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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE LICEA and SONYA VALENZUELA, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CINMAR, LLC, a Delaware limited liability company, and DOES 1 through 25, inclusive,

Defendants.

Case No. 2:22-cv-06454-MWF-JEM

THE RETAIL LITIGATION CENTER INC.'S

(1) *EX PARTE* APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT CINMAR, LLC'S MOTION TO DISMISS

(2) MEMORANDUM OF POINTS AND AUTHORITIES

(3) DECLARATION OF P. CRAIG CARDON IN SUPPORT OF EX PARTE APPLICATION RE URGENCY AND RE NOTICE

Hon. Michael W. Fitzgerald

[*Proposed Order Submitted Concurrently Herewith*]

***EX PARTE* APPLICATION**

Proposed *amicus curiae* The Retail Litigation Center, Inc. (the "RLC") hereby applies *ex parte* to this Court for an order granting the RLC leave to file the *amicus curiae* brief attached as **Exhibit A** to the supporting Declaration of P. Craig Cardon filed concurrently, in support of the Motion to Dismiss filed by Defendant Cinmar, LLC ("Defendant" or "Cinmar"). The RLC is a trade association dedicated to representing leading retailers in matters before the judiciary. Dozens of RLC members have received demand letters or complaints with claims virtually identical to those made against Cinmar, each alleging far-reaching and far-fetched violations of the California Invasion of Privacy Act ("CIPA"). Given the broad perspective the RLC has by virtue of its position as an industry association, the RLC can provide insight into the relevant issues beyond that which can be provided by the parties.

Accordingly, this Application is made under the Court's widely recognized discretion to permit *amicus* briefs, given that the decision on the Motion will likely affect all of the RLC's members, and the RLC's resulting strong interest in the outcome of the proceedings. Not only does the decision directly affect those members who have already had complaints filed against them or received demand letters, but the decision also indirectly affects the remainder of the RLC's members, which are likely to receive similar demands in the future, either from Plaintiffs' counsel or a copycat. The RLC thus respectfully asks this Court to grant the RLC's request to file the *amicus curiae* brief in support of the Motion to Dismiss. If the Court grants this Application, the RLC proposes to give the Plaintiffs an opportunity to respond by January 11, 2023.

Under L.R. 7-19, counsel for all parties have been contacted concerning this Application. Cinmar has consented to the filing of this Application. On December 12, 2022, during the L.R. 7-3 conference concerning Cinmar's then proposed Motion to Dismiss, counsel for Cinmar informed Plaintiffs' counsel that the RLC would like to file an *amicus curiae* brief and requested that Plaintiffs stipulate to

permitting the RLC to submit such a brief and, in the alternative, informed Plaintiffs of the RLC's intent to submit this *ex parte* Application absent a stipulation. Plaintiffs' counsel declined to so stipulate, and indicated their desire to oppose this Application. Plaintiffs' lead counsel's contact information is:

Mr. Scott Ferrell, Esq.
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In accord with this Court's Standing Order, prior to service of this Application, the RLC notified Plaintiffs' counsel that this Application would be forthcoming and that opposing papers must be filed no later than 24 hours after service of this Application. *See* **Exhibit B** to the supporting Declaration of P. Craig Cardon filed concurrently. The RLC anticipates that Plaintiffs will file an opposition to this Application within 24 hours of service.

Good cause exists to grant this Application on an *ex parte* basis because, unless this Application is granted, the RLC will not have an opportunity to be heard regarding the Motion to Dismiss, resulting in potentially irreparable harm to the RLC and its members. *Mission Power Eng'g Co. v. Cont'l Cas. Co*., 883 F. Supp. 488, 492 (C.D. Cal. 1995). There is not sufficient time to hear a regularly noticed motion prior to the hearing on the Motion to Dismiss, which is presently set for January 30, 2023. If the Court denies the Application, both Defendant Cinmar and the RLC will be prejudiced as the Court will lose the opportunity to consider the perspective that the RLC can bring to bear on the issues involved in this critical decision. Further, there can be no prejudice to Plaintiffs; under the RLC's proposal, Plaintiffs will have an opportunity to respond to the *amicus* brief.

The RLC's Application for Leave To File is based on this *ex parte* Application, as well as the accompanying memorandum of points and authorities, the Declaration of P. Craig Cardon, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any

argument or evidence that may be presented to or considered by the Court prior to its ruling. The RLC respectfully requests that the Court permit the filing of the *amicus curiae* brief. A proposed order is lodged concurrently with this Application.

Dated: December 21, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ P. Craig Cardon*
P. CRAIG CARDON
Attorneys for RETAIL LITIGATION CENTER, INC.

Dated: December 21, 2022 DEUTSCH HUNT PLLC

By */s/ Hyland Hunt*
HYLAND HUNT
ALEXANDRA MANSBACH
Attorneys for RETAIL LITIGATION CENTER, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Proposed *amicus curiae* the Retail Litigation Center, Inc. (the "RLC") applies *ex parte* for leave to file the *amicus curiae* brief attached as **Exhibit A** to the supporting Declaration of P. Craig Cardon filed concurrently, in support of the Motion to Dismiss filed by Defendant Cinmar, LLC ("Cinmar" or "Defendant") in response to Plaintiffs' Jose Licea and Sonya Valenzuela ("Plaintiffs") claims for violation of the California Invasion of Privacy Act ("CIPA") Cal. Penal Code §§ 630 *et seq.* The RLC requests an opportunity to provide further background on the allegations at issue, which threaten all of the RLC's retail members. The RLC is regularly granted permission to file *amicus curiae* briefs, including at the district court level, when its members' interests are at stake. Amicus participation is particularly important here because the RLC's members, and the industry as a whole, are facing large legal costs to combat baseless claims that jeopardize retailers' ability to help their customers using what has become a ubiquitous and essential customer service channel - internet chat features on retailer websites. The RLC has a unique perspective on these issues. If leave is granted, the RLC proposes a deadline of January 11, 2023 for Plaintiffs' response.

The RLC has provided timely notice of this Application (*See* Declaration of P. Craig Cardon ("Cardon Decl."), ¶3.) The RLC understands that counsel for Plaintiffs intends to oppose this Application within 24 hours of receipt of service. (*Id.*)

For these and the reasons discussed below, the Court should grant leave to the RLC to file the *amicus curiae* brief and should consider the brief prior to ruling on Cinmar's Motion to Dismiss.

II. BACKGROUND

This action is one of about 70 virtually identical suits Plaintiffs' counsel Scott Ferrell has filed in California state and federal courts since July 2022, with more

being filed daily. *See* Def.'s Mot. to Dismiss, Dkt. 26, at 4 (Dec. 19, 2022). Plaintiffs' counsel has also sent over one hundred demand letters to retailers across the country. These complaints and demand letters all allege that the retailers are violating CIPA because they are keeping the written communications sent to them by their customers via a customer service chat function on their websites that is akin to an instant-message platform. The nature of these allegations should give anyone pause, because they cast an everyday, common means of customer support as illegal - indeed criminal - on the theory that keeping a copy of the written communications that customers send to retailers is a wiretap. Under Plaintiffs' theory, a small store in Maine that sets up a website chat feature to help its online customers around the country, including in California, obtain fast, easy answers to their questions is now exposed to huge statutory damages - potentially hundreds of millions of dollars for larger stores. [1] Because these cases involve issues with broad ramifications for retailers and other consumer-facing businesses that conduct business through websites (including the many companies who are members of the RLC), the RLC should be permitted an opportunity to offer its views on the law applicable to this case and the ramifications of an order permitting Plaintiffs' claims to proceed beyond a motion to dismiss.

The Retail Litigation Center is the only trade organization dedicated solely to representing the retail industry in the judicial system. Its members include many of the country's largest and most innovative retailers. Collectively, the RLC's members employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives

[1] Plaintiffs' counsel's suits are hardly limited to large nationwide retailers, but also include smaller businesses like a car dealership. *See* Class Action Compl., *Esparza v. UAG Escondido A1 Inc., d/b/a Acuraofescondido.com*, Case No. 37-2022-00047997-CU-MT-CTL (Cal. Super. Ct. San Diego Cnty.) (Defs. Request for Judicial Notice, Exh. 63).

on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 200 judicial proceedings on a wide range of issues important to retailers. Its *amicus* briefs have been favorably cited by courts including the U.S. Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc*., 586 U.S. 519, 542 (2013).

