Public Feedback on Proposed Revisions to the Consumer Arbitration Rules

Feedback From Attorneys and Advocacy Groups

Attorney Comment #1

Attorney: **Jim Swiderski**
Law Firm: **Law Office of James Swiderski**
City: **San Diego, CA**
Date Received: **2/6/25**

Counsel:

I think it is a mistake to mandate documents only cases for claims up to $50,000, or for any amount for that matter.

Small claims courts preserve the rights to a hearing for claims under $12,500 in California.

Why should that critical right be lost (except by agreement between the parties) in disputes from $12,501 to $50,000?

This is the right of cross examination we are talking about. You can't cross examine a document.

I think it would render any AAA decision subject to attack on due process grounds.

Even if this documents only procedure is judicially validated as complying with the Constitution, its still an inferior dispute resolution procedure.

Seems to me this is prompted by businesses who use these clauses to avoid class actions.

Give consumers the option.

Also, I would amend the small claims exemption to make it only available to the Consumer, not the business. This assumes that in person or at least virtual hearings are allowed. It is wrong to allow the business to game the Court system by selective application of its arbitration clause to preclude its use in small dollar cases simply because of the disproportional expense of using Arbitration to resolve smaller dollar claims. The business CHOSE this method, and the consumer, not the business, should have the option of affirming that choice where it benefits them. An arbitration allows much more individual attention to a case than would be the case at a small claims proceeding. A consumer might rationally choose it as the preferable forum (again, if the case allows a hearing / cross examination).

The ONLY reason the BUSINESS wants the ability to send matters to small claims is related to their COSTS, which is not a proper consideration. Small claims do NOT allow lawyers and that is major disadvantage and requires two hearings for them to win.

Thanks.

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Attorney Comment #2

Attorney: **Anonymous**
Date Received: **2/6/25**

Good morning,

Under the new rule R-20, the text does not address the exchange of a list of witnesses between the parties, whereas the current rule - R-22 does.

I am unsure if the intent of the verbiage under the new rule R-20 (a) "The arbitrator shall manage any necessary exchange of information among the parties..." is intended to encompass the exchange of a witness list or not, however, I think the omission of any text regarding a witness list leaves room for an argument to be made that, under the new rule, the exchange of a witness list by the parties is unnecessary or not required.

Since the new rule greatly expands the clarity around the exchange of "documents" while making no mention of the exchange of a witness list, in contrast to the current rule - R-22, this could be interpreted as being an intentional omission.

It's my belief that the exchange of a witness list is just as crucial to ensuring a fair outcome for both parties as the exchange of documents, that if the new rule is intended to clarify the exchange of information, the new rule should also specifically mention the exchange of a witness list between the parties.

Attorney Comment #3

Attorney: **Anonymous**
Date Received: **2/6/25**

So, if I'm reading this right, the primary "ethical" change is a new rule that provides for cases "under $50,000" to only be heard by desk arbitrations? From an organization where consumers only win 27% of the time in hearings anyway. There are zero pro-consumer changes in here, like a strike list for arbitrators or some discovery. Who writes this stuff? Elon Musk?

Attorney Comment #4

Attorney: **Anonymous**
Date Received: **2/6/25**

I am deeply troubled by the proposed new rules for consumer arbitrations because they do not resolve the significant problems that exist in the current consumer arbitrations and reinforce the bias against consumers prevalent therein. If the rules are adopted without changes, I would have an ethical obligation to prevent cases from reaching AAA for arbitration. All references below are to the propose rules unless specifically noted.

R-20 – Current R-22 was in need of significant change because it consistently prevented consumers from having access to information that was needed to fairly adjudicate claims. R-20 blatantly allows parties to hide negative evidence and only disclose the good evidence "on which they intend to rely." This is either a long running gross oversight, or was deliberately written to allow the business defendant to withhold evidence the consumer needed to prevail on their claims. There is no other explanation for limiting the disclosure from relevant information to only the information a party intends to rely.

R-20(iii) is a welcome addition because it implies parties have the right to propound document requests. That right should be more explicitly stated.

A significant flaw with the current rules and the proposed revisions are that all exchange of information (R-20(b)) is subject to the arbitrator discretion. That means arbitrators have the discretion to completely prohibit the exchange of information. That would not be appropriate but is clearly permitted by the rules.

