No. 24-1645

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Kiana Jones,
Plaintiff-Appellant,

v.

Starz Entertainment, LLC
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 5:24-cv-00206-KK-DTB
Hon. Kenly Kiya Kato

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, such as the enforceability of arbitration agreements and the interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16.

Many of the Chamber's members and affiliates include arbitration provisions in their user agreements and rely on arbitration to resolve disputes with their customers. Individual arbitration helps claimants

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from the Chamber, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties consented to the filing of this brief.

and companies resolve their disputes fairly, quickly, and efficiently. That in turn allows companies to pass along cost savings to consumers and employees, in the form of lower prices and higher wages. The Chamber's members and affiliates have entered millions of contractual relationships providing for arbitration precisely to achieve those benefits.

These mutual benefits of arbitration, however, are threatened by the recent explosion of abusive mass arbitrations, in which a single plaintiffs' firm simultaneously files hundreds or thousands of boilerplate arbitration demands on behalf of users solicited on the internet without proper vetting and without any expectation of actually arbitrating the claims on the merits. Plaintiffs' lawyers often recruit claimants who never even used the targeted company's service—and thus have no arbitration agreement—and leverage the large number of claims (including the fraudulent ones) to confront the targeted companies with the threat of crippling arbitration fees to extract *in terrorem* settlements.

Both companies and arbitration providers need procedural tools to make even properly vetted mass arbitrations affordable and efficient. Consolidation is one such tool, and the ruling below properly upheld JAMS's decision to consolidate the thousands of identical arbitrations

filed against Starz Entertainment, LLC ("Starz"). Disturbing that ruling would encourage further abusive mass-arbitration threats and conflict with the FAA's nationwide policy favoring arbitration.

The Chamber's brief highlights abusive mass-arbitration tactics and the importance of preserving flexibility for companies and arbitration providers to respond efficiently to mass arbitrations.

INTRODUCTION

To make arbitration a fair and attractive form of dispute resolution, the major arbitration providers require businesses to pay nearly all the costs of consumer arbitrations. Placing this burden on businesses helps make arbitration accessible for consumers with claims that are too small to litigate individually in court. But in recent years, plaintiffs' lawyers have tried to take advantage of this disparity to extort blackmail settlements by soliciting claimants online without proper vetting and then, once they have accumulated a sufficient number, simultaneously filing thousands of identical, and often frivolous, claims against the targeted company. Although these "mass arbitrations" involve identical claims, plaintiffs' lawyers demand that fees be charged for every individual claim to increase the cost to the targeted companies. And

because arbitration providers (and certain questionable state laws) require fees to be paid immediately, companies must pay millions of dollars in fees to the arbitration providers (such as JAMS and the American Arbitration Association ("AAA")) just to initiate the arbitrations. That is only the price of admission—the companies are also on the hook for the arbitrators' individual fees, which are significantly higher than the initiation fees.

For many plaintiffs' lawyers, saddling companies with crippling fees is the whole point. Regardless of how flimsy the claims are, these plaintiffs' lawyers use the threat of fees to coerce companies into quick *in terrorem* settlements. To maximize the settlement pressure, plaintiffs' attorneys often sign up thousands of clients who never used the targeted company's service and thus never agreed to the company's terms of use or arbitration agreement. These claims are patently fraudulent, but they provide useful leverage for plaintiffs' attorneys because companies are typically required to pay the fees before they are able to challenge any particular claimant's factual assertions. This shakedown scheme has proved remarkably effective, and plaintiffs' attorneys have expanded

their operations to target increasing numbers of companies with consumer arbitration agreements.