Most importantly here, the RLC was granted permission by Judge David O. Carter to participate as an *amicus* in one of the nearly identical CIPA cases filed by Plaintiffs' counsel in the Central District of California, *Cody v. Boscov's, Inc.*, Case No. 8:22-cv-1434, presently before Judge Sunshine S. Sykes. (*See* Cardon Decl., ¶5; **Exhibit C**.) The RLC has also been granted permission to participate as an *amicus* at the district court and trial level in many other situations comparable to this case, where serial complaints alleging meritless claims were filed against retailers. *See, e.g.*, *Murphy v. Kohl's Department Stores, Inc*. Case No. 1:19-cv-09921-GHW; *Matzura v. Red Lobster Hospitality LLC*, No. 19 Civ. 9929 (MKV)(DCF); *Lopez v. Kahala Restaurants, L.L.C.*, No. 19 Civ. 10077 (AJN) (S.D.N.Y.); *Mendez v. Outback Steakhouse*, 19 Civ. 9858 (JPO) (S.D.N.Y.); *Camacho v. Dave & Buster's Ent. Inc.*, 19 Civ. 6022-GRB-RER (E.D.N.Y.); *Tucker v. Saks Fifth Avenue LLC*, 19 Civ. 10289 (LTS)(RWL) (S.D.N.Y.); *Tucker v. Ulta Beauty, Inc.*, 19 Civ. 9845 (KPF) (S.D.N.Y.); *Dominguez v. Taco Bell Corp.*, 19 Civ. 10172 (LGS) (S.D.N.Y.); *Dominguez v. Athleta, LLC*, No. 19 Civ. 10168 (GBD) (S.D.N.Y.). In one such case, the court cited to the RLC's *amicus* brief in its decision granting defendant retailer's motion to dismiss after recognizing that the New York district courts had "been flooded with litigation from a handful of plaintiffs seeking injunctive relief, compensatory damages, and, of course, attorneys' costs and fees" for litigation "premised on the meritless argument" regarding the Americans with Disabilities

Act. *Dominguez v. Banana Republic*, No. 19 Civ. 10171 (GHW) (S.D.N.Y.) (citing the RLC's *amicus* brief at fn. 7).

The RLC's participation at the district court stage can help the Court understand the broader context in which this suit arises, including the critical role that chat plays in modern customer service, and the sweeping consequences of adopting Plaintiffs' theory, which risks subjecting written internet communications with customers to never-ending, ever-shifting compliance demands or discouraging retailers from offering chat options to consumers.

III. ARGUMENT

A. This Court Has Discretion To Permit the Submission of the Amicus Brief and Leave to File *Amicus* Briefs Is Liberally Granted

The district court has broad discretion to grant *amici curiae* the opportunity to submit briefing to the Court, and such decision will only be reversed if the district judge has abused their discretion. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds, Sandin v. Conner*, 515 U.S. 472 (1995); *see also Earth Island Inst. V. Nash*, No. 119CV01420DADSAB, 2019 WL 6790682, at *1 (E.D. Cal. Dec. 12, 2019). "'There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable to the court.'" *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (quoting *United States v. Louisiana,* 751 F. Supp. 608, 620 (E.D. La. 1990)); *see also California v. United States DOI*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019).

Generally, courts have liberally allowed *amici curiae* to be heard in a pending case. *Roxford Foods*, 790 F. Supp. At 997; *see also Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007). District courts "frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the

court beyond the help that the lawyers for the parties are able to provide.'" *Sonoma Falls Dev., LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)).

In sum, *amicus* briefs are permitted when the issues at hand have potential ramifications beyond the parties directly involved and the proposed *amici* are "helpful." *Earth Island Inst.*, No. 119CV01420DADSAB, 2019 WL 6790682, at *4. Under these standards, there is ample reason for the Court to permit the RLC to submit an *amicus* brief.

B. The Legal Issues in This Case Have Potential Ramifications Beyond the Parties Directly Involved

Any decision on the issues pending before this Court will have broad ramifications for the retail industry. As noted above, there are nearly 70 suits pending in California making nearly identical allegations and over one hundred similar demand letters that have been received by California retailers. In the absence of a decision squarely addressing and repudiating these claims at the pleadings stage, retailers and RLC members will be required to pay legal fees to combat meritless claims through summary judgment, class certification, trial, and so on. Recognizing that retailers and others face such legal fees, Plaintiffs and their counsel are actively seeking to extract settlements on scores of meritless claims.

These non-party retailers, all of whom are affected by the decision in this case either directly or indirectly, are best represented by the RLC as an *amicus* in this action. The RLC, as a trade organization dedicated to representing the retail industry in the judicial system, can offer the Court the perspective of its members and the industry as a whole, as well as the ramifications that a decision in this case may have. Accordingly, the Court should permit the RLC's *amicus* participation to enable the most informed possible briefing on these important issues.

C. The RLC Has Useful Insights and Will Submit a Helpful *Amicus* Brief

With the permission of the Court, the RLC intends to submit the *amicus curiae* brief to build upon the parties' briefing by explaining how chat works, its prevalence, how it benefits consumers and retailers, and how far afield today's website chat functions are from the type of espionage and eavesdropping that CIPA was enacted to prevent. The RLC's brief discusses why and how these issues are affecting the retail industry as a whole - issues that Cinmar (as a single retailer) is not as well positioned to convey.

As a national organization, the RLC has unique perspectives on the importance of preserving CIPA's express, statutorily crafted boundaries. This action and all of the similar ones that have been filed challenge these fundamental boundaries and threaten the ability of retailers to serve their customers well. Where, as here, the answers to questions of statutory interpretation are likely to have an impact beyond a single case, trade group insights are "useful" and "desirable" to the Court. *Roxford Foods*, 790 F. Supp. at 997.

D. Plaintiffs' Potential Arguments Opposing *Ex Parte* Relief Lack Merit

During the meet and confer process, Plaintiffs indicated that they will oppose the *ex parte* Application and the RLC's participation as an *amicus*. Any potential arguments Plaintiffs may use to oppose this Application lack merit.

First, Plaintiffs may argue that the Federal Rules of Civil Procedure include no express rule addressing *amicus* participation in the district court. True, but beside the point, as district courts' authority to permit *amicus* participation is well-established.

Second, Plaintiffs may argue that the RLC delayed in seeking to file an *amicus* brief. Not so. The RLC is filing this application just 2 days after Defendant's Motion to Dismiss, enabling it to review that filing to ensure that its

proposed brief does not repeat arguments made by the parties, and to attach the proposed brief to the application to aid the Court's consideration of whether to grant leave to file. Further, the RLC's proposal will provide Plaintiffs a full opportunity to respond to the *amicus* brief, without delaying the hearing or extending the case schedule at all. There can thus be no prejudice to Plaintiffs.

Third, Plaintiffs will likely argue that the RLC cannot show irreparable injury. Because there is not sufficient time for the RLC to file a regularly noticed motion, *ex parte* relief is appropriate, and irreparable injury would exist without it.

Fourth, Plaintiffs may argue that the RLC's participation may spur further participation by other interested entities. But that isn't prejudice. If anything, it demonstrates that this case and its evolution have broad ramifications that the Court should consider when it rules.

IV. CONCLUSION

The RLC respectfully asks this Court to grant this *ex parte* Application to file the attached *amicus curiae* brief, with a January 11, 2023 deadline for Plaintiffs' response.

Dated: December 21, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ P. Craig Cardon*
P. CRAIG CARDON
Attorneys for RETAIL LITIGATION CENTER, INC.

Dated: December 21, 2022 DEUTSCH HUNT PLLC

By */s/ Hyland Hunt*
HYLAND HUNT
ALEXANDRA MANSBACH
Attorneys for RETAIL LITIGATION CENTER, INC.

DECLARATION OF P. CRAIG CARDON

I, P. Craig Cardon, declare as follows:

1. I am an attorney who is licensed to practice law in the State of California and a partner at Sheppard, Mullin, Richter & Hampton LLP, attorneys of record for the Retail Litigation Center ("RLC"). The facts stated in this Declaration are known to me based on my personal knowledge except where noted on information. If called as a witness, I could and would competently testify under oath to the truth of such facts.

2. A true and correct copy of RLC's proposed *amicus curiae* brief in support of Cinmar's Motion to Dismiss (the "Motion") and corresponding Request for Judicial Notice is attached hereto as **Exhibit A.**

3. *Ex Parte* Notice. I am informed by counsel for Cinmar that on December 12, 2022, counsel for Cinmar engaged in the L.R. 7-3 conference with Plaintiffs' counsel regarding Cinmar's then proposed Motion to Dismiss. During that conference, at my request, counsel for Cinmar informed counsel for Plaintiffs that the RLC would like to file an *amicus curiae* brief in this case and asked if Plaintiffs would stipulate to such filing. Plaintiffs' counsel declined to stipulate and counsel for Cinmar stated that the RLC would be seeking leave to file as an *amicus curiae* via an *ex parte* application. Prior to the filing of this Application I sent counsel for Plaintiffs, Scott Ferrell and Dave Reid, an email notifying them of this impending filing (which would be served on counsel of record via the ECF system) and that they could file an opposition within 24 hours of service of this application. A true and correct copy of this December 21, 2022 email is attached hereto as **Exhibit B.**

4. Urgency. If the RLC is not permitted to file an *amicus curiae* brief prior to the hearing on the Motion, the RLC will not have an opportunity to be heard prior to the Court's decision on this matter. As the Motion threatens to affect matters of significant importance to the RLC's members, it is appropriate for the Court to

consider the RLC's input and expertise on the issues. For these reasons, it is urgent that the Court permit the RLC to file its *amicus curiae* brief.