R-20 is missing the following necessary discovery provisions:
The ability to conduct depositions. Simply put, not all evidence is contained in a document. Parties must be permitted to take depositions in order to gain the information needed to adjudicate claims.
Identification of witnesses. I am amazed that AAA removed the requirement to identify witnesses from the discovery procedures. Current R-22 was flawed in that it only required the identification of witness the parties "plan to have testify." As discussed above with documents, that is a flawed position because it allows parties to conceal the bad witnesses and only disclose the good witnesses. Proposed-Rule 20 had completely done away with the disclosure of witnesses. How are parties to fairly adjudicate claims when they are not even informed of the potential witnesses (who may then need to be deposed or subpoenaed)???

Subpoenas - Absent is the ability to issue subpoenas to obtain information from third-parties who frequently have relevant information that will be helpful in proving or disproving claims. R-32 is not a substitute. R-32 relates to the presentation of evidence at the hearing. If the parties are not permitted to

uncover the documents and identify witnesses with subpoenas prior to the hearing, R-32 rings hallow. For example, a CarFax report may indicate that Toyota Santa Monica worked on the subject vehicle on particular dates. CarFax does not identify the employees who did the work nor the specific work that was done (CarFax is intentionally vague). Absenst a subpoena to Toyota Santa Monica in the discovery phase to get the repair records and/or a PMQ deposition, the party will not know the identity of the person who actually did the repair work (or the specific work that was done) and therefore cannot subpoena the right person to appear at the arbitration hearing to testify. That person may no longer be an employee of Toyota Santa Monica, so a last-minute subpoena to Toyota Santa Monica to appear at the arbitration hearing is insufficient to get the correct witness for the presentation of evidence. Subpoenas are necessary during the discovery phase of the case, not just for presentation of evidence at the hearing. Further, if this is a documents-only arbitration, a subpoena under R-32 would be completely useless because the party seeking record with the subpoena would not have the benefit of seeing the records when preparing the briefing.

R-36 – now strips the consumer of the right to a hearing and forces them into a document only proceeding by giving the arbitrator the ultimate decision on whether a hearing occurs or the case will be resolved on documents only. Further, the increase from $25,000 to $50,000 appears to be intended to ensure that almost every consumer arbitration can be forced into a document only proceeding. This ensures consumers not only lose the right to a judge and jury in court, but now also lose the right to even testify in their own case and cross-examine the witnesses against them. That is shameful. If the parties all choose a document only proceeding, so be it. But this revision further degrades consumers opportunity to have claims fairly adjudicated in arbitration.

R-9 – this rule now allows the respondent (the business in almost every case) to avoid arbitration and force the consumer to small claims court. This would allow the business to evade the very arbitration provision that they force upon the consumer in the adhesive contract. There is no reason one party to a dispute should be allowed to remove the case from arbitration just because they don't want to arbitrate the case. This presents a further dichotomy of power. It is the business that forces cases in to arbitration and now the business has the option to force the case out of arbitration. That is not a fundamentally fair process.

R-42(b) – This provision goes too far. Entry of a protective order to protect trade-secret information is not a problem. But the rule goes further and allows the arbitrator to generally deem all matters connected with the arbitration to be confidential. In forcing consumers into arbitration and then allowing the arbitrator to deem everything confidential, this rule would prevent the consumer from having recourse to the courts for intervention and overturning arbitration awards under the FAA and CAA. This would also effectively allow the arbitrator to impose a gag order on the consumer so that they cannot tell their story to friends, family, and other potential consumers. That would allow the same misconduct that gave rise to the case to repeat and evade injunctive relief that is expressly authorized in arbitration proceedings.

R-56 – As written, this rule contradicts the California Arbitration Act's sanctions provisions for non-payment by the business in consumer cases. Under CCP 1281.98(d) and 1281.99(b)(2) terminating sanctions are permitted. R-56 strips the arbitrator of the power to impose the statutory terminating sanction. While terminating sanctions are not common, the option must remain available to comply with California law.

If the proposed rules above are implemented without change, I will have an ethical duty to my clients to take action to prevent cases from being arbitrated at AAA. That would be unfortunate because I have quite a few cases with AAA and many more heading to AAA in the near future.

