SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

ELIZABETH BRITTON, individually and on behalf of herself and all others similarly situated, *Plaintiff-Respondent*, - against - SENECA MEADOWS, INC., *Defendant-Appellant*.	Case No. CA 21-00681 **NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

PLEASE TAKE NOTICE that, upon the annexed affirmation of Andrew J. Pincus, dated October 18, 2021, the Chamber of Commerce of the United States of America will move this Court, at a term of the Appellate Division of the Supreme Court, Fourth Department, at the Courthouse located at East Avenue, Rochester, New York, on November 1, 2021, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting leave to file a brief as *amicus curiae* in support of Defendant-Appellant Seneca Meadows, Inc. The motion will be submitted on the papers, and Respondent's personal appearance in opposition is neither required nor permitted.

Dated: October 18, 2021

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH DEPARTMENT

ELIZABETH BRITTON, individually and on behalf of herself and all others similarly situated,	:	
	:	Case No. CA 21-00681
Plaintiff-Respondent,	:	
- against -	:	**AFFIRMATION OF ANDREW J. PINCUS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***
SENECA MEADOWS, INC.,	:	
Defendant-Appellant.	:	

ANDREW J. PINCUS, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Mayer Brown LLP, counsel for the Chamber of Commerce of the United States of America ("the Chamber"). I am familiar with the legal issues involved in the above-captioned action. I submit this affirmation in support of the motion of the Chamber for leave to file the accompanying brief as *amicus curiae* in support of Seneca Meadows, Inc.

2. The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function

of the Chamber is to represent the interests of its members in the courts on issues of concern to the business community.

3. This case presents important questions concerning the professional responsibilities of attorneys and the remedies for failures to comply with those responsibilities, particularly in the realm of mass tort and class action litigation. The Chamber's brief discusses how the specific ethical concerns at issue in this case fit into a broader pattern of abuses by certain plaintiffs' lawyers, including those intent on obtaining the largest possible portfolio of clients or nominal clients in order to maximize their settlement leverage.

5. A significant number of the Chamber's members have experienced firsthand one or more of these abuses. Participation of the Chamber as *amicus curiae* in this appeal would assist the Court by discussing its broad range of experience with these issues.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Chamber leave to submit its brief as *amicus curiae* in support of Defendant-Appellant Seneca Meadows, Inc.; (ii) accepting the brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: October 18, 2021

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SUPREME COURT OF THE STATE OF NEW YORK
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ELIZABETH BRITTON, individually and on behalf of herself and all others similarly situated, *Plaintiff-Respondent*, - against - SENECA MEADOWS, INC., *Defendant-Appellant*.	:	Case No. CA 21-00681

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF THE *AMICUS CURIAE*

Amicus the Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community, including in the New York courts.[1]

The Chamber and its members have a keen interest in ensuring that courts enforce the rules governing attorney conduct and provide appropriate remedies for unethical or other abusive practices. The Chamber's members are routinely defendants in class actions or mass tort litigation, and a significant number of the Chamber's members have experienced firsthand abuses in those contexts.

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[1] *See, e.g.*, Amicus Curiae Brief of Chamber of Commerce of the United States of America, *Burdick v. Tonoga*, No. 527117 (3d Dep't) (class certification requirements); Amicus Curiae Brief of Coalition for Litigation Justice, Inc. et al., *In re New York City Asbestos Litig.*, No. APRL-2017-00114 (N.Y.) (punitive damages); Amicus Curiae Brief of Business Council of New York State, Inc. et al., *Caronia v. Philip Morris UAS, Inc.*, No. CTQ-2013-00004 (N.Y.) (medical monitoring); Amicus Curiae Brief of Chamber of Commerce of the United States of America et al., *Sperry v. Crompton Corp.*, No. 2004-6518 (N.Y.) (indirect purchaser class actions).