In this case, the arbitration provider (JAMS) recognized that the thousands of simultaneously filed claims were identical and consolidated them, consistent with both the arbitration agreement and JAMS's rules. When not prohibited by the arbitration agreement or the arbitration provider's rules, such consolidation benefits everyone by making the arbitration process more efficient. It helps reduce the coercive settlement pressure because only one set of fees is charged for all the consolidated arbitrations. And it helps claimants because it ensures that their claims can be efficiently and timely adjudicated on the merits. Consolidation (or coordination) of cases involving similar claims is a familiar feature of both federal and state court litigation. If a lawyer were to file thousands of identical claims in one or more federal district courts, those claims would almost certainly be consolidated or coordinated before a single judge. Consolidation in front of a single arbitrator can yield similar efficiencies. Without the ability to consolidate, many companies would likely abandon their arbitration agreements, depriving companies, customers, and workers of the mutual benefits of arbitration. This Court

should affirm the decision below and uphold the authority of arbitration providers to consolidate mass arbitrations when consistent with the parties' arbitration agreement and the provider's rules.

ARGUMENT

I. Many plaintiffs' attorneys use abusive mass-arbitration tactics to extort *in terrorem* settlements from companies that include arbitration provisions in their user agreements.

The rise of abusive mass arbitrations threatens the mutual benefits of consumer arbitration. Arbitration is an efficient and fair mechanism for resolving consumer disputes. A recent study released by the Chamber's Institute for Legal Reform surveyed more than 41,000 consumer arbitration cases and 90,000 consumer litigation cases, and found that on average, arbitration claimants recover more money in less time than plaintiffs in court.[2] Consumer arbitration claimants also win more frequently than plaintiffs in court.[3] Other studies similarly show

[2] *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration*, U.S. Chamber of Commerce Institute for Legal Reform 13–16 (Mar. 2022), https://bit.ly/3SK7QwA.

[3] *Id*. at 12.

that consumers fare just as well in arbitration as in court, if not better.[4] And because it costs less than litigation, arbitration allows businesses to pass along cost savings to consumers, thereby "lower[ing] the prices of the goods and services consumers buy."[5] The risk of extortionate mass arbitrations pressures companies to abandon their arbitration agreements and return consumer disputes to overburdened judicial fora.

A. Abusive mass arbitrations leverage fee-payment provisions to saddle companies with huge filing fees.

Arbitration providers often require companies to pay the entirety (or vast majority) of the provider's fees, even if a consumer initiated the dispute. Critically, even if the demands are entirely cookie-cutter, fees are typically charged on a *per claim* basis and vary between several hundred dollars and several thousand dollars per demand. For example, under JAMS's rules, companies must pay $1,750 per consumer claim in

[4] *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896–904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996).

[5] Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negot. L. Rev. 29, 85, 113 (2017).

initial and non-refundable filing fees ($2,000 for each claim where the claimant files a fee waiver request and the company is required to pay the consumer's share).[6] Even if a business wins every claim, it still must pay these initial fees. That means that if a plaintiffs' attorney files 20,000 identical demands along with 20,000 fee waiver requests (which is not unusual), JAMS would charge the respondent business ***$40,000,000*** in filing fees just to initiate the arbitrations.

Under certain providers' rules and (questionable) state laws, when a claim for arbitration is filed, the company's fees—but not the consumer's fees—are due immediately.[7] Thus, even if the claims are frivolous, and even if some claimants never agreed to the arbitration

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[6] *Arbitration Schedule of Fees and Costs*, JAMS (last accessed July 26, 2024), https://www.jamsadr.com/arbitration-fees. In May 2024, JAMS adopted new rules specifically for mass arbitrations. *See Mass Arbitration Procedures and Guidelines*, JAMS (May 1, 2024), https://www.jamsadr.com/mass-arbitration-procedures. But those new rules apply only when companies have updated their arbitration agreements to incorporate the new rules. Many companies, still unaware of the risks of mass arbitrations, have not yet updated their terms, and the old rules thus continue to apply to many disputes.

