AFFIDAVIT OF ALEXANDER COLVIN

I, Alexander Colvin, of 302 Old Gorge Road, Ithaca, New York, MAKE OATH AND SAY THAT:

1. I am an Associate Professor in the Department of Collective Bargaining, Labor Law and Labor History at Cornell University. I have a Ph.D. in Industrial & Labor Relations from Cornell University and a J.D. from the University of Toronto. I conduct academic research in the area of employment dispute resolution, including empirical studies of employment arbitration. My *curriculum vitae* is attached to this affidavit as "Exhibit A". All statements and views expressed in this affidavit are my own and do not represent those of Cornell University.

2. The attorneys representing the plaintiff have asked me to discuss two questions relating to arbitration of employment disputes. First, how do outcomes from arbitration compare to those from litigation? Second, to what degree is there evidence of a repeat player effect favoring employers in arbitration? The information I present in answering these questions is primarily based on a study I authored entitled "Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration", which was presented at the 61st Annual Meeting of the Labor and Employment Relations Association, a leading academic association in the field, in January 2009. A copy of this study is attached as "Exhibit B" to this affidavit.

3. My study was based on analysis of data on 1,213 employment arbitration awards administered by the American Arbitration Association (the "AAA") from January 1, 2003 to December 31, 2007. This data was based on AAA filings required under Cal. Civ. Proc. Code SS 1281.96. Under this provision, arbitration service providers offering services in the state of California are required to provide a prescribed, though limited, set of information about cases they administer involving consumers or employees. Although these case information filings are based on

California Code requirements, the dataset includes all arbitrations administered nationally by the AAA over this period involving individual, nonunion employees that were based on employer promulgated arbitration agreements. It does not include arbitrations conducted under individually negotiated agreements. Although the AAA's basic case report filings are publicly available, to permit analysis I had to convert them, with the help of a team of graduate research assistants, into a database that would permit statistical analyses to be performed on it. To my knowledge, this dataset is currently the largest, most complete set of data on employment arbitration outcomes.

4. Earlier research on employment arbitration, some of which found similar outcomes from litigation and arbitration, was mostly based on smaller samples of arbitration awards which included only decisions that the parties consented to have publically available. These earlier studies also included large numbers of arbitration awards based on individually negotiated agreements, which tend to have different characteristics than arbitration awards based on employer promulgated agreements that are adhesive in nature.

5. In my study, I found that employees won 260 out of the 1,213 arbitration awards in the dataset, which is an employee win rate of 21.4 percent. This win rate is calculated using a relatively broad definition of an employee win as any case in which any amount of damages, however small, were awarded to the employee. Amongst the 260 cases in which the employee was successful, the median (typical) damage award was $36,500 and the mean (average) damage award was $109,858. (All dollar amounts reported in this deposition are converted to 2005 dollars.) When I include the cases in which zero damages were awarded, the mean damage award for all 1,213 awards was $23,548.

6. To compare arbitration outcomes to litigation outcomes, I compared my results for arbitration to outcomes from litigation reported by Theodore Eisenberg and Elizabeth Hill in "Arbitration and Litigation of Employment Claims: An Empirical Comparison" published in the *Dispute Resolution Journal* in 2003. Professor Eisenberg of Cornell Law School is a leading empirical researcher on litigation and in my judgment the results that Eisenberg and Hill report are the best available recent data on employment litigation outcomes.

7. Comparison of my results for employment arbitration to those of Eisenberg and Hill for employment litigation indicates large differences in outcomes between the two forums, with employees having significantly less success in arbitration. Whereas I found a 21.4 percent employee win rate in arbitration, Eisenberg and Hill report employee win rates of 36.4 percent for a sample of 1430 employee discrimination cases in Federal Courts, 43.8 percent for a sample of 160 state court employment discrimination cases, and 56.6 percent for a sample of 145 non-discrimination employment cases in state courts. The differences in win rates between arbitration and both federal courts and state courts are statistically significant, i.e. larger than we would expect by random chance, with a 99 percent confidence level. Whereas I found a mean award of $109,858 in arbitration cases where the employee was successful, Eisenberg and Hill report a mean award where the employee was successful of $394,223 for 408 Federal Court employment discrimination trials and $595,594 for 68 state court employment discrimination trials. The differences in award amounts between arbitration and state courts are statistically significant with a 99 confidence level (An equivalent calculation for the federal court awards cannot be made because Eisenberg and Hill do not report the standard deviation of those award amounts.).

8. To provide an overall comparison including win rates and damages, I calculate mean damage awards for all cases in each sample, i.e. including also those cases where the employee lost.

Whereas the mean award for all 1,213 arbitration awards was $23,548, the mean awards for the Eisenberg and Hill litigation results were $143,497 for the 1430 Federal Court employment discrimination trials and $260,871 for the 160 state court employment discrimination trials. By way of comparison, the mean outcome for an employee in the arbitration cases was only 16.4 percent of the mean outcome received by employees in the Federal Court trials and only 9.0 percent of the outcome of the state court trials.

9. One possible explanation for the relatively low award amounts obtained in arbitration is that the cases in arbitration may tend to involve smaller claim amounts. However, amongst the AAA arbitration cases I analyzed, the mean claim amount was $844,814 and the median (typical or 50th percentile) claim amount was $106,151. Only a quarter of the claims were less than $36,000, further indicating that most of the arbitration cases did not involve small claims.