Attorney Comment #5

Attorney: **Larry Smith**
Law Firm: **SmithMarco, PC**
City: **Sarasota, FL**
Date Received**: 2/6/25**

Thank you for the opportunity to provide comment to these proposed rule changes. I will provide my few comments:

Rule 1 – threshold for documents only disputes – Document only disputes are fundamentally unfair for the claimant at any level. Not allowing a person to have their one day in court and confront witnesses in a fact-finding hearing completely fails to provide that claimant a fair hearing. This is nothing more than a way for an arbitrator to be lazy and efficient with the small amount of money that they are paid for the hearing.
Rule 20- exchange of information rule – Arbitrators should be advised to allow broader discovery. Especially depositions. We have often been limited to just one deposition in our cases whereas in the cases we handle, there are always more than one crucial witness with specific evidence needed in the case. We are being forced to take the deposition of a corporate rep who had nothing to do with the matters in controversy and is a meaningless witness.
Rule 22 – virtual hearings – This should be reversed. Only virtual hearings if necessary. Not allowing the plaintiff to present their case live, present and confront witnesses, allowing the factfinder to personally view and draw conclusions about credibility, is fundamentally unfair. A final hearing is as close to a trial as an aggrieved party will be allowed to get. Trials should never be virtual, and a final hearing should never be virtual unless completely necessary.

Rule 42 – confidentiality – What right does the AAA have to abridge ones rights under the First Amendment? This is a most offensive change. Lawsuits are public records. Nothing about what we do at AAA is confidential. If a party wants documents kept confidential, they can get an order. But to tell a person that they cannot speak about their award (or lack thereof) or what happened at their hearings is a violation of the First Amendment. AAA has no right to order someone not to speak about their case.

Thank you for the opportunity to provide my comments.

Larry P. Smith

Attorney Comment #6

Attorney: **Anonymous**
Date Received: **2/6/25**

Dear AAA Consumer Arbitration Rules Committee,

I appreciate the opportunity to provide public comment on the proposed amendments to the Consumer Arbitration Rules. As an attorney representing consumers in arbitration proceedings against corporate entities, I have concerns that several of the proposed changes disproportionately favor businesses at the expense of consumer rights. Below, I outline specific rule changes that should be reconsidered to ensure fairness, transparency, and accessibility for consumers engaging in arbitration.

Rule 1: Increase in the Threshold for Documents-Only Arbitration from $25,000 to $50,000
Opposition: This change disproportionately disadvantages consumers by expanding the scope of cases resolved without hearings, limiting their ability to present evidence and cross-examine witnesses. A hearing is often critical for claims involving misrepresentation, fraud, and defective goods or services.
Recommendation: Maintain the $25,000 threshold. Alternatively, if an increase is implemented, ensure that consumers retain an automatic right to request an oral hearing without requiring a showing of necessity. Further, arbitrators should conduct a preliminary conference to assess the need for hearings rather than presuming a documents-only resolution.

Rule 2: Extension of the Automatic Stay for Judicial Intervention from 30 to 90 Days
Opposition: Extending the stay period from 30 to 90 days allows corporate respondents to delay arbitration unfairly, increasing costs for consumers and discouraging the pursuit of claims. This issue is particularly egregious in mass arbitration, where businesses face thousands of claimants and have an even greater incentive to use judicial intervention as a delay tactic. A 90-day stay effectively paralyzes all claims at once, further burdening consumers and denying them access to timely relief.
Recommendation: Retain the 30-day stay period, permitting extensions only upon a showing of good cause. Implement a strict timeline requiring judicial challenges to be resolved expeditiously to prevent indefinite stalling tactics that disproportionately harm consumers in mass arbitration proceedings.

Rule 4: AAA's Authority to Consolidate Multiple Claims Filed by the Same Consumer
Opposition: While consolidation may provide administrative efficiency, it should not be imposed in a way that diminishes the ability of consumers to assert individualized claims. Cases involving distinct arbitration agreements or differing damages should not be automatically merged. Additionally, in mass arbitration, consolidation could be used as a procedural tool by businesses to create delays by disputing how cases should be grouped.
Recommendation: Consumers should have the option to consolidate claims or file separately. Businesses should not be able to force consumers into consolidated claims if doing so would delay resolution. Additionally, separate damages calculations should be preserved for each claim, ensuring no consumer receives a diluted recovery due to forced consolidation.