[7] *See, e.g.*, JAMS Rule 31, https://www.jamsadr.com/rules-comprehensive-arbitration/; AAA Rule 2, https://adr.org/sites/default/files/Consumer%20Rules.pdf; Cal. Code Civ. Proc. § 1281.97. The Chamber contends that section 1281.97 is preempted by the FAA because it discriminates against arbitration. *See infra* n.9.

agreement, companies are required to promptly pay the fees for *all* the cases just to preserve their right to defend *any* of them. This pressures companies to settle even frivolous claims. In the last few years, dozens of mass arbitrations have been filed, with some settlements reaching as high as $100 million.[8]

Naturally, some companies have challenged the fee provisions, arguing that they should not have to pay fees for claimants who cannot even show that they entered into an arbitration agreement. In response, parties have sometimes reached agreements with arbitration providers to pay the fees seriatim as the individual arbitrations progress, or only after threshold challenges to the propriety of the filings are resolved.

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[8] *See, e.g.*, U.S. Chamber of Commerce Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* (Feb. 2023), https://bit.ly/3qTzu1q ("*Mass Arbitration Shakedown*"); J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1346, 1349, 1380 (2022); McCune Wright Arevalo, LLP, *McCune Wright Arevalo, LLP, Bringing Arbitrations Against Chase Banks and Wells Fargo Over Allegedly Unfair Overdraft Fees*, PR NewsWire (Apr. 12, 2022), https://bit.ly/47RvVt1; Alison Frankel, *Mass Consumer Arbitration Is On! Ed Tech Company Hit With 15,000 Data Breach Claims*, Reuters (May 12, 2020), https://reut.rs/3z1uwAU; Nicholas Iovino, *DoorDash Ordered to Pay $9.5 to Arbitrate 5,000 Labor Disputes*, Courthouse News Service (Feb. 10, 2020), https://bit.ly/3D1oTDQ; Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration*, Reuters (Jan. 14, 2020), https://reut.rs/3Spv5v5.

But companies responding to mass arbitrations in California can no longer address fraudulent demands before paying the fees because a failure to pay arbitration fees within 30 days of being invoiced risks serious sanctions. *See* Cal. Code Civ. Proc. § 1281.97 (2019). Under California law, if a respondent company does not pay the initial arbitration fees within 30 days, the claimant can "[w]ithdraw the claim from arbitration" and proceed in court, and the court can issue a terminating sanction (including a default judgment) against the company on the underlying claims. Cal. Code Civ. Proc. §§ 1281.97, 1281.99(b)(2)(B). Other potential sanctions include payment of claimants' attorney's fees, evidentiary sanctions, and contempt orders. Cal. Code Civ. Proc. § 1281.99(b).[9]

[9] As several courts have correctly concluded, the Federal Arbitration Act preempts sections 1281.97 and 1281.99 because those provisions discriminate against arbitration. *See Belyea v. GreenSky, Inc.*, 637 F. Supp. 3d 745, 755–59 (N.D. Cal. 2022); *Lee v. Citigroup Corp. Holdings, Inc.*, No. 22-cv-02718-SK, 2023 WL 6132959, at *2 (N.D. Cal. Aug. 29, 2023); *Miller v. Plex, Inc.*, No. 22-cv-05015-SVK, 2024 WL 348820, at *5–6 (N.D. Cal. Jan. 30, 2024); *Hernandez v. Sohnen Enters., Inc.*, 102 Cal. App. 5th 222, 238–240 (2024). Indeed, these provisions were motivated by the California legislature's hostility to arbitration, which the State Assembly Judiciary Committee called a "predatory" and "controversial form of dispute resolution" that lacks even a "modicum of fairness." *Arbitration Agreements: Breach by Drafting Party: Enforcement*: Hearing

Companies faced with mass arbitrations face tremendous pressure to settle before being required to pay the exorbitant filing fees. "[A]busive mass arbitrations are [thus] the 21st-century equivalent of the abusive class actions that characterized the last part of the 20th century—claims that can be brought . . . solely for the purpose of extracting a settlement unrelated to the merits by leveraging the threat of huge costs."[10] Professor Glover, after interviewing the plaintiffs' lawyers who originated the mass-arbitration strategy, concluded that "[t]he mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure" through the imposition of "astounding" fees that "can spell financial catastrophe for a potential defendant."[11]

B. Abusive mass arbitrations often involve fraudulent claims by those without an arbitration agreement.

Mass arbitrations can lead to extortionate *in terrorem* settlements because companies settle solely to avoid the excessive fees, not because

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on S.B. 707 Before the Assemb. Comm. on Judiciary, 2019-2020 Reg. Sess. 10 (Cal. 2019). The point of these "unforgiving" sanctions was to force businesses to "reconsider their liberal use of binding arbitration provisions." *Id*. These provisions thus conflict with the FAA's "national policy favoring arbitration." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

[10] *Mass Arbitration Shakedown*, *supra*, at 5.