The trial court here concluded that one of the law firms representing the plaintiff violated New York's Rules of Professional Conduct in a number of ways, and defendant convincingly explains why additional violations took place. Unfortunately, the trial court left the misconduct unchecked in this litigation, failing to deter similar misconduct in the future. Accordingly, the Chamber respectfully submits this brief to provide the Court with additional context concerning the effects of the types of misconduct displayed in this case and the importance of deterring such misconduct in the future.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises important questions regarding multiple violations of New York's Rules of Professional Conduct and the proper remedy for such violations. It arises from the mailing by plaintiff's counsel of almost three hundred *unsolicited* retainer agreements to Seneca County residents containing brightly colored flags urging the recipients to "Sign Here," not to mention the thousands of attorney advertising mailings sent by the same counsel that the lower court found improper. As defendant's brief persuasively details, the transmission of these mass-mailed, ready-to-execute retainer agreements and other improper mailings violated the New York Rules of Professional Conduct and warrants meaningful sanctions.

The Chamber writes separately to provide important background: the misconduct here was unfortunately far from an isolated occurrence in our litigation

system. Most mass tort cases and class action lawsuits that are not dismissed are settled rather than go to trial. That is because the ability of plaintiffs' lawyers to aggregate claims creates "hydraulic" pressure on defendants to settle to avoid the risks of a huge adverse judgment and outsized litigation costs—and to do so even if the defendant has a strong chance of prevailing on the underlying merits of the case. *E.g.*, *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 80 (2d Cir. 2004). Seeking to bring such pressure to bear by amassing as large an "inventory" of claims as they can, unscrupulous or negligent plaintiffs' lawyers sometimes take short cuts in creating an attorney-client relationship or in vetting potential plaintiffs' claims.

When a substantial goal of litigation is to accumulate as big a client list as possible to extract a settlement, abuses predictably can and do occur. Plaintiffs' lawyers and third-party lead generators spend millions of dollars on advertising and other practices to generate as many claims as possible, and as quickly as possible. To be sure, courts have held that there is nothing inherently improper about attorney advertising and other communications. But virtually every jurisdiction has adopted rules of professional conduct governing such communications, precisely because of the risks and consequences of abuse. Sadly, some law firms and lawyers fail to adhere to those rules and fail to vet their clients' claims before asserting them.

The abuses are not limited to advertising and communications. Additional concerns surround the terms of retainer agreements that many plaintiffs' lawyers

require their clients to sign. For example, some lawyers include terms designed to wrest control of settlement away from their clients—such as providing incentives for settling on a class basis or deterring clients from settling on an individual basis by requiring clients to pay attorneys' fees if they accept an individual settlement that would otherwise make them more than whole.

Compounding these problems, even in those rare cases where violations by plaintiffs' counsel are unearthed and presented to a court, counsel frequently face no penalty, or, at most, the equivalent of a judicial slap on the wrist. When that happens, the rules of professional conduct end up "denigrate[d] . . . by indifference" (*Matter of Weinstock*, 40 N.Y.2d 1, 6 (1976)), and plaintiffs' lawyers have little reason not to try the same tactics again and again.

ARGUMENT

I. The Push To Aggregate Numerous Claims Creates Incentives For Plaintiffs' Lawyers To Cut Corners.

1. A primary goal of plaintiffs' lawyers in the current mass tort system is not to resolve cases on the merits, but instead to "solicit clients and stockpile inventories of potential claimants." U.S. Chamber Institute for Legal Reform, *Twisted Blackjack: How MDLs Distort And Extort* 3 (Oct. 2021), https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-Briefly-MDL-FINAL.pdf. In multidistrict (MDL) litigation in federal court, for example, there is no effective "mechanism to separate the weaker claims from the potentially

meritorious," causing lawsuits and claimants to "pile up" and "lay stagnant" until "a global settlement is reached." *Id.* Mass tort filings overwhelm already crowded court dockets; *two-thirds* of *all* private civil cases pending in federal courts are mass tort claims in MDL proceedings. *Id.* at 3-4.