Rule 42: Confidentiality of Arbitration Proceedings
Opposition: Often, businesses harm thousands of people and require claimants to try their claims individually through a class waiver. Confidentiality allows them to hide the facts of their wrongdoing and the awards made to the claimants who first try their case at arbitration hearings. Transparency regarding corporate misconduct, liability, and damages allows similarly situated claimants to assess the viability of their claims and their desire to proceed. Additionally, transparency pressures businesses to consider public

relations implications, which can encourage them to reach a global resolution of claims. This is particularly relevant in mass arbitration, where businesses seek to prevent future claimants from learning about successful outcomes and liability findings. The default rule should be transparency, with confidentiality only permitted if explicitly provided in the arbitration agreement or granted by the arbitrator upon a justified motion for a protective order.

Recommendation: Modify the rule to ensure transparency is the default unless confidentiality is contractually agreed upon or ordered by the arbitrator for specific, justified reasons. This will prevent businesses from shielding their misconduct and limiting consumer awareness of successful claims, which is especially important in mass arbitration settings.

Rule 56: AAA's Authority to Decline Future Administration for Businesses That Fail to Pay Fees
Support with Strengthened Consequences: Businesses facing mass arbitration claims frequently attempt to evade responsibility by refusing to pay arbitration fees, effectively blocking all claims. While Rule 56 is a positive step in addressing this tactic, the consequences should be more severe to prevent businesses from abusing this loophole.
Recommendation: If a business fails to pay its required arbitration fees, it should face stronger penalties, such as an automatic liability determination in favor of the claimants or increased financial obligations before future arbitrations can proceed. This will prevent businesses from weaponizing non-payment to obstruct mass arbitration.

These changes, as currently drafted, create procedural disadvantages for consumers and contradict the principles of fairness, efficiency, and accessibility that the AAA has committed to uphold. Strengthening these provisions would prevent businesses from exploiting procedural loopholes and ensure that consumers—who are often laypeople unfamiliar with legal procedures—are not unfairly disadvantaged against the corporate lawyers and legal teams they face in arbitration proceedings. I urge the AAA to reconsider these provisions to ensure that arbitration remains a viable and just mechanism for consumers seeking redress against corporate misconduct.

Thank you for your time and consideration. I look forward to your response and further discussions on protecting consumer rights in arbitration proceedings.

Attorney Comment #7

Attorney: **Anonymous**
Date Received: **2/21/25**

Two issues that need to be addressed urgently and on a large scale are:

1. Parties (primarily businesses and commercial entities) failing to pay their arbitration invoices in a timely manner if at all. In too many situations, the consumer is prevented from filing a lawsuit and thus has to file an arb claim. Consumer pays their filing fee/case initiation fee and AAA invoices the business. The business fails to pay the invoice and several reminders are sent spanning months and months that garner no

payment by the business. In the meantime the consumer is in limbo. The consumer contacts AAA staff to get the case moving but nothing really happens.

This failure to have and enforce clear and forceful rules about payment of invoices compromises the arbitration process and calls into question the integrity of the arbitration entity that is allowing the delay and failure to pay. In the end the consumer is the one who is usually losing out by not having an opportunity to get started on the process and eventually have the case heard. This must be fixed and urgently.

2. Arbitrations that clearly involve a consumer good or consumer purchase that get foist into commercial status. This is disingenuous and costly for the consumer plus it is inefficient processing of an arbitration case. The rules defining which cases are handled via the consumer track versus the commercial track need to be made more common sensical and applied as such.

There are numerous arbitrations across the country that involve either of the above two issues and some that involve both. To the extent arbitration is more and more becoming the means that disputes are settled, it is of critical importance that the rules comport with notions of justice and equity and the efficient administration of justice.

Thanks for your consideration and be well.