[11] Glover, *Mass Arbitration*, 74 Stan. L. Rev. at 1345, 1349.

of the merits of the claims. Indeed, abusive mass arbitrations often involve fraudulent claims asserted by individuals who have no relationship with the targeted company and never used its services.

For example, in 2022, plaintiffs' lawyers filed over 35,000 arbitration demands against Samsung with AAA. *Wallrich v. Samsung Electronics. Am., Inc.*, 106 F.4th 609, 614 (7th Cir. July 1, 2024). Although none of the claimants presented evidence that he or she even had an arbitration agreement with Samsung, AAA nevertheless "determin[ed] that the consumers had met the AAA filing requirements" and sent Samsung an invoice for several million dollars. *Id.* When Samsung refused to pay the filing fees, the claimants filed a petition to compel arbitration in federal court, asking for "an order compelling Samsung to pay its AAA filing fees and to arbitrate the claims." *Id.*

The district court granted the petition, but the Seventh Circuit reversed, holding that the claimants failed "to meet their burden of proving the existence of an arbitration agreement." *Id*. at 619. The court noted that while the claimants had produced "copies of their arbitration demands," "a spreadsheet containing their names and addresses," and "copies of Samsung's terms and conditions," that evidence did not show

that any of the claimants actually had an arbitration agreement with Samsung. *Id.* at 618. Although the claimants "could have submitted almost anything" to show that they had arbitration agreements, such as "receipts, order numbers, [] confirmation numbers from their purchases of Samsung devices," or "declarations attesting to the allegations in their arbitration demands," they failed to do so. *Id.* at 619. The Seventh Circuit held that AAA's determination that its filing requirements had been met "d[id] not serve as evidence of an arbitration agreement" because the "filing requirements involve[d] no substantive determinations," as AAA did not "determine whether the claimants entered into an arbitration agreement with the business or even whether the claimants were customers of the business." *Id.*

This case illustrates the problems that mass arbitrations pose for companies: the initial fees are billed—and, under California law, must be paid—before claimants even show that they entered into an arbitration agreement. And because fraudulent claims increase settlement pressure, plaintiffs' attorneys have a strong incentive to sign up *anyone* willing to file a demand, regardless of whether they have ever used the targeted company's products or services. In their rush to sign up clients, plaintiffs'

attorneys cut corners, often failing to conduct even basic due diligence. Instead, plaintiffs' attorneys solicit claimants online with ads that highlight the possibility of getting money but often say little to nothing about the nature of the alleged violation or the claims the attorneys plan to bring. The solicitations often use vague terms such as "privacy violations," "misuse of information," or "discrimination" without elaborating.[12] Their online solicitations sometimes "make it appear that individuals are merely signing up to participate in an investigation or a class action, rather than an individual arbitration proceeding in which the claimant must engage personally." *Hoeg v. Samsung Electronics Am., Inc.*, No. 1:23-cv-01951 (N.D. Ill. Aug. 28, 2023) ECF No. 44-4 (Letter from Jaime Huff, Vice President and Counsel, Public Policy, CJAC, to Enrique Zuniga, Public Trust Liaison, State Bar of California).