As the MDL Subcommittee of the federal Advisory Committee on Civil Rules has observed, this deluge of claimants happens because of the "'get a name, make a claim'" attitude of lawyers who hope to get "'inventory value' for their claims" as part of a global settlement. *Advisory Committee on Civil Rules Report* 142 (Nov. 1, 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf. Another factor is "that amassing a large inventory of claims can support a lawyer's quest for appointment to a leadership position in the MDL." *Id.*

A recent and revealing study of mass tort plaintiffs underscores that "[v]olume is the play for many plaintiffs' firms involved in" mass tort litigation. Alison Frankel, *First-ever survey of MDL plaintiffs suggests deep flaws in mass tort system*, Reuters (Aug. 7, 2021), https://www.reuters.com/legal/litigation/first-ever-survey-mdl-plaintiffs-suggests-deep-flaws-mass-tort-system-2021-08-09/ (discussing Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* (Aug. 6, 2021), Cornell L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900527). As the survey lays bare, "lawyers did little for the clients they stockpiled"; instead, their

clients are subjected to "Costco-type warehousing" that leaves them "feeling deeply dissatisfied with nearly all aspects of their attorney-client relationship." Burch & Williams, *supra*, at 1, 53. And while the lawyers are rewarded handsomely in a global settlement, their clients do not share in their satisfaction: "a mere ***1.8%*** of all participants felt their lawsuit accomplished what they hoped." *Id.* at 1 (emphasis added). It would be no surprise if "much of this dissatisfaction can be chalked up to the absence of an early vetting process that forces plaintiffs' counsel to communicate with their clients and familiarize themselves with the particular facts of each individual case." *Twisted Blackjack*, *supra*, at 6.

2. Similarly, in the class action context, plaintiffs' lawyers are aware that the costs of defending class actions can be substantial, putting enormous pressures on defendants to settle even specious claims. Class action litigation costs in the United States are huge. They totaled a staggering $2.64 billion in 2019, continuing an upward trend that started in 2015. *See 2020 Carlton Fields Class Action Survey*, at 4 (2020), https://ClassActionSurvey.com.

The merits of the claims in class actions often take a back seat to the potential for certification of a large class seeking astronomical sums of damages. Defendants in class actions thus face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The United States Supreme Court has long recognized the power

of class action lawsuits to induce settlement. As the Court explained over 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("a class action can result in 'potentially ruinous liability'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23).

Enterprising plaintiffs' lawyers, aware of this litigation dynamic and in search of large attorneys' fees awards, have the incentive to turn any perceived misstep or arguable regulatory violation, no matter how insignificant or how inventive the theory of liability, into a class action. And they therefore aggressively recruit claimants to serve as putative class representatives for these cases.

II. The Ethical Violations In This Case Fit Into A Broader Pattern Of Abuses In Mass Tort And Class Action Litigation.

1. Advertising designed to find and recruit mass tort plaintiffs is an enormous business. "Plaintiffs' lawyers, companies that specialize in advertising and gathering claims (known as 'lead generators'), and third parties that finance the litigation spend about $1 ***billion*** on television advertising each year to seek plaintiffs for mass tort litigation." U.S. Chamber Institute for Legal Reform, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle* 1 (Apr. 2020), https://

instituteforlegalreform.com/wp-content/uploads/2020/04/Lawsuit-Advertising-Paper_web.pdf (emphasis added).

Sometimes, "claims may seek compensation for people who were actually harmed by a defective product," but "plaintiffs' lawyers, lead generators, and third-party funders also *create* mass tort litigation through misleading, fearmongering ads." *Id.* at 6 (emphasis added). The aim of such efforts is to inundate businesses with lawsuits, at which point they are "pressured to settle due to the cost of never-ending litigation, the risk of liability (particularly in areas viewed as plaintiff-friendly), and damage to their reputations." *Id.* And to that end, the "ads often incorporate practices that mislead viewers," including "prominently featur[ing] blockbuster awards, settlement amounts, and civil fines," "giv[ing] the misleading impression that viewers may already be entitled to compensation from a verdict or settlement," "introducing the advertisement as a 'medical alert'" or presenting it "in a news-type format," and "hiding information identifying the ad sponsor." *Id.* at 60-61; *see also* U.S. Chamber Institute for Legal Reform, *Bad for Your Health: Lawsuit Advertising Implications and Solutions* 10-14 (Oct. 2017), https://instituteforlegalreform.com/research/bad-for-your-healthlawsuit-advertising-implications-and-solutions; Elizabeth Tippett, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 Am. J. L. & Med. 7 (2015).