Attorney Comment #8

Attorney: **Anonymous**
Date Received: **2/24/25**

Good afternoon,

I have arbitrated a number of matters in AAA on behalf of consumers and provide the following in response to AAA's request for public comment:

1. In-Person Hearings (R-1(F)). Consumer testimony is often critical to fully understand the fraud and deception that takes place in consumer disputes. It is also similarly important for evaluating the harm suffered by consumers. Consumers should always have the opportunity to present their case in a hearing, regardless of the amount in controversy
2. The venue of such hearing should presumptively be wherever the consumer resides
3. Remedies for Non-Payment (R-56).There should be a time limit for companies to pay their share of the arbitration fees, otherwise the arbitration should be administratively dismissed. To allow otherwise, permits inexcusable delay which can prejudice a consumer's claims.
4. Exchange of Information (R-20). There should be a required exchange of information at the onset of arbitration, that includes what documents and witnesses each side intends to rely on. There should also be an allowance for depositions to be taken.
5. Third party testimony (R-32(e)). Consumers should not have to incur additional cost in arbitration just because there is a legitimate need for third party testimony. One such example comes up in auto-fraud

cases, where the testimony of a third party finance company is important to establish misrepresentations made by a respondent-dealer in arbitration. If any such additional fees are incurred in arbitration for such testimony, it should be paid for by the company, who often is the party insisting on arbitration in the first place.

6. There are multiple references to a consumer fee schedule and I think it's more transparent laying out what the fees are in the consumer rules, rather than requiring consumers to review another document when seeking to file an arbitration claim.

Thank you

Attorney Comment #9

Attorney: **Anonymous**
Date Received: **2/24/25**

No dispositive motions.
No dispositive motions.
No dispositive motions.

Thanks.

Advocacy Group Comment #10

Attorney(s): **Adam Gana, Michael Bixby, Joe Wojciechowski**
Advocacy Group: **Public Investors Advocate Bar Association – PIABA**
City: **Norman, OK**
Date Received: **2/28/25**

February 28, 2025

Via Email Only @ ConsumerRules@Adr.org
Bridget M. McCormack President &
CEO
American Arbitration Association 120
Broadway, Floor 21
New York, NY 10271

RE: Comment Letter Regarding Proposed Amendments to the AAA's Arbitration Rules under the Consumer Arbitration Rules

Dear President McCormack:

We write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding

investment fraud and financial industry misconduct. Our members and their clients have a strong interest in rules promulgated by arbitration forums such as AAA. As such, PIABA frequently comments upon proposed rule changes and retrospective rule reviews to protect the rights and fair treatment of the consumers who are forced to submit their disputes to arbitration.

Background

Our members have collectively represented thousands of clients in AAA Arbitrations, primarily retail investors and other consumers. Our members handle securities and investment fraud claims as well as cryptocurrency related litigation, and even general consumer protection cases such as claims involving cell phone carriers. Consumers and investors who are forced into arbitration with sophisticated corporations or professionals must have confidence in the integrity and the fairness of the arbitration process and procedure. Arbitration is often presented as efficient and cost-effective compared to court litigation. However, there are systemic shortcomings in arbitration forums, including base- level access to justice issues such as high costs and other procedural safeguards such as access to reasonable discovery, transparency, and ensuring arbitrators are fair and unbiased.

The AAA Consumer Rules must be improved to provide basic minimum procedural safeguards for consumers.

We understand AAA is proposing to amend various rules under the AAA Consumer Arbitration Rules. We support certain of these rule changes, have recommendations for improvements, and oppose certain items as described herein. We provide discussion of the more significant proposed rule changes below. We believe all of our suggestions and recommendations would enhance the principles of fairness, efficiency and accessibility, transparency, and ethics that AAA has stated as its goals.

Discussion/Position

New Rule R-1 – Applicable Rules of Arbitration.

PIABA's members represent individual customers in claims for wrongful conduct against their financial and investment advisors and firms, and one of our missions is to ensure that mandatory dispute resolution forums are fair and affordable for our clients to bring their claims. In many instances, our clients have lost large amounts of their life savings due to their advisors' misconduct, and they therefore have limited resources to spend in any attempt to recover their losses. When these investors are required to arbitrate their claims against financial and investment advisors and firms in the AAA, the financial implications between the AAA's Consumer versus Commercial Rules are critical for customers to achieve a fair and affordable resolution. PIABA remains extremely concerned about forum costs creating very real barriers for retail investor consumers to get access to justice. PIABA strongly believes that until investment advisory cases have their own rule set, that all investment advisory cases should be administered under the consumer rules of AAA because it is the only way to ensure investors have access to justice.