Many people respond to these solicitations even if they have never used the product or service and thus do not even have an arbitration agreement with the targeted company. This should come as no surprise, as the same type of fraud has been documented in the class-action

[12] *See, e.g., Tubi, Inc. v. Keller Postman LLC*, No. 1:24-cv-01616-ACR (D.D.C. May 31, 2024) ECF No. 1 (Complaint at Exhibit 3).

context. When a class action settles, the class administrator frequently advertises online to find as many class members as possible, so that the members can sign up to receive their portion of the award. Some people submit fraudulent claims, hoping to receive a payment. In those situations, the class administrator monitors the registrations submitted online by checking the IP addresses and contact information and flagging fake and duplicative claims. In one such case, the administrator noticed thousands of suspicious claims, and plaintiffs' counsel preemptively alerted the court to the issue, proposing steps to remedy the problem. *See Opperman v. Kong Techs., Inc.*, No. 3:13-cv-00453-JST (N.D. Cal. Nov. 30, 2017) Dkt. No 911.

In mass arbitrations, however, such a correction almost never occurs because plaintiffs' attorneys have an incentive to increase the number of fraudulent claims and the arbitration providers have declined to verify whether an arbitration agreement exists for each claimant before invoicing the targeted companies. Defense counsel report that the proportion of obviously groundless claims in mass arbitrations often exceeds 30 percent.[13] Claimants' counsel here, Keller Postman, has been

[13] *Mass Arbitration Shakedown*, *supra*, at 37.

accused of filing thousands of fraudulent claims. In one case, the respondent company accused Keller Postman of "deliberately avoid[ing] obtaining the information it would need to recognize many claims are frivolous." *Tubi v. Keller Postman*, No. 1:24-cv-01616-ACR (D.D.C. May 31, 2024) ECF No. 1 (Complaint ¶ 27(a)(iii)). The targeted company alleged that by choosing to not investigate before filing, Keller Postman "maintain[ed] plausible deniability that it was aware its clients' claims [we]re fraudulent." *Id.*

Tubi is not the first company to accuse Keller Postman of filing frivolous claims on behalf of customers who never transacted with the company. *See, e.g., In re CenturyLink Sales Pracs. & Sec. Litig.*, No. CV 17-2832, 2020 WL 3513547, at *3 (D. Minn. June 29, 2020) (alleging that Keller Postman filed claims on behalf of customers located in states where the company did not provide services, and on behalf of purported customers with fake or duplicate names); *In re Intuit Free File Litig.*, No. 3:19-cv-2546-CRB (N.D. Cal. Dec. 7, 2020) Dkt. No. 192 (Decl. of Roger Cole ¶¶ 21–22) (noting that Keller Postman withdrew 8,282 arbitrations after Intuit demonstrated that the claimants were either not Intuit customers or never paid the disputed fee). Keller Postman faces similar

accusations from several other companies. *See Cacho v. Keller Postman LLC*, No. 6:23-cv-001109-PGB-LHP (M.D. Fla. June 12, 2023); *Dominguez v. Keller Postman LLC*, No. 3:23-cv-00185-FM (W.D. Tex. May 5, 2023); *Gonzalez v. Keller Postman LLC*, No. 3:23-cv-00145-DCG (W.D. Tex. Apr. 10, 2023).

Most lawyers would be reluctant to file such fraudulent claims in court for fear of being sanctioned under Rule 11 of the Federal Rules of Civil Procedure or the state equivalent. But many plaintiffs' attorneys have had no such qualms in the mass-arbitration context, likely because the goal is to negotiate a confidential settlement before the company even pays the fees (and thus before the amount of fraud is discovered). And courts have generally been reluctant to hold plaintiffs' firms civilly liable for bad-faith litigation tactics.[14] Plaintiffs' attorneys are thus emboldened

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[14] *See Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1087–88 (11th Cir. 2004) ("alleged conspiracy to extort money through the filing of malicious lawsuits" were not predicate acts of extortion or mail fraud under RICO); *Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018) ("allegations of frivolous, fraudulent, or baseless litigation activities–without more–cannot constitute a RICO predicate act"); *Snow Ingredients, Inc. v. SnoWizard, Inc.,* 833 F.3d 512, 525 (5th Cir. 2016) ("bad faith litigation absent corruption" cannot sustain civil-RICO claims); *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047, 1055 (8th Cir. 2024) ("conclusory, unpersuasive assertions do not provide a reason not to apply the general rule" that

to file fraudulent claims on behalf of individuals that the attorneys either knew or should have known had no arbitration agreement with the targeted company.[15]