5. A true and correct copy of Judge David O. Carter's November 2, 2022 Order granting the RLC's *ex parte* application for leave to file an *amicus* brief in *Cody v. Boscov's, Inc.*, Case No. 8:22-cv-1434 is attached hereto as **Exhibit C.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on December 21, 2022, at Palm Springs, California.

/s/ P. Craig Cardon
P. Craig Cardon

EXHIBIT A

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Attorneys for *Amicus Curiae*, Retail Litigation Center, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE LICEA and SONYA VALENZUELA, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CINMAR, LLC, a Delaware limited liability company, and DOES 1 through 25, inclusive,

Defendants.

Case No. 2:22-cv-06454-MWF-JEM

RETAIL LITIGATION CENTER, INC.'S AMICUS BRIEF IN SUPPORT OF DEFENDANT CINMAR, LLC'S MOTION TO DISMISS

Judge: Hon. Michael W. Fitzgerald

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I. INTEREST OF AMICUS CURIAE

The Retail Litigation Center ("RLC") is the only trade organization dedicated solely to representing the retail industry in the judicial system. Its members include many of the country's largest and most innovative retailers. Collectively, the RLC's members employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus* in more than 200 judicial proceedings on a wide range of issues important to retailers. Its *amicus* briefs have been favorably cited by courts, including the U.S. Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 586 U.S. 519, 542 (2013).

The RLC files an *amicus* brief here because this case has broad ramifications for retailers and other consumer-facing businesses that engage in commerce on the internet, including many RLC members. This action is one of more than 30 virtually identical suits pending in California. Plaintiffs in these suits are all represented by the same counsel, who has sent over one hundred demand letters to retailers alleging that they are violating the California Invasion of Privacy Act ("CIPA") by allowing customers to initiate "chats" with retailers' agents on the retailers' websites.

But CIPA - a criminal statute passed to combat illegal wiretapping during the Cold War - has nothing to do with consumer chats. Chat is a vital part of today's retailers' customer service and is valued by consumers, particularly those who purchase goods and services online. Customers appreciate the ability to communicate immediately with a retailer's representative and obtain swift answers to their questions. Chat also offers customers the ability to exchange photos or screenshots with a representative and to multi-task. For these reasons, chat is many consumers'

preferred method of communication with customer service. Despite the creative attempts of the plaintiffs' attorney here, CIPA - aimed at wiretapping and eavesdropping - does not criminalize this routine and valuable consumer service.

II. INTRODUCTION

Imagine the following scenario: It is early December and you've just purchased the perfect holiday gift for your grandchild on the internet from a small store on the East Coast that specializes in hard-to-find collectibles. But as the days pass, you have yet to receive a shipping notification and you become worried the gift will not arrive in time. You attempt to call the store, but get voicemail; your work schedule and the time zone difference make it difficult to call when the store is open. Luckily, however, the voicemail greeting mentions that the store's website has a "chat" feature - a fast way to get your questions answered without waiting for a call back. You quickly log onto the retailer's website, find the "chat" function, and type a message explaining that you have a question about the estimated date of shipment and delivery. Within seconds, the agent (automated or 'live') on the other end of the chat asks for your order number and is quickly able to provide you with the good news: the item will ship tomorrow and be delivered the day after, just in time. The entire interaction is completed in mere minutes.

Plaintiffs target this important and efficient form of customer service, one that is a boon to consumers and retailers alike and of particular importance for smaller retailers that lack capacity to handle a large volume of customer service phone calls. Of course, retailers provide multiple ways for customers to contact them; no one need chat unless they choose to. But most do. Chat is preferred by customers who appreciate and benefit from the ability to document their interactions and expect that retailers will keep track of the communication - just as with an email or any other form of internet communication - in case of follow up. Because customers and retailers alike find it very helpful, chat is now ubiquitous.

Plaintiffs have seized on the ubiquity of chat to target the retail industry with over a hundred demand letters making nearly identical allegations. If Plaintiffs were to succeed in characterizing the chat function as an illicit wiretap, it would not only set an unwarranted litigation trap for hundreds of thousands of retailers across the country. Consumers would be the ultimate losers. In this context - where customers not only expect but demand that retailers save a record of their communications, so that they need not repeat themselves if they seek follow up - some sort of disclaimer that a chat "may be recorded and saved" is both silly and unnecessary. Anyone web savvy enough to use a website chat feature understands that written communications sent to others over the internet are automatically saved. Nor is it as simple as saying a disclaimer solves the issue, because that just gives rise to more uncertainty about what it must say, where it must go, and so on. And as long as there is uncertainty, retailers will continue to face demand letters for meritless claims and wasteful litigation costs. What's more, many other entities besides retailers have installed a chat function on their website to aid the public. Any of them could unexpectedly be served with a demand letter and costly lawsuit alleging a violation of CIPA, too.

This lawsuit attempts to twist a Cold-War era criminal statute meant to thwart industrial espionage into a tool to penalize entities that offer people the choice to use a website chat feature for convenient and speedy service. This lawsuit should not be allowed to survive the pleading stage. The RLC thus respectfully asks this Court to swiftly dismiss the claims in this bellwether case and send a strong message about the infirmity of such lawsuits. Any other result may subject the retail industry (and others) to millions of dollars in legal fees to combat meritless litigation and deprive customers from accessing new and valued forms of customer service.

III. ARGUMENT

A. Chat Functions Are Vital to Consumers and Retailers Alike

1. How chat works

Online retail has grown exponentially since the 1990s, especially as most traditional brick-and-mortar stores have expanded their internet presence and become omnichannel retailers. As retailers have developed their websites as forums for selling goods, they have simultaneously built multiple different channels for customers to receive information and support.

Over the past twenty years, as an alternative to sometimes frustrating automated phone trees and long wait times, many businesses have added a "chat" function to their websites. Such chats allow any person visiting the site to connect immediately with a retail representative. Similar to SMS texting, the customer can type directly into the chat window and hit "send"; the message is instantaneously transmitted to and saved on the retailer (recipient's) computer system or device so that it can be displayed to both the customer (sender) and the retailer (recipient). The retailer or its agent can type and send a message as a response, which is then displayed to both parties. Sometimes a retailer's customer service representatives respond to customer queries in writing just as a telephone representative would orally. Sometimes the retailer first starts with an automated "chatbot" responding to customer questions, selecting the most appropriate from a wide range of pre-set answers, or providing customized answers through automated queries (for example, by looking up an order status). If a customer indicates that the chatbot answers are insufficient, the chatbot may direct the customer to the appropriate human representative. Most retailers (especially smaller retailers) do not have the capacity to develop chat functionalities in-house but instead typically buy an "off-the-shelf" chat function (either live chat or chatbot or both), which they can install on their websites.

In either instance, the chat is identical to any electronic "instant message" system (such as AOL instant messenger or Microsoft Teams chat). It works similarly to a text message in that what a user sends to the other party is instantly transmitted, saved, and displayed for both the sender and recipient, usually in a dialog box that contains all the prior entries in the conversation. Just as with text messages, it often

aids understanding to be able to see the entire conversation at once, which is why a chat typically displays both correspondents' entries chronologically. And just as with text messages, the chats are not automatically deleted upon receipt.

Website users rely on chats for many different purposes. On retail websites, shoppers may use chat for: help finding certain merchandise; to obtain details about a specific product; to ask questions about shipping, returns, or other logistics; to follow up with an existing order; for more information about store policy, hours, and locations; or for help placing a new order. Sometimes the chat is wholly anonymous in the sense that the customer does not enter any personal or identifying information; this is most common when the customer has generic questions about a product, the website, or the retailer. Sometimes a customer may need to give the retailer's representative more information to allow the agent to help answer their question. For instance, if a customer wants to ask about the status of an order she has placed, she will need to type her order number or other specific information into the chat so that the agent can find the order and answer the questions posed.

2. Chats are so helpful that they are preferred by consumers

The main reason for the exponential growth of retail website chat is that consumers want prompt answers to their questions. By allowing a customer to type her message into chat and send it directly to the business's customer service representative, the customer can get an immediate answer to her question rather than waiting for an e-mail response, navigating phone menus, or waiting on hold. *See, e.g.*, Bernard May, *The Rise Of Live Chat, Chatbots, And Text Message Marketing*, Forbes Agency Council (July 23, 2019, 6:00 am), https://tinyurl.com/58b8xtf3 ("Live chat gives customers an alternative to calling a customer service number, which takes time and can fuel frustration."); MDS Brand, *The history of live chat and how it transformed customer service*, MDS Brand Blog, https://tinyurl.com/4e2rfzc5 ("Eliminating having to wait on hold over the phone to have a simple question answered is the instant gratification and fast paced resolution that customers love.").