The fees for filing a case in court typically cost an investor-plaintiff approximately $400. Any forum that provides mandatory alternatives to court should not be more expensive to the consumer than court. Courts have properly held it is "unconscionable to condition that process [arbitration] on the consumer posting fees he or she cannot pay. It is self-evident that such a provision is unduly harsh and one-sided, defeating the expectations of the non-drafting party, and shocks the conscience. While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not . . . To state it simply: it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself." *See Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 90, 7 Cal. Rptr. 3d 267, 277 (2003), as modified on denial of reh'g (Jan. 8, 2004) (emphasis added) (citations omitted).

Our members have experienced forced AAA Commercial Arbitration for consumer customers' claims against Registered Investment Advisors and similar firms, and the mandatory deposits and fees have prevented customers from even seeking a just resolution of their claims. In some instances, the AAA Commercial fees, inclusive of arbitrator fees, can exceed the damages sought by the investor. In many cases, if the AAA Commercial Rules are applied, the AAA Forum and Arbitrator expenses will completely outweigh any potential recovery. This risk effectively shuts off access to justice for thousands of consumers. For these reasons, we believe it is crucial for the AAA to require that consumer customer claims against financial and investment advisors be heard in accordance with the AAA Consumer Arbitration rules rather than its more expensive Commercial Rules, until a new set of rules is approved for investment advisory claims.

PIABA appreciates the AAA's efforts to revise its Consumer Rules, including R-1, to clarify the definition of "consumer agreements" to encompass all consumer transactions. We have serious concerns regarding the language used in R-1 defining consumer agreements that would be required to be arbitrated under the Consumer Rules. These rules need to be clear that consumer claims are subject to the AAA's consumer rules. The former R-1 gave specific examples of contracts that fell under the Consumer Rules. However, financial and investment advisor contracts were not listed in either category. The new revised R-1 does not – but should - include these examples; it keeps the same language defining a "consumer agreement" in new section R-1(b).

First, the use of the term "standardized" in relation to the consumer services may be used by investment advisors to attempt to argue that their relationship with customers is not consumer in nature. Investment advisors are fiduciaries who are required to act in their customers' best interest and provide customer-specific advice and services. The AAA definition of consumer services should make clear that the "standardized" requirement relates to the contract itself, not the consumer investment services provided to each customer.

Retail customer contracts with financial and investment advisors certainly meet the definition's description of non-negotiable "standardized, systematic" arbitration clauses and contracts, and the provision of consumer services. However, the terms "consumable goods or services" are not defined and are unclear.

Does the term "consumable" modify the term "services"? Is the provision of investment advice to a customer a "consumable service"? We believe it should be and is, but we also believe that the AAA should include language that would make clear that a contract for such financial advice and services in an investment advisory contract for a customer would fall under the definition of consumer services. Alternatively, we believe that R-1(b) should read: "… where the terms and conditions of the payment for services or the purchase of consumable goods are non-negotiable…"

The proposed revised rule R-1(d) would further allow an investment advisor who is in a Consumer Arbitration to object to the applicability of the Consumer Rules to the appointed arbitrator, and to request a change to the Commercial Rules. This should not be allowed in instances where the AAA has already decided that the Consumer Rules apply. The Arbitrator would have a potential conflict-of-interest because they may be paid a higher fee in a Commercial Arbitration; such a change would be highly prejudicial (and unduly expensive) to consumer customers.

Accordingly, while we welcome attempts to clarify and broaden the definitions of "consumer" agreements subject to the Consumer Rules, we believe that the current definition should make clearer that the contractual relationship between financial and investment advisors and their consumer customers fall under the Consumer Rules.

New Rule R-4 – Filing Requirements and Procedures

PIABA generally supports new Rule 4, but has reservations about subsection (e), which in PIABA's view is unclear and has the potential to create confusion. PIABA also believes that it is imperative that a forum designed to replace courts in the resolution of disputes cannot be fair if it reserves to itself the unilateral power to reframe or rewrite the claimant's statement of the claimant's own claim in any way. Indeed, allowing that to happen would mean that what was resolved would not even be the claimant's dispute as the claimant conceptualized and pleaded it. Instead, it would be a version of the dispute made up by the forum that the Claimant's opponent had hand-picked and written into the arbitration form. The consumer must be the master of the consumer's own claim.