10. My conclusion based on this analysis is that there is a large gap in outcomes between the employment arbitration and litigation forums, with employees obtaining significantly less favorable outcomes in arbitration. This data does not allow me to analyze the characteristics of the cases filed that affected these outcomes and which may partly explain the differences found. However, the findings are consistent with the results of experimental studies which have found that when presented with identical hypothetical cases, employment arbitrators are significantly less likely to rule in favor of employees than other decision-makers, including former jurors who have participated in employment discrimination trials (In particular, see an article published by three researchers at the University of South Carolina School of Business, Professors Hoyt Wheeler, Brian Klaas and Douglas Mahony, "Decision-Making about Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators and Jurors", published in *Industrial Relations*, a leading academic journal in the field, in 2006).

11. On the second question, arguments for a repeat player effect suggest that employers will have an advantage in employment arbitration compared to employees by virtue of being repeat users of this forum. In my study, in cases filed against employers who used arbitration more than once (repeat employers), the employee win rate was 16.9 percent, compared to an employee win rate of 31.6 percent in cases filed against employers who participated in only one arbitration case (one-shot employers). This difference was statistically significant, with a confidence level of 99 percent, indicating that repeat employers do better in arbitration.

12. There are a number of possible advantages that repeat employers may have in arbitration, including greater size, resources, sophistication and familiarity with the arbitral forum, as well as the possibility that arbitrators may be biased in favor of these repeat players in hopes of obtaining future business through selection in subsequent cases. To investigate whether arbitral bias is an element in the repeat employer advantage, I examined the employee win rate in cases where an arbitrator and an employer had been involved in more than once case with each other (a repeat employer-arbitrator pairing). The employee win rate in the 216 cases where there was a repeat employer-arbitrator pairing was 12.0 percent, compared to an employee win rate of 18.6 percent in the 628 cases involving employers who used arbitration multiple times but had not been involved in repeat cases with the same arbitrator. This difference was statistically significant with a 95 percent confidence level. This finding is important because it indicates that employers tend to win more cases when the same arbitrator is deciding multiple cases involving that same employer, over and beyond the generally greater win rate for employers who are repeat participants in arbitration, providing stronger evidence that arbitral bias in favor of repeat players is occurring. There is also a similar difference in damage awards, with the average award from a repeat employer-arbitrator pairing being $7,451 compared to an average award of $19,146

amounts cases involving employers who were involved in multiple arbitration cases but not with the same arbitrator. However, although large in practical terms, we cannot say that this difference is statistically significant given the high variability in damage awards.

13. On the second question, my conclusion is that there is strong evidence that employers who are repeat participants in arbitration perform better in this forum. Furthermore, the evidence indicates that employers who are involved in more than one case with the same arbitrator tend to win even more often. This latter finding supports arguments that there is a danger in employment arbitration of a repeat player bias where some arbitrators will tend to favor the employer who is a repeat player in arbitration out of hope of being selected as the arbitrator for multiple cases. This finding that there is a general tendency for arbitration to favor repeat players appearing before the same arbitrator multiple times heightens the importance of procedural protections designed to avoid potential bias in particular cases.

14. The most widely recognized set of basic procedural fairness standards for the conduct of employment arbitration are those contained in the Due Process Protocol, which is attached to this declaration. The provisions of the Due Process Protocol were developed by representatives of a number of organizations involved in labor and employment law representing employer, employee and neutral interests, including the American Arbitration Association, which has endorsed its provisions, to provide a minimum set of fairness standards for the administration and of conduct of arbitration hearings. Of particular importance for reducing the danger of repeat player bias is the provision of the Due Process Protocol indicating that parties to arbitration should be provided with the names and contact information for the parties and their representatives from recent cases decided by potential arbitrators being considered for selection. In my view, the failure to provide contact information for parties involved in previous cases with

proposed arbitrators would be a material violation of due process standards for employment arbitration given: 1) the consensus amongst experts within the field, as represented by the Due Process Protocol, that availability of such information on past cases decided by potential arbitrators is a basic fairness standard; and 2) the findings from my study indicating that there is a pattern of employers being more likely to be favored in cases where they are appearing multiple times before the same arbitrator.

15. The findings in the study described here are based on aggregate statistical analysis of the cases in the dataset. Although individual arbitrators in cases are identifiable in the dataset, there are generally insufficient numbers of cases to permit drawing statistical inferences for specific arbitrators. I was able to identify three cases in the dataset decided by the arbitrator who decided the present case, Arbitrator Melva Harmon. The employers involved in these three cases were Dillard's, Swift Transportation Co., and Kellogg, Brown & Root. The employees involved in these cases, whose names are not included in the dataset (since names of the employee parties to cases are not required to be provided under the California Code filings requirements), were unrepresented by counsel in all three cases. The employers won each of these three cases decided by Arbitrator Harmon. However, given the limited number of cases involved it is not possible to draw any reliable inferences from statistical analysis of such a small sample size.

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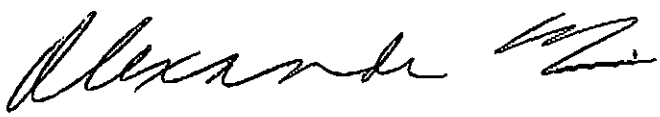

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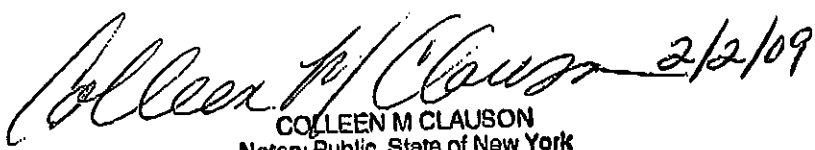

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Commission Expires April 27, 20 11