Seventy-nine percent of survey respondents found "the immediate replies of live chats to be the most important benefit of the channel." Anil Soeyuenmez, *Live Chat for Websites: Everything you need to know!*, Messengerpeople.com (June 15, 2022), https://tinyurl.com/2xst3rd2. This fast response time explains why chat is "more popular than e-mail and phone for communicating with companies" and why "live chat has the highest customer satisfaction rate out of all channels with 73 percent." *Id.*; *see also* Haniya Rae, *Inside Retail's Live Chat Revolution*, Forbes (Mar. 30, 2017, 11:45 pm), https://tinyurl.com/a7af3bx7.

Chat has many other benefits for consumers. Users appreciate that chat allows them to send website links back and forth to the retailer's agent to troubleshoot a problem, to send pictures to a representative (*e.g.*, a picture of a damaged product), and to receive a screenshot with instructions if they are less tech-savvy. Similarly, chat allows customers to have an accurate visual record of the information they receive, rather than needing to write down a long order or product number. And because the chat function is written rather than spoken, regardless of the language used, customers can have their message translated seamlessly to the retailer's customer service representative. Likewise, customers who are hard of hearing are able to see the chat unfold in front of them, making it easier for them to follow. Finally, customers appreciate that they can use chat to get help while completing other tasks at the same time; chat "opens the door for multitasking; type a question over live chat, go back to what you were doing, and in minutes there is a response waiting." MDS Brand, *The history of live chat and how it transformed customer service*, MDS Brand Blog, https://tinyurl.com/4e2rfzc5.

Chat is also beneficial for retailers. Aside from pleasing customers and helping to complete transactions in an efficient and timely manner, chat can quickly ensure that customers have accurate information, with a minimum of retail worker time. Anil Soeyuenmez, *Live Chat for Websites: Everything you need to know!*, Messengerpeople.com (June 15, 2022), https://tinyurl.com/2xst3rd2. Moreover,

chatbots can answer some of the most routine queries, and save human representatives' time by already having gathered some information about the user's questions or issues. And one representative can chat with multiple people at once, which is not possible on the phone. Bernard May, *The Rise Of Live Chat, Chatbots, And Text Message Marketing*, Forbes Agency Council (July 23, 2019, 6:00 am), https://tinyurl.com/58b8xtf3. Chatbots can also offer information and answer customer questions 24 hours a day, seven days a week. *Id.*

One important positive feature of chats for customers and retailers alike is the documentation of the communication. For internet chat to function, a written chat log is necessarily created as the chat progresses. Indeed, the consumers *watch and participate in* the creation of that chat log. This log is useful for customers for several reasons. First, the customer can retain the chat for her own records, to help remember what was said (such as an expected shipping date) or to have proof in case there is any later dispute (such as a promised discount or refund). Second, sometimes customers have follow-up questions later or may need to continue the support via phone. If the retail representative knows the details of the customer's issue, it saves the customer from the frustration of repeating detailed information that was already recounted, for a second or third time. This helps retailers, too, because a representative in a later interaction with the same customer can better understand the context of the customer's issue and solve the problem more quickly.

Not only are chat logs incredibly useful for both consumers and retailers, but consumers expect chat logs to be retained. The nature of written communication, especially on the internet, ensures that nothing is ephemeral. Just as the writer of a letter can expect the recipient to keep the letter (especially if it contains important financial or logistical information), and the sender of a fax can expect the recipient to keep the fax for their records, the sender of an e-mail, text message, or chat can expect the recipient to retain an electronic copy. This is so commonly understood by internet

users that the exceptions prove the rule.[1] When there is a rare internet service for which written communications are *not* retained for very long, this impermanence is a selling feature.[2] For instance, the popular messaging application "Snapchat" is premised on the idea that private messages or photos sent over the app are automatically deleted from Snapchat servers after viewing and cannot be re-viewed, saved, or retained by the recipient. *Snapchat 101: What It Is and How to Use it*, Verizon.com, https://tinyurl.com/2p8kn7ba ("Snapchat, which has become hugely popular, lets you share images or video clips to your friends. But there's a twist: They can only be viewed for a matter of seconds."). In fact, the application goes so far as to notify a sender if the recipient has taken a screenshot to attempt to retain the message or photo. Billy Gallagher, *You Know What's Cool? A Billion Snapchats: App Sees Over 20 Million Photos Shared Per Day, Releases On Android*, TechCrunch (Oct. 29, 2012, 9:00 am), https://tinyurl.com/bdfzkbwy. If all internet communications disappeared after receipt, Snapchat would have no market.

The common presumption (and reality) that all written communications over the internet are retained by the recipients demonstrates the absurdity of Plaintiffs'

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[1] The common understanding is reflected in the case law, which holds that "individuals cannot have a reasonable expectation that their online communications will not be recorded" because "*[e]veryone who uses a computer knows that . . . participants in chat rooms can print the . . . chat logs and share them with whoever they please, forward them or otherwise send them to others*." *In re Google*, No. 13–MD–02430–LHK, 2013 WL 5423918, at *22-23 (N.D. Cal. Sept. 26, 2013) (collecting cases) (dismissing Section 632 claim arising from purported interceptions of emails).

[2] Even with a service like Snapchat, communications are necessarily retained for some amount of time, because an internet communication must be saved to the recipient's device (at the very least) for the communication to be displayed and received. The fact that web chat is conducted in a "recorded" form by definition is just one among many reasons why one of the parties saving a chat "transcript"—or not immediately deleting it—does not violate CIPA. *See* Defs. Mot. to Dismiss, Dkt. No. 26, at 22-24 (Dec. 19, 2022).

contention that all chats must conspicuously display some sort of disclaimer that the chat is being saved. Such a disclaimer is wholly unnecessary for consumers, who understand that already. And it is unlikely that adding disclaimers would end the litigation shell game, as counsel would likely find new ways to challenge the disclaimer as insufficient or otherwise wanting in an effort to extract quick settlements. *See* pp. 14-15, *infra*.

The numbers prove the utility of chat - and the associated chat logs - to consumers. Failing to offer chat could place a retailer at a commercial disadvantage since, "71% of customers expect brands to provide customer support through digital messaging platforms." Jenny Chang, *166 Relevant Live Chat Software Statistics: 2022 Data Analysis & Market Share*, FinancesOnline (Nov. 8, 2022), https://tinyurl.com/4thmkt6c. Chat is now ubiquitous. As many as 74% of retailers use it, Anil Soeyuenmez, *Live Chat for Websites: Everything you need to know!*, Messengerpeople.com (June 15, 2022), https://tinyurl.com/2xst3rd2, and 60% of customers between ages 18 and 34 "regularly use live chat for customer service," Bernard May, *The Rise Of Live Chat, Chatbots, And Text Message Marketing*, Forbes Agency Council (July 23, 2019, 6:00 am), https://tinyurl.com/58b8xtf3.

Retailers are not alone in implementing chat as a source of information and support. Government agencies use it too, including the Department of Education, https://studentaid.gov/, and the Internal Revenue Service. *See* Darren Guillot, *Using Voice and Chat Bots to Improve the Collection Taxpayer Experience*, irs.gov (Sept. 29, 2022), https://tinyurl.com/yk6wja3e; *see generally* Tonya Beres, *Should Your Agency be Offering Chat Service?*, Digital.gov (July 28, 2014), https://tinyurl.com/3xep8vpj. The IRS chat service (using a chatbot) launched in December 2021; since then, it has handled 450,000 taxpayer inquiries and resolved about 40% of questions without human assistance. *See* Guillot, *supra*. State agencies also use chat, from the California Secretary of State (for election questions), https://www.sos.ca.gov/elections, to the California State Library,

https://library.ca.gov/chat/. So do courts. *See, e.g.*, U.S. Court of Appeals for the Tenth Circuit, https://www.ca10.uscourts.gov/. Schools, too. *See, e.g.*, Los Angeles Southwest College, https://www.lasc.edu/. Far from being illegal or nefarious**,** online chat functions on websites are routine and valued by consumers and retailers alike, as well as other many other kinds of entities that have public-facing websites.

B. CIPA Was Enacted during the Cold War to Penalize Clandestine Wiretapping, Not Voluntary, Ordinary Communications between Businesses and their Customers.

Internet chat did not exist when CIPA was introduced in 1967, in the throes of the Cold War. But ordinary written communications between businesses and their customers were commonplace - including business letters that could be photocopied and saved by their recipients. CIPA was not designed to police such quotidian activities. Rather, its focus is the clandestine interception of private communications, a world apart from the ordinary business interactions between senders and recipients at issue here.