*   *   *

Companies confronted with abusive mass arbitrations face a Hobson's choice: either pay the enormous bill for arbitration fees to preserve the opportunity to investigate and defend against the claims on the merits, or accept under duress an extortionate settlement that reflects the arbitration provider's fees rather than the merits of the claims. Most companies acquiesce to these blackmail settlements, which amount to a mass-arbitration tax on businesses that is passed on to

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allegations of frivolous litigation activities cannot constitute a RICO predicate act); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) (meritless litigation is not a predicate act of extortion under RICO) (collecting cases).

[15] Mass arbitrations often involve other ethical issues, too. For example, even though mass-arbitration attorneys are required to communicate settlement offers to their clients, Cal. R. Prof. Conduct 1.4.1, mass-arbitration settlement offers are frequently "rejected" by every single claimant, including even claimants who have never used the product or service and thus have no arbitration agreement or any reasonable prospect of prevailing in an individual arbitration. Such rejections strongly suggest that the offers were never communicated to the clients. *Mass Arbitration Shakedown*, *supra*, at 38–39.

customers in the form of higher prices and to employees in the form of lower wages or fewer jobs. Some companies decide to abandon arbitration altogether, thus depriving their customers of the benefits of arbitration.[16] None of this is good public policy, and the only winners are the plaintiffs' attorneys who succeed in extorting settlements out of companies.

II. Companies and arbitration providers have reasonably responded to mass arbitration abuse with alternative procedures for handling mass claims.

In response to abusive mass arbitrations, companies and arbitration providers have begun to adopt alternative procedures for handling mass claims, including consolidation, batching, and bellwethering. When arbitration providers consolidate claims, the claims are arbitrated together before a single arbitrator. Consolidation—the approach JAMS took here—is similar to coordination before a single multi-district litigation ("MDL") judge empowered to hear a global motion to dismiss. Batching is a similar procedure, though instead of consolidating *all* claims before a single arbitrator, the claims are sorted into sequential batches of varying sizes pursuant to the parties'

[16] *See, e.g.*, Amanda Robert, *Amazon Drops Arbitration Requirement After Facing 75,000 Demands*, ABA J. (June 2, 2021), https://bit.ly/3URJuTj.

agreement, and all claims in a given batch are heard together. Other companies have opted for bellwethering provisions that also operate similarly to the MDL process and help the parties efficiently resolve mass claims. In a bellwethering process, a few representative claims are arbitrated before the others. The outcomes of these initial bellwether arbitrations help encourage settlements by providing "real-world evaluations of the litigation."[17] One arbitration provider—FedArb—refers mass claims to a three-arbitrator "MDL Tribunal" that has the power to decide common factual and legal issues.[18] Consistent with these procedures, some companies have included explicit consolidation, batching, and/or bellwethering terms in their arbitration agreements, including terms that allow companies to choose to consolidate claims in their discretion.[19]

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[17] Hon. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2325 (2008).

[18] *See* FedArb, *ADR-MDL Framework for Mass Arbitration Proceedings* (Sept. 26, 2023), https://www.fedarb.com/wp-content/uploads/2024/02/Final-Revisions-to-MDL-w-prefiling-disposition.pdf.

[19] *See also Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1015 (9th Cir. 2023) (upholding a non-mutual dispute resolution provision because "something more than the absence of mutuality is required for us to find the provision unconscionable") (citation omitted).

These mechanisms are familiar to litigants because they are adapted from the analogous court procedures for the adjudication of mass claims. In the federal system, the Judicial Panel on Multidistrict Litigation can coordinate or consolidate for pre-trial proceedings "civil actions involving one or more common questions of fact . . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The cases are transferred back after pre-trial proceedings, *id.*, although most cases are resolved by then.[20] Similarly, in California, cases can be coordinated by the Chairperson of the state Judicial Council "if one judge hearing all of the actions for all purposes . . . will promote the ends of justice." Cal. Code Civ. Proc. § 404.1.