Often it is not even the law firms themselves that are advertising for clients. And frequently, lawyers do not even interview the prospective clients who respond to those ads or vet their claims prior to forming an attorney-client relationship. Instead, law firms often outsource this work to third-party lead generators, creating additional ethical considerations—such as the need for lawyers to ensure that the lead generators are not "recommending the lawyer's services," making "false or misleading statements," or obscuring the identity of the lawyer or law firm on whose behalf they are advertising. Lucian Pera et al., *7 Ethics Considerations For Lawyers Using Lead Generators*, Law360 (Mar. 13, 2020), https://www.law360.com/articles/1249576/7-ethics-considerations-for-lawyers-using-lead-generators; *see also* Burch & Williams, *supra*, at 53 n.423 (noting that "[i]n 2014, two of the top five TV mass-tort advertisers were lead generators"). In addition, some plaintiffs' law firms do not practice law in any traditional sense, instead existing solely to generate and refer clients—meaning that they have little incentive to meet those clients or vet their claims before passing the claims on to other lawyers who will try to settle them. *See Bad for Your Health*, *supra*, at 33-34 (discussing a complaint filed against a law firm that had a total of five attorneys but spent over $25 million in 2015 on television advertising to recruit mass tort claims, which it would then bundle and sell en masse to other lawyers in exchange for a 40% contingency fee).

Perhaps most problematic, the failure to vet clients churned up by plaintiffs' firms or lead generators means that "dubious cases abound" in mass tort litigation. *Twisted Blackjack*, *supra*, at 5. In one famous example, a plaintiffs' firm and the third parties that investors paid to generate clients appeared to have simply manufactured around 40,000 clients in the wake of the Deepwater Horizon oil spill, including "a number of names that seemed to have been copied directly out of the phone book" and the name of at least one individual who had died prior to the spill—leading to a federal indictment and several civil lawsuits. Francesca Mari, *The Lawyer Whose Clients Didn't Exist*, The Atlantic (May 2020), https://www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082/.

Even when mass tort claimants are real people, substantial numbers of them lack any basis to assert a claim, either because they "did not use the defendant's product, did not suffer any injury, or filed suit long past the statute of limitations." *Twisted Blackjack*, *supra*, at 5. In some mass tort litigations, as many as ***half*** of the claims fall into this category, and an estimate of "20 to 30%" is ***typical***. *Advisory Committee on Civil Rules Report*, *supra*, at 142.

Yet there is no mechanism by which defendants can efficiently conduct "early triage" to winnow out these frivolous claims. *Id.* at 144. Rather, weeding out these frivolous or even fraudulent claims can be more expensive for businesses than

negotiating a global settlement agreement—one that pays plaintiffs' lawyers 30 percent or more of the recovery. *See* Burch & Williams, *supra*, at 10 & n.61. As a result, plaintiffs' lawyers rarely face any adverse consequences in the mass tort setting for bringing hundreds or even thousands of frivolous claims. On the contrary, they are rewarded for it.[2]

2. In class actions, it is class certification, rather than a final judgment on the merits, that is the primary endgame for plaintiffs' lawyers. But as in this case, plaintiffs' lawyers may also seek to amass clients as a backup plan in the event that they are unable to certify a class. *See* Opening Br. 1, 47-48. The desire to certify a class or extract a global settlement can lead to another type of abuse, as some plaintiffs' lawyers stretch the boundaries of ethics in seeking to increase their level of control over their clients, particularly with regards to settlement.

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[2] The mass torts playbook that "more claimants equals more money" has recently spread to the context of arbitration as well. *See* U.S. Chamber Institute for Legal Reform, *The Mass Arbitration Racket: Unscrupulous Abuse of The Arbitration Ecosystem* (Dec. 2020), https://instituteforlegalreform.com/the-mass-arbitration-racket-unscrupulous-abuse-of-the-arbitration-ecosystem. In that context, certain "plaintiffs' lawyers have used questionable tactics to amass large numbers of claimants—often without proper vetting or investigation," resulting in some claimants "who are not customers or workers associated with the business," "who did not use the product or service that is the subject of their claim," or "who have not actually entered into valid engagement agreements with the lawyers who seek to represent them." *Id.*