CIPA's enactment was prompted by new technologies that made it easier to engage in industrial espionage and electronic snooping, wiretapping, and bugging. CIPA's sponsor explained that "businessmen and private citizens are seriously concerned over the problem of the ready availability of these electronic 'bugging' devices," Statement of Assembly Speaker Jesse M. Unruh before the Senate Committee on Judiciary on Assembly Bill 360 Relating to Invasions of Privacy (June 8, 1967) at 6, which allow for "unethical industrial espionage and spying operations," "render[ing] the businessman unable to develop new products without fear of having these developments discovered by a competitor through illegal means," Statement of Assembly Speaker Jesse M. Unruh (Mar. 1, 1967). (*See* Request for Judicial Notice ("RJN"), at Exhibit A-(1-2).) CIPA was a response to these concerns and was specifically "intended to put a stop to" "increasing intrusion into [] private affairs by those who would interfere with private communications by eavesdropping with

sophisticated electronic devices and wiretapping." Letter from Assembly Speaker Jesse M. Unruh to Craig Biddle, Chairman, Criminal Procedure Committee (Mar. 16, 1967) (*See* RJN, at Exh. A-3.)

To deter these espionage activities, CIPA was enacted as a criminal statute, with treble damages and potential jailtime. The bill's sponsor explained that "[t]he availability of a civil action for the recovery of triple damages should prove to be an effective deterrent in cases where wire-tapping or eavesdropping is connected with industrial espionage." Statement of Assembly Speaker Jesse M. Unruh Relative to Assembly Bill 860 (A Bill to Curb Invasions of Privacy) (Mar. 14, 1967) (*See* RJN, at Exh. A-4.) CIPA thus aimed to "severely restrict the private 'snooper' from invading the privacy of our citizens." Statement For The Floor on Assembly Bill 860 Relating to Invasions of Privacy (May 2, 1967) at 4 (*See* RJN, at Exh. A-5.) It was not meant to prevent members of the public from engaging in legitimate communication. In fact, the bill's sponsor made clear that the bill targeted only "clandestine overhearing, recording and eavesdropping upon an individual's private, confidential communications," but it would remain "perfectly legal," for instance, for entities such as public utilities "to monitor business calls, to insure proper service of customers by employees." Letter from Assembly Speaker Jesse M. Unruh to Charles L. Gould, Publisher, San Francisco Examiner (June 30, 1967) (*See* RJN, at Exh. A-6.) From the outset, CIPA's remit was protecting confidential communications from illicit snooping, not policing ordinary business-customer interactions. This anti-espionage statute should not be stretched to reach non-confidential business communications between customers and retailers simply because they utilize modern technology.

And there is no textual warrant for doing so. *See* Defs. Mot. to Dismiss at 9-18. Section 630 of CIPA itself explains that it was aimed at preventing "eavesdropping upon private communications." Cal. Penal Code § 630. The term 'eavesdropping' means "to listen secretly to what is said in private." *Rogers v. Ulrich*, 52 Cal.App.3d

894, 899 (1975). This perfectly encapsulates the concern of the legislature - that third parties were using new technology to overhear private conversations. *See id.* ("only a third party can listen secretly to a private conversation").

Furthermore, since originally enacted, CIPA has been amended several times to address the same eavesdropping concern as applied to new technologies. Each time, the driving force behind the legislation has been to prevent third parties from clandestinely listening in on conversations in which they are not a participant. With the emergence of cellular and wireless telephones, the California legislature was concerned that CIPA did not prohibit the interception of analog calls over mobile phone frequencies. At that time, electronic scanners could pick up the frequencies used by mobile telephones, making it easy for unscrupulous eavesdroppers to intercept and record those conversations, unbeknownst to either party to the conversation. Accordingly, CIPA was amended in 1985, 1990, and 1992, adding several subsections intended "to take account of privacy issues raised by the increased use of cellular and cordless telephones." *Smith v. LoanMe, Inc*., 11 Cal. 5th 183, 191 (2021).

Throughout these amendments, the consistent through-line has been preventing the capture of conversations that parties reasonably expect would not be recorded, either by prohibiting non-parties from using electronic methods to access live conversations, or by prohibiting the recording of certain telephone calls. CIPA was not intended to address internet privacy for a medium of written communication that is "recorded" by definition, especially since the internet was in its infancy when CIPA was last amended. In fact, given that the California legislature has repeatedly amended the statute to address new telephone technologies, its decision not to amend CIPA to address web chat is telling. Instead, California has a comprehensive privacy law, the California Consumer Privacy Act ("CCPA"), that specifically addresses how businesses can use consumers' information obtained online. Cal. Civil Code § 1798.100 *et seq*. (2018). What's more, the type of privacy concerns at issue in CIPA

- raised by third-party eavesdropping in Section 631, wrongful recording of confidential communications in Section 632, and illicit recording of certain wireless phone calls in Section 632.7 - are by no means implicated when the consumer herself initiates and participates in a written internet chat with a retailer to get her own question answered.[3]

Based on the plain text of the statute and the legislative history, CIPA was intended to cover nefarious criminal conduct - illicit eavesdropping. Interpreting this statute, with its stiff financial penalties and jail time, to cover benign and routine digital communications initiated by a participating party to get help from legitimate businesses and public agencies will create perverse incentives to pursue meritless but predatory litigation. And that, in turn, is going to discourage retailers from using chat, despite how beneficial it is for customers. Retailers, especially small ones on the other side of the country, are unlikely to have considered that an anti-wiretapping statute covers their chats (because it doesn't). If a chat were a wiretap, then institutions like the Tenth Circuit, the California Secretary of State Division of Elections, or other entities discussed above would probably have some sort of notice or disclaimer on their chat systems - yet they don't. *See, e.g.*, https://www.ca10.uscourts.gov/ (click on "Let's Chat" in lower right); https://www.sos.ca.gov/elections (click on "Questions?" in lower right).

Even if retailers thought CIPA required a disclaimer, adding one isn't easy and will simply invite more litigation. Is there any end to the communications that would be "wiretaps" under Plaintiffs' theory? Must a disclaimer be placed on every web form where a customer can input information, hit submit, and generate an email to a company? On every page providing an email address, stating that inbound emails will not be immediately deleted? What's more, there is nothing straightforward about a disclosure requirement. Laws requiring disclosures are legion, and so is litigation

[3] Plaintiffs have made no claim that Defendants are not in compliance with CCPA.

about what suffices. Where on a web page must a disclosure be placed? When must it be presented? What font size is good enough? What precise wording is compliant? If getting it wrong risks a demand letter and litigation costs at best, and treble damages or even criminal penalties at worst, many retailers will simply have to shut down their chat option - to the detriment of their customers.

Nor are retailers alone in this. If the court does not clearly hold that ubiquitous and useful internet communication between retailers and their customers is outside the scope of CIPA's prohibitions, it will be open season for unscrupulous plaintiffs' attorneys not only on retailers but on any individual or organization that uses instant messaging to communicate.

This case is a prime example of predatory litigation that is possible only because the obvious limits of CIPA have not yet been clearly stated by courts. The case is part of a wave of nearly identical lawsuits brought by the same plaintiffs' counsel on behalf of many of the same named plaintiffs against any retailer that offers an online chat feature. CIPA's criminal prohibition on third parties eavesdropping on private conversations plainly does not apply when customers voluntarily send written messages to a retailer through a website's chat functions and the retailer receives and retains the messages. Nevertheless, Plaintiffs' attorneys have sent well over one hundred demand letters and filed nearly 70 complaints asserting these meritless CIPA theories in search of a lucrative windfall.[4]

This onslaught of meritless litigation has industry-wide consequences. Litigation, and particularly class action litigation, is very expensive. Even the initial steps - conducting a factual investigation, responding to the complaint, and briefing a motion to dismiss - are costly. If a case proceeds beyond the pleadings, the costs of written and documentary evidence, depositions and opposing class certification

[4] The active complaints filed by Pacific Trial Group are attached as Exhibits 1-68 to Defendant's Request for Judicial Notice.

increases significantly, even for one retailer. Magnified across an industry, the expenditures rise dramatically. If these cases proceed beyond the pleadings, the retail industry as a whole will waste millions of dollars responding to meritless claims. Faced with such costs, many recipients of the hundred-plus demand letters, especially small or independent businesses, may have no choice but to pay specious settlement claims to avoid litigation expenses. Only by ensuring that the interpretation of CIPA adheres to its original contours can this court prevent these frivolous claims and wasteful litigation costs, and ensure that chat remains a viable tool to provide desirable service to consumers.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the Motion to Dismiss.