As in the federal and state judicial systems, consolidation, batching, and bellwethering help efficiently administer claims on the merits and avoid abuse and gamesmanship. For example, if a plaintiffs' firm files 20,000 arbitration demands, JAMS's non-mass arbitration rules require

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[20] *See* U.S. Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2021*, 3 (2021), https://bit.ly/3feso28.

the corporation to pay $40 million—$2,000 per arbitration multiplied by 20,000 individual arbitrations—in initiation fees alone. But if the arbitrations are consolidated, fees are initially charged for one single arbitration, and total only $2,000. Similarly, under JAMS's new mass-arbitration procedures (which apply only when companies have updated their arbitration agreements to refer to the new rules, or when both sides otherwise agree to them), the initial filing fee is only $7,500, regardless of the number of claims.[21] These changes in mass-arbitration rules and fee schedules are a good first step toward making it feasible for parties to resolve their disputes on the merits, rather than on the fees that the business must pay even if it wins.

If the parties are unable to reach a settlement, an arbitrator can resolve the claims *en masse*. By definition, mass arbitrations involve cookie-cutter demands, so in many instances, the arbitrator will be able to deal with the claims collectively. Indeed, because mass arbitrations often involve dubious legal theories, an arbitrator would have little

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[21] *Mass Arbitration Procedures Fee Schedule*, JAMS (Apr. 30, 2024) https://www.jamsadr.com/files/uploads/documents/massarbitrationprocedures-fs_4.29.24.pdf.

difficulty in most situations resolving the claims quickly with little expenditure of time and money.

Consolidation of mass arbitrations is fundamentally different than *class arbitration*, where a single claimant asserts arbitration demands on behalf of unnamed class members. In a class arbitration, the arbitrator's ruling is binding on non-parties who had no voice in the selection of the arbitrator or opportunity to be heard at the arbitration. Because class arbitration is different in kind from the efficient individual arbitration envisioned by the FAA, class arbitration requires an express affirmative statement of consent in the agreement. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). In a consolidated mass arbitration, by contrast, all of the claimants are parties to the proceeding—no one is asserting a claim on behalf of anyone else—and all have the right to be heard should they deem it necessary.

Although plaintiffs' attorneys typically oppose consolidation because it reduces the coercive settlement pressure at the heart of the abusive mass-arbitration strategy, consolidation does not change the merits-based risk for individual claimants, who still each have one

proceeding and one judgment either way. Consolidation only changes the risk for companies, which forego the ability to take multiple bites at the apple for similar claims when they agree to consolidation. Accordingly, some companies may continue to eschew consolidation based on their own calculus, and an arbitration provider cannot consolidate if the parties' agreement forbids it. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 506 (2018) (citing *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 223 (2013)) (The FAA "requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify . . . *the rules* under which that arbitration will be conducted.'") (emphasis in original). But when an arbitration agreement defers to the arbitration providers' rules and/or does not prohibit consolidation, and the arbitration provider exercises its authority to consolidate numerous identical claims, each claim is still being arbitrated in accordance with the parties' arbitration agreement.

If a company is willing to contract for consolidation of mass arbitration claims, or to give the arbitration provider discretion to decide that issue, and thus accepts the risk of an adverse judgment on multiple claims at once, there is no reason why a reviewing court should intervene

and hold consolidation improper. Companies facing mass arbitrations are often willing to accept this risk, which demonstrates that they believe the claims are frivolous. Consolidation would be in the interest of any plaintiffs' attorney who believes in the merits of his or her claims. After all, quickly obtaining a single arbitration award for 20,000 claims should be far more attractive than individually arbitrating 20,000 meritorious claims over a much longer time. The fact that Keller Postman opposes consolidation here—and in other cases as well—is a telling sign that it may lack confidence in the merits of its claims and launched this mass arbitration for the sole purpose of abusing the filing fees as extortionate leverage to shake down Starz and other defendants.

CONCLUSION

This Court should affirm the district court's order.

Dated: July 29, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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