Their tactics include requiring clients to sign retainer agreements designed to discourage individual settlements. In one case, a retainer agreement included a "troubling" provision likening the acceptance of an individual settlement offer to "a betrayal of the class or comparable to 'a politician selling out his constituents by taking a bribe.'" *Kulig v. Midland Funding LLC*, 2014 WL 5017817, at *5 (S.D.N.Y. Sept. 26, 2014) (quoting the retainer agreement). Consistent with the disconcerting tenor of that provision, the plaintiff's lawyer in that case failed to communicate an individual settlement offer to his client—a clear violation of Rule 1.4 of the New York Rules of Professional Conduct. *Id.* at *4; *see also Zito v. Harding*, 975 N.Y.S.2d 2, 3 (1st Dep't 2013).

While the "troubling" retainer agreement in *Kulig* contained mere rhetoric discouraging individual settlement, all too often retainer agreements either expressly prohibit a named plaintiff from settling on an individual basis against his or her lawyer's wishes or impose a substantial financial penalty for doing so. In one case, for example, the retainer agreement "contracted away [the plaintiff's] ability to direct the case by requiring her 'to follow the recommendation of my attorney in connection with whether this case should be settled and the terms of such settlement.'" *In re Ocean Bank*, 2007 WL 1063042, at *6 (N.D. Ill. Apr. 9, 2007). Such a provision, the court explained, "improperly impinges" on the plaintiff's

"independence" and impermissibly "cede[s] all control over settlement to class counsel." *Id.*

In several other recent cases, retainer agreements have put the client "on the hook for attorney's fees if he accepts a settlement against the advice of his counsel." *Tataru v. RGS Fin.*, 2021 WL 38142, at *7 (N.D. Ill. Jan. 4, 2021), *vacated on other grounds on reconsideration*, 2021 WL 1614517 (N.D. Ill. Apr. 26, 2021); *see also Lanteri v. Credit Prot. Ass'n, LLP*, 2018 WL 4625657, at *5-6 (S.D. Ind. Sept. 26, 2018) (retainer agreement providing that "[i]f Client abandons the class and settles on an individual basis against the advice of Attorneys, Client shall be obligated to pay Attorneys their normal hourly rates for the time they expended in the case, and shall be obligated to reimburse the Attorneys for all expenses incurred"); *Keim v. ADF MidAtlantic, LLC*, 328 F.R.D. 668, 691-92 (S.D. Fla. 2018) (similar). Because fees at attorneys' hourly rates quickly dwarf the value of their clients' claims, such provisions give counsel an effective veto over individual settlements—even offers that would make their clients whole many times over—notwithstanding counsel's ethical obligation to "abide by a client's decision whether to settle a matter." NYCRR 1200.0 Rule 1.2(a).[3]

[3] These examples are almost certainly just the tip of the iceberg. Defendants are not always able to obtain the retainer agreements between putative class representatives and their counsel, as some courts have rejected efforts to compel

In a case in the U.S. Court of Appeals for the Ninth Circuit, the retainer agreements contained "incentive agreements" providing that class counsel would seek incentive awards for their clients that increased on a sliding scale as the settlement amount increased, but maxed out with a settlement of $10 million. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009). Accordingly, "once the threshold cash settlement was met, the agreements created a disincentive to go to trial; going to trial would [have] put their $75,000 [incentive payment] at risk in return for only a marginal individual gain even if the verdict were significantly greater than the settlement." *Id.* at 959-60. The Ninth Circuit explained that "agreements of this sort infect the class action environment with the troubling appearance of shopping plaintiffships," because "ex ante incentive agreements could tempt potential plaintiffs to sell their lawsuits to attorneys who are the highest bidders, and vice-versa." *Id.* at 960. The agreements also "implicate California ethics rules that prohibit representation of clients with conflicting interests." *Id.*

For similar reasons, the Ninth Circuit rejected a settlement agreement that conditioned incentive awards on the class representatives' support for the settlement. *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1164-68 (9th Cir. 2013). Like the incentive agreements in *Rodriguez*, the "conditional-inventive-awards

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production of those agreements during discovery. *See, e.g.*, *Piazza v. First Am. Title Ins. Co.*, 2007 WL 4287469, at *1 (D. Conn. Dec. 5, 2007) (collecting cases).

provision" created a conflict between the named plaintiffs and absent class members that rendered counsel's attempt to represent all of them a violation of California's ethical rules—a violation compounded by counsel's insistence that there was no conflict and counsel's failure to inform the court of the issue. *Id.* at 1167.