Dated: December 21, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE LICEA and SONYA VALENZUELA, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CINMAR, LLC, a Delaware limited liability company, and DOES 1 through 25, inclusive,

Defendants.

Case No. 2:22-cv-06454-MWF-JEM

RETAIL LITIGATION CENTER, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF AMICUS BRIEF FILED IN SUPPORT OF DEFENDANT CINMAR, LLC'S MOTION TO DISMISS

Judge: Hon. Michael W. Fitzgerald

I. INTRODUCTION

Under Federal Rule of Evidence 201, *Amicus Curiae* the Retail Litigation Center, Inc. (the "RLC") asks this Court to take judicial notice of the following documents in connection with the RLC's *Amicus* Brief in Support of Defendant Cinmar, LLC's Motion to Dismiss, submitted concurrently herewith:

1. Statement of Assembly Speaker Jesse M. Unruh before the Senate Committee on Judiciary on Assembly Bill 360 Relating to Invasions of Privacy (June 8, 1967), a true and correct copy of which is attached as Exhibit A-1.

2. Statement of Assembly Speaker Jesse M. Unruh (Mar. 1, 1967), a true and correct copy of which is attached as Exhibit A-2.

3. Letter from Assembly Speaker Jesse M. Unruh to Craig Biddle, Chairman, Criminal Procedure Committee (Mar. 16, 1967), a true and correct copy of which is attached as Exhibit A-3.

4. Statement of Assembly Speaker Jesse M. Unruh Relative to Assembly Bill 860 (A Bill to Curb Invasions of Privacy) (Mar. 14, 1967), a true and correct copy of which is attached as Exhibit A-4.

5. Statement for the Floor on Assembly Bill 860 Relating to Invasions of Privacy (May 2, 1967), a true and correct copy of which is attached as Exhibit A-5.

6. Letter from Assembly Speaker Jesse M. Unruh to Charles L. Gould, Publisher, San Francisco Examiner (June 30, 1967), a true and correct copy of which is attached as Exhibit A-6.

II. JUDICIAL NOTICE IS PROPER

A matter that is properly the subject of judicial notice may be considered along with the complaint when deciding a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."). The above legislative information concerning the California Invasion of

Privacy Act is judicially noticeable under Rule 201(b). In fact, courts have routinely taken judicial notice of legislative history of state statutes in the Ninth Circuit. *See Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005) (taking judicial notice of California statute's legislative history); *Louis v. McCormick & Schmick Rest. Corp.*, 460 F. Supp. 2d 1153, 1155 n.4 (C.D. Cal. 2006) ("Under Rule 201 of the Federal Rules of Evidence, the court may take judicial notice of the records of state courts, the legislative history of state statutes, and the records of state administrative agencies."); *see also Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice."); *Stone v. Sysco Corp.*, No. 16-CV-01145-DAD-JLT, 2016 WL 6582598, at *4 (E.D. Cal. Nov. 7, 2016) ("[C]ourt[s] may properly take judicial notice of legislative history, including committee reports.") (citing *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 945 n.2 (9th Cir. 2013)). Thus, Exhibits A-(1-6) should be judicially noticed by the Court.

III. CONCLUSION

Based on the foregoing, the RLC respectfully requests that the Court take judicial notice of the attached exhibits.

Dated: December 21, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ P. Craig Cardon*
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Dated: December 21, 2022 DEUTSCH HUNT PLLC

By */s/Hyland Hunt*
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EXHIBIT A-1

June 8, 1967

STATEMENT OF ASSEMBLY SPEAKER JESSE M. UNRUH
before the Senate Committee on Judiciary

on

Assembly Bill 860
Relating to Invasions of Privacy

Assembly Bill 860 represents the first major overhaul in California law relating to invasions of privacy by the use of wiretap and electronic eavesdropping devices that has been proposed in several years. The bill is a result of my increasingly strong conviction that as our society develops more sophisticated technology, together with the ever-increasing stakes which successful industrial espionage and eavesdropping present to the unscrupulous operator, the right of the California citizen to be reasonably secure in his private communications and conversations is seriously threatened.

The continual development and use of highly sophisticated devices for eavesdropping -- and their ready availability on the market --- in my opinion creates a serious threat to our right of privacy and the free exercise of personal liberty. Assembly Bill 860 seeks to provide increased protection for the right of privacy by making various changes in the law pertaining to wiretapping, eavesdropping, and the manufacture, sale and possession of the equipment which makes such activity possible.

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EXHIBIT A - 38

A complete and detailed digest of the bill has been prepared and is before each member of this committee. I do not intend to go over each provision of the bill in detail, unless questions arise. Let me, however, discuss briefly what we are attempting to accomplish with the legislation, and then place before you examples of the evils of the ease of invading another's right to privacy which exists now in California.

Before I get into the bill, I want to state categorically that it has never been my intent in this legislation to change the state of the law in this area as it regards law enforcement agencies or officers. We have placed language in Assembly Bill 860 which should insure that the police may continue to purchase and use eavesdropping or wiretapping equipment in the course of their duties, provided that one party consents to its use. This is the same provision that exists in the present law and under many court decisions. We have been in constant touch with the Attorney General's Office on this aspect of the bill, and I believe adequate provisions relative to law enforcement's right to overhear private conversations in apprehending criminals are provided in Assembly Bill 860.

There are four major changes in the wiretapping and eavesdropping law proposed by Assembly Bill 860. In the first place, whereas such

invasions of privacy are presently legal if only one party consents to the listening in, Assembly Bill 860 would require that all parties must consent. This is a most reasonable requirement.

Presently it is entirely legal for one who receives a call to be totally unaware that it is being listened to by another party. Likewise, a party may converse in person with another party who is secretly recording the conversation -- he may be seriously injured by that conversation, either personally or in his business affairs -- and he has no recourse at law.

Assembly Bill 860 would correct this defect. It is a defect that was less meaningful before the recent development and widespread availability of eavesdropping devices, but as the advertising material which I have passed out to you indicates, it is a legal defect which is most apparent today.

Another major change in the law I am proposing relates to the penalties for violation of these sections. At the present time, these penalties vary greatly, and they are scattered throughout the Penal Code. There is no differentiation in penalties for first and second violations. The type of individual or business enterprise which often eavesdrops for the purpose of obtaining trade secrets is unimpressed with the present

very small financial penalties for such violations, and the fact that there are no increased penalties for repeated offenses almost invites violation of the law in this field.

Assembly Bill 860 proposes uniform penalties for the violation of any of our "right to privacy" laws, as follows:

1. not to exceed one year in prison, or not to exceed a $2.500 fine, or both for a first violation. This is somewhat less than the penalties in present law.

2. not exceeding five years in the state prison, or a fine of not more than $10,000 for any subsequent violation. In the court's discretion, both penalties may be imposed. This is far heavier a penalty than is prescribed under the present law.

The intent here is to give notice to those who regularly invade the privacy of others as a way of life that if they are convicted once of violating state law in this field, they face a much heavier penalty -- particularly that of imprisonment, which is more onerous to the businessman who eavesdrops to gain access to industrial secrets than a mere fine -- if they are caught again.

Thirdly, we propose to impose perhaps the most effective enforcement mechanism available, that of civil suit, upon violators of

our invasion of privacy laws. Assembly Bill 860 provides that any violator of these sections may be sued by one who is eavesdropped upon, and that triple damages may be assessed against the defendant. Actual damages are not a prerequisite to such suit, and in the same or another civil action the person whose privacy is invaded may ask the court to enjoin the eavesdropper from his illegal action, through the issuance of an injunction.

Finally, Assembly Bill 860 would declare contraband any device sold, advertised, used or possessed "primarily for the purpose of eavesdropping." We are doing the same thing in California in the case of automatic weapons, mortars, recoilless rifles and other weapons with severe destructive force. It is my judgment that the insidious devices which you see displayed in the advertisements which I have passed out to the committee are just as dangerous to the liberties of Californians as the dangerous weapons we have already outlawed are to their lives. Naturally, we have made exceptions in this section of the bill for purchase and use of these devices by law enforcement agencies, agencies of the federal government, and public utilities in the communications business and their subscribers using that equipment.

But there can be no valid purpose in allowing the sale on the open market of these sophisticated devices to just anyone with a

"snooping complex" To illustrate the ready availability of this material in California, let me quote from the classified page of the Los Angeles Times of March 12, 1967. This was sent to me by one outraged citizen:

"BUGS

> Did you know that you can eavesdrop on a conversation in Los Angeles from New York, Miami or even Glendale? Amazing! You've seen it on TV and in national magazines. Now available to the public 60% less than former price . . . ."

The ad goes on to state that by writing an Orange County address (naturally no name is given), an interested purchaser may obtain information as to where to purchase the device.

One representative of a large manufacturer of anti-eavesdropping equipment (perhaps analogous to the anti-missile-missile) has informed me that in California alone in less than one year, his company has sold twelve eavesdropping detection devices, at a price of $12,000 apiece.

