 44E authorizing prevailing party to "recover fees paid in the arbitration in accord with Rule 37C").

The defendants accordingly request that this Court grant this petition for rehearing, vacate its opinion in Feeney II, and reverse the order of the Superior Court denying the defendants' Renewed Motion to Confirm Arbitration Award of Dismissal With Prejudice.

Respectfully submitted,

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