As the above examples demonstrate, there is no end to the variety of devices that certain lawyers will employ to maximize their chances of a lucrative global settlement. These devices walk right up to—and sometimes cross —the boundaries of ethics.

III. Courts Must Impose Real Consequences For Attorney Misconduct To Deter Future Abuses.

As defendant's brief details (at 50-60), the trial court's decision not to impose any remedy notwithstanding its finding of numerous ethical violations risks "denigrat[ing] . . . by indifference" the New York Rules of Professional Conduct. *Matter of Hof*, 102 A.D.2d 591, 596 (2d Dep't 1984) (quoting *Matter of Weinstock*, 40 N.Y.2d at 6).

That is a recurring theme in mass tort and class action litigation. Unfortunately, even when attorney misconduct is brought to light, the attorneys responsible all too often face few or no consequences. For example, most of the courts addressing improper provisions in retainer agreements regarding individual settlements concluded that the plaintiffs' lawyers could simply amend their agreements to remove the problematic provisions and could still serve as class

counsel. *See, e.g.*, *Tataru*, 2021 WL 38142, at *7; *Lanteri*, 2018 WL 4625657, at *5-6; *Keim*, 328 F.R.D. at 691-92; *In re Ocean Bank*, 2007 WL 1063042, at *6. In other words, once caught, the lawyers were free to walk away from their misconduct without penalty. And because these courts addressed the retainer agreements at the class certification stage, the damage had already been done. Individual settlements do not take place *after* a class has been certified, so the belated concessions were meaningless in practice.

At minimum, lawyers who commit serious ethical violations should be found inadequate to represent a class under Federal Rule of Civil Procedure 23 or its state counterparts, such as NY CPLR 901. *See Radcliffe*, 715 F.3d at 1167-68. Courts routinely hold that "the honesty and integrity of the putative class counsels" are relevant to the adequacy inquiry, given that counsel "will stand in a fiduciary relationship with the class." *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 160-61 (S.D.N.Y. 2010) (collecting cases, and holding that counsel was inadequate when they at minimum "were complicit in the misrepresentations made by the Plaintiff" and at worst "actually encouraged and counseled" them).

But a finding of inadequacy alone is not enough. Deterring future misconduct requires reaching unscrupulous lawyers where it hurts: their bottom lines. Disqualification and the denial of any attorneys' fees are therefore appropriate

remedies for addressing unethical conduct relating to improper efforts to generate client "inventory."

The Ninth Circuit's decisions in *Rodriguez* are persuasive on this point. After finding an ethical violation in its first opinion, 563 F.3d at 967-68, the court remanded for the district court to reconsider the attorneys' fee award. When the case returned to the court of appeals a few years later, the court affirmed the district court's decision to deny fees altogether to the responsible law firm. *Rodriguez v. Disner*, 688 F.3d 645, 653-58 (9th Cir. 2012). As the court of appeals recognized, "under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation," additionally noting that "[t]he representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees." *Id.* at 655; *cf.* Opening Br. 50-60 (explaining why the misconduct here warrants revocation of *pro hac vice* admission and disqualification).[4]

This Court should provide similar guidance to New York trial courts in order to deter similar misconduct in the future.

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[4] While the Ninth Circuit was applying "federal equitable principles" in *Disner*, it noted that federal courts "frequently look[] to state law for guidance in determining when an ethical violation affects an attorney's entitlement to fees." 688 F.3d at 654, 657.

CONCLUSION

This Court should acknowledge and provide guidance to New York trial courts regarding the need for meaningful relief when defendants are subjected to improper practices that violate the Rules of Professional Conduct.

Dated: October 18, 2021

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By: 
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