I think this is ample evidence that many businessmen and private citizens are seriously concerned over the problem of the ready availability of these electronic "bugging" devices.

Gentlemen, that is the bill before you. It has been developed after a great deal of research, study and cooperation with various concerned groups. We have had the generous cooperation of the Pacific Telephone Company, the Attorney General's Office and interested private citizens in developing the legislation. I believe it is needed, and represents a genuine response by the California Legislature to one of the most pressing problems facing our citizens today.

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EXHIBIT A-2

NEWS FROM THE OFFICE OF
Jesse M. Unruh
Speaker of the Assembly
State of California

FOR WEDNESDAY A.M.'S RELEASE
March 1, 1967

Assembly Speaker Jesse M. Unruh today will introduce legislation broadening "anti-bugging" laws in California. He described the proposal as a "major advance in the protection of the rights of privacy of the individual citizen.

"Recent advances in technology and science," Unruh delcared, "have made the description of the American society as 'the open society' much more than a cliche."

"As it becomes more and more apparent that we must live in 'glass houses', it becomes all the more urgent that government protect the right of the individual to reasonable privacy in his personal affairs," the Speaker said.

Unruh's measure would prohibit listening in on telephone conversations or interfering with telegraph communications, without the consent of both parties to the communication. California law presently requires only that one party to a conversation must consent before such eavesdropping occurs.

Unruh stated that the present law, "makes a mockery of the right of privacy in communications."

The bill introduced today would also ban the use of electronic bugging devices unless all parties to the conversation being overheard agreed to the bugging. "These tiny devices," said the Speaker, "may be

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EXHIBIT A - 46

suitable for international espionage, but they are utterly inconsistent with life in a free and open society such as ours."

The bill also declares contraband in California any device which is "sold, advertised or used primarily for eavesdropping purposes".

Unruh said that his proposed legislation also makes the penalties for violation of the privacy laws much stiffer, and added that, under his proposal, private parties who suffer injury due to eavesdropping without their consent could file civil suit to recover substantial money damages.

"This provision is intended to put a stop to unethical industrial espionage and spying operations in California," he said. "Such activities render the businessman unable to develop new products without fear of having these developments discovered by a competitor through illegal means."

Unruh said he will ask the Assembly Committee on Criminal Procedure to study his proposal, and to make any improvements in it which the legislators develop in hearings on the bill.

"I believe that all our efforts to improve the quality of society and life in our state and nation are of little value," Unruh stated, "if we do not carefully protect the right of the individual citizen to speak and act freely and without fear."

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EXHIBIT A-3

Same letter to all members of Criminal Procedure Committee

Sacramento, California
March 16, 1967

Honorable Craig Biddle, Chairman
Criminal Procedure Committee
State Capitol

Dear Craig:

As you may know, I have introduced Assembly Bill 860, which has been referred to the Committee on Criminal Procedure. AB 860 is intended to protect the individual against increasing intrusion into his private affairs by those who would interfere with private communications by eavesdropping with sophisticated electronic devices and wiretapping.

This is an increasingly serious problem in our open society, and one in which state government has, I believe, a duty to respond responsibly to protect its citizens from unwarranted invasions of their privacy.

I am enclosing a digest of AB 860 which may be useful to you in answering any queries you receive on the bill.

Sincerely,

Jesse M. Unruh
Speaker of the Assembly

JMU:bq
Enclosures

SAC Legislature (1967) A-41
AB 860
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3.0.37

March 14, 1967

STATEMENT OF ASSEMBLY SPEAKER JESSE M. UNRUH

relative to

ASSEMBLY BILL 860

(A Bill to Curb Invasions of Privacy)

Advances in science and technology have led to the development of highly sophisticated devices and techniques which are used for the purpose of eavesdropping upon private communications. The continued and increasing use of these devices and techniques creates a serious threat to our right of privacy and the free exercise of personal liberty. Assembly Bill 860 seeks to provide increased protection of the right of privacy by making various changes in the law pertaining to wiretapping, eavesdropping, and the manufacture, sale, and possession of the equipment which makes such activity possible.

The bill would establish a new chapter, entitled "Invasions of Privacy," in the Penal Code. All existing Code provisions dealing with wiretapping and eavesdropping would be transferred to that chapter and certain new provisions would be added. Creation of this new chapter will provide a more orderly arrangement of the Code and tend to enhance the status of the laws relating to the protection of private communications. The bill's substantive provisions are discussed below.

WIRETAPPING A-35

Existing law, Penal Code section 640, allows a person who is not a party to a telephone conversation to listen in if he has the consent

of one party. This legislation would require that all parties to a telephone conversation must give their consent before an outsider may legally overhear it. This would protect a person placing or receiving a telephone call from a situation where the person on the other end of the line permits an outsider to tap his telephone or listen in on the call.

Assembly Bill 860 would also make it clear that privately owned telephone systems in homes, offices, and industrial plants are included within the wiretapping prohibition. Section 640 now prohibits the unauthorized placing of taps upon "any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company." The bill would broaden this prohibition to cover the placing of taps on the wires, lines, cables, or instruments of "any internal telephonic communication system." This is an especially serious problem today in view of increasing industrial spying and the theft of trade secrets by competitors.

It would also revise the criminal penalties for wiretapping. Upon conviction a wiretapper may now be fined up to $5,000, or imprisoned in the county jail for a period of one year, or in state prison for a period not exceeding five years, or subject to both fine and imprisonment. This bill would provide a lesser punishment for a first conviction and a more severe punishment for a second conviction. A first offense would be punishable by a fine of not more than $2,500, or by imprisonment in the county jail for one year, or in state prison for a period not exceeding

A-30

three years, or by both fine and imprisonment. A second offense could be punished by a $10,000 fine, or imprisonment in the county jail for one year, or in state prison for not more than five years, or by both a fine and imprisonment. Thus, those to whom a moderate fine means very little would face a much more unpleasant and substantial jail sentence.

In addition, the bill provides that information obtained by means of wiretapping shall not be admissible as evidence in any judicial, administrative, legislative, or other proceeding. A similar provision is now contained in the statute which prohibits electronic eavesdropping, but it does not apply to evidence obtained by means of a wiretap.

ELECTRONIC EAVESDROPPING

Assembly Bill 860 would change the law to require that all parties to a confidential communication must give their consent before it may be listened to or recorded by means of any electronic amplifying or recording device. Under existing law, Penal Code section 653j, confidential conversations may be eavesdropped upon or recorded if only one party to the conversation gives his consent.

This legislation would also increase the criminal penalties for electronic eavesdropping. At present, illegal electronic eavesdropping is only a misdemeanor. It is punishable by imprisonment in the county jail for a period of one year or by a fine of up to $1,000, or by both such fine and imprisonment. The bill would provide that a first offense is punishable by a fine of not more than $2,500, or by imprisonment in the

county jail for not more than one year, or in state prison for up to three years, or by both imprisonment and fine. A second offense could be punished by a fine of up to $10,000, or by imprisonment in the county jail for one year, or in state prison for a period not exceeding five years, or by both a fine and imprisonment. Thus, the penalties for electronic eavesdropping would be the same as those provided for wiretapping.

MANUFACTURE, SALE, ADVERTISING FOR SALE, OR POSSESSION OF EAVESDROPPING EQUIPMENT

Modern wiretapping and eavesdropping equipment is difficult to detect after it has been placed on a telephone line or installed in a room. Electronic detection techniques are available; however, they are expensive and they may not provide complete assurance that a telephone system or meeting place is free of eavesdropping devices. Therefore, any realistic attack upon modern eavesdropping practices must seek to control the manufacture, sale, and possession of the devices themselves.

Assembly Bill 860 would make it a crime to manufacture, sell, offer for sale, advertise for sale, possess, transport, or import any device "which is primarily or exclusively designed or intended for eavesdropping upon the communication of another." In effect, eavesdropping devices would be placed in the category of contraband items and treated in the manner that the law treats such things as narcotics, burglary tools, and machine guns. A violation of this portion of the bill would be subject to the same criminal penalties applicable to the actual use of wiretapping and eavesdropping devices.

CIVIL REMEDIES

The legislation also provides civil remedies for persons who are the victims of eavesdropping or wiretapping activity. A person injured by any violation of the chapter on invasion of privacy could bring a civil suit for the collection of damages. In that action he could recover a minimum of $500 or an amount equal to three times the actual damage he suffered by the invasion of his privacy. In the same suit, or in a separate action, he could also seek to enjoin the eavesdropping. The bill specifically provides that it would not be necessary for a plaintiff to show that he suffered or is threatened with actual damage in order to maintain either an action for damages or an injunction.

The availability of a civil action for the recovery of triple damages should prove to be an effective deterrent in cases where wiretapping or eavesdropping is connected with industrial espionage. In such cases the possible economic rewards might be so great that they would outweigh the threat of criminal penalties. But a large civil damage award, such as could be obtained in a triple damage suit, might in fact discourage the activity.

EFFECT UPON LAW ENFORCEMENT

There is no intention in AB 860 to interfere in the justifiable and essential practices of local or state law enforcement agencies and personnel. The recodification of this portion of the Penal Code carries intact several existing exclusionary provisions, which state that "nothing in this section

shall be construed as prohibiting law enforcement officers from doing that which they are otherwise authorized by law to do."

In addition, however, several amendments will be offered to the legislation prior to hearing which will insure that law enforcement procedures will not be impeded so long as they do not unjustifiably impinge upon individual rights of privacy.

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EXHIBIT A-5

May 2, 1967

STATEMENT FOR THE FLOOR
on

Assembly Bill 860
Relating to Invasions of Privacy

Assembly Bill 860 represents the first major overhaul in California law relating to invasions of privacy by the use of wiretap and electronic eavesdropping devices that has been proposed in several years. The bill is a result of my increasingly strong conviction that as our society develops more sophisticated technology, together with the ever-increasing stakes which successful industrial espionage and eavesdropping present to the unscrupulous operator, the right of the California citizen to be reasonably secure in his private communications and conversations is seriously threatened.

The continual development and use of highly sophisticated devices for eavesdropping -- and their ready availability on the market -- in my opinion creates a serious threat to our right of privacy and the free exercise of personal liberty. Assembly Bill 860 seeks to provide increased protection for the right of privacy by making various changes in the law pertaining to wiretapping, eavesdropping, and the manufacture, sale and possession of the equipment which makes such activity possible.

Briefly, Assembly Bill 860 makes these major changes in our privacy laws:

1. Whereas such invasions of privacy are presently legal if only one party consents to the listening in, Assembly Bill 860 would require that all parties must consent. This is a most reasonable requirement.

Presently it is entirely legal for one who receives a call to be totally unaware that it is being listened to by another party. Likewise, a party may converse in person with another party who is secretly recording the conversation -- he may be seriously injured by that conversation, either personally or in his business affairs -- and he has no recourse at law. Assembly Bill 860 would correct this defect.

2. A second major change in the law I am proposing relates to the penalties for violation of these sections. At the present time, these penalties vary greatly, and they are scattered throughout the Penal Code. There is no differentiation in penalties for first and second violations. The type of individual or business enterprise which often eavesdrops for the purpose of obtaining trade secrets is unimpressed with the present very small financial penalties for such violations, and the fact that there are no increased penalties for repeated offenses almost invites violation of the law in this field.

Assembly Bill 860 proposes uniform penalties for the violation of any of our "right to privacy" laws which are much stronger in the case of a second offense.

3. Thirdly, we propose to impose perhaps the most effective enforcement mechanism available, that of civil suit, upon violators of our invasion of privacy laws. Assembly Bill 860 provides that any violator of these sections may be sued by one who is eavesdropped upon, and that triple damages may be assessed against the defendant. Actual damages are not a prerequisite to such suit, and in the same or another civil action the person whose privacy is invaded may ask the court to enjoin the eavesdropper from his illegal action, through the issuance of an injunction.

4. Assembly Bill 860 would declare contraband any device sold, advertised, used or possessed "primarily for the purpose of eavesdropping." We have done the same thing in California in the case of automatic weapons, mortars, recoilless rifles and other weapons with severe destructive force.

We have made exceptions in this section of the bill for purchase and use of these devices by law enforcement agencies, agencies of the federal government, and public utilities in the communications business.

There can be no valid purpose in allowing the sale on the open market of these sophisticated devices to just anyone in this State with a "snooping complex".

5. The Criminal Procedures Committee added an amendment which should add to the enforceability of the bill, by providing that any private investigator licensed by the State who violates these provisions of law may be subject to suspension or revocation of his license.

Assembly Bill 860 does not affect the use or purchase of eavesdropping devices by law enforcement agencies, nor does it affect their use by the telephone company in maintaining its service.

But the measure would severely restrict the private "snooper" from invading the privacy of our citizens.

EXHIBIT A-6

Sacramento, California
June 30, 1967

Mr. Charles L. Gould
Publisher, San Francisco Examiner
Fifth and Mission Streets
San Francisco, California

Dear Mr. Gould:

In reply to your editorial of June 29, 1967, concerning the anti-eavesdropping bill which I have introduced at this session of the Legislature, permit me to differ with your view that this legislation, Assembly Bill 360, "goes too far". This measure has been carefully drafted and studied by the Criminal Procedure Committee of the Assembly and the Senate Judiciary Committee. We have studiously avoided mass application of the proposed ban against invasions of the privacy of communications by exempting law enforcement officers, persons reporting violent crimes, and the justifiable use of wiretapping and eavesdropping devices by legitimate business interests.

Your editorial states that AB 860 "could be interpreted to extend to monitoring done in the business world to protect consumers". According to the attorneys for the Pacific Telephone Company, legislative committee lawyers and the State Legislative Counsel this is not the case. This legislation specifically exempts from the anti-eavesdropping ban any licensed telephone equipment regulated by the Public Utilities Commission. Under my bill, it would continue to be perfectly legal to monitor business calls, to insure proper service of customers by employees.

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AB 860 would make unlawful clandestine overhearing, recording and eavesdropping upon an individual's private, confidential communications, an aim with which your editorial states you agree.

Californians today face unprecedented scientific and technological advances which have made possible the development of the most insidious miniaturized forms of eavesdropping and "bugging" devices. Our citizens must have the protection which AB 860 provides to insure their Fourth Amendment right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures".

If an American citizen has the right, as I believe he does, to maintain his home inviolate as "his castle", should his right to privacy over his confidential communications be any less secure? I believe it should not and cannot. The intent and purpose of AB 860 is to provide that protection.

Sincerely,

Jesse M. Unruh
Speaker of the Assembly

JMU:bq

EXHIBIT A - 64

EXHIBIT B

From: Craig Cardon
To: Dave Reid; Scott Ferrell
Cc: Gian Ryan; Jay Ramsey; Hyland Hunt; Lexi Mansbach
Subject: Cinmar - RLC ex parte application - Licea and Valenzuela v. Cinmar
Date: Wednesday, December 21, 2022 9:59:13 AM

Dear Scott and Dave,
I write to follow up on Dave's conversation with Cinmar's counsel on December 12, 2022. Cinmar's counsel has confirmed that during that call you declined to stipulate to the RLC filing an *amicus curiae* brief in this case during that conversation. Accordingly, we will be filing an *ex parte* application today seeking leave to file an *amicus curiae* brief which will be submitted with the application. I understand that you intend to oppose this application. That opposition will be due 24 hours after today's filing and service.
Best regards,
Craig

Craig Cardon
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310.228.3749 | direct
415.637.7895 | mobile

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Sent from my iPad

EXHIBIT C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANNETTE CODY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BOSCOVS, INC., a Pennsylvania corporation; and DOES 1 through 25, inclusive,

Defendants.

Case No. 8:22-cv-01434-DOC-ADS

ORDER GRANTING THE RETAIL LITIGATION CENTER'S *EX PARTE* APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT BOSCOV'S MOTION TO DISMISS [26]

EXHIBIT C - 68

ORDER

Good cause appearing, the Court grants the *Ex Parte* Application filed by the Retail Litigation Center (Dkt. 26) and hereby orders the following:

1. The Retail Litigation Center is to submit their *amicus curiae* brief in support of Defendant Boscov's motion to dismiss on November 14, 2022;
2. Plaintiff's response is due by November 21, 2022;
3. The hearing on Defendant Boscov's motion to dismiss is continued from November 7, 2022 to December 5, 2022 at 8:30 AM.

IT IS SO ORDERED.

DATED: November 2, 2022

David O. Carter

Hon. David O. Carter

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE LICEA and SONYA VALENZUELA, individually and on behalf of all others similarly situated,

Plaintiff,

v.

CINMAR, LLC, a Delaware limited liability company, and DOES 1 through 25, inclusive,

Defendants.

Case No. 2:22-cv-06454-MWF-JEM

[PROPOSED] ORDER GRANTING THE RETAIL LITIGATION CENTER'S *EX PARTE* APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT CINMAR, LLC'S MOTION TO DISMISS

Ex Parte Application filed concurrently herewith

[PROPOSED] ORDER

Good cause appearing, the Court grants the *Ex Parte* Application filed by the Retail Litigation Center and hereby orders the following:

1. The Retail Litigation Center may file the *amicus curiae* brief attached to its *Ex Parte* Application;
2. Plaintiffs' response is due by January 11, 2023;

IT IS SO ORDERED.

DATED: ___, 2022

Hon. Michael W. Fitzgerald