New Rule R-10/56 Declining or Ceasing Administration/Remedies for Non-Payment

PIABA is concerned about Respondents that fail to pay arbitrator fees, which effectively stays and potentially ends a AAA arbitration proceeding. AAA should address this problem in either Rule 10 or 56. After an arbitration begins, a respondent should not be able to stop the arbitration by failing to pay required fees. Claimants are then forced to either 1) go to a court of law to compel a Respondent to pay the required fees; or 2) dismiss the arbitration claim and refile the claim in court after months or even years in arbitration. If a Respondent fails to pay required administrative or arbitrator fees, then the AAA must have the discretionary authority to inform the arbitrator to issue a default award. Once a default award is issued, then Claimant can take that default award to an appropriate court of law to convert it to a judgment and begin judgment adjudication proceedings. AAA needs to write a rule that makes it clear that if a party does not pay its fees a default award may be issued.

New Rule R-11. Mediation

PIABA opposes new Rule 11 to the extent it requires parties to mediate. Forcing parties to mediation is regularly used in court litigation by judges and in PIABA's experience, often does not work when the parties are not ready and willing to engage in the process, and results in undue delays and costs. PIABA believes mediation is a useful tool for resolving disputes, but only when the parties agree to mediate on their own and are *willing* participants.

Most attorneys in these cases have extensive experience and can determine when mediation may be beneficial. Compelling the parties to mediate when the expectations of the parties are not aligned can be a waste of time and resources for claimants, respondents, and

AAA itself. PIABA also opposes new Rule 11 to the extent it imposes additional compulsory costs on the consumers. Businesses, not consumers, should bear the costs of any compulsory mediation.

For the foregoing reasons, PIABA opposes specifically the first sentence of Rule 11, which reads: "During the AAA's administration of the arbitration or at any time while the arbitration is pending, the AAA may refer the parties to mediation, or the parties may request mediation." PIABA recommends the rule strike "the AAA may refer parties to mediation" so that mediation is entirely voluntary.

In addition, it is our experience that voluntary mediation can be effective only after a fair degree of discovery has been accomplished by both sides. Thus, to the extent the AAA retains any mediation referral, PIABA suggests that the mediation referral only takes place after parties are granted the right to full and fair discovery and exchange of documents and information.

New Rule R-12 "Business Notification and Publicly Accessible Consumer Clause Registry"

PIABA generally agrees with the purpose and intent of the proposed Rule. Notwithstanding, there are some changes to the proposed Rule that would further its purpose of providing for a fair and equitable dispute resolution forum for consumers.

First, the use of the word "should" in subsection (a) is permissive and implies best practices. However, the filing of a consumer arbitration clause with AAA for publication in the AAA Consumer Clause Registry ("CCR") should be mandatory. PIABA recommends that the word "must" be used in place of "should", making the final rule read "…(as defined in Rule R-1(b)) must register its consumer arbitration clause…" This will ensure that all consumer clauses are both properly filed and publicly available. PIABA also encourages AAA to include all older and updated versions of the consumer arbitration clauses used by each business on the CCR to ensure full transparency.

Second, in conjunction with AAA's due process standards review discussed in subsection (b), PIABA suggests that AAA publish on the CCR the following information related to each clause that does not pass the due diligence review: 1) the name of the business; 2) the full text of the clause; and 3) the reason for denial. This will provide an important element of transparency that will be beneficial to both businesses seeking to use AAA arbitration clauses and consumers, alike.

New Rule R-14 "Fixing of Locale"

Of course, the (a) portion of the proposed rule explaining that the parties may mutually agree on the locale of the arbitration makes good sense. However, PIABA does not support the (b) portion of the proposed rule, which provides that AAA selects the locale. While the rule does indicate that the filing party may select a locale among more than one option specified in the parties' arbitration agreement, this is a very narrow circumstance that will not apply to most arbitration agreements. Rather, most consumer arbitration agreements – written by the business involved and not subject to negotiation by the consumer – likely specify just one locale: the one most favorable or convenient for the business. To fulfill the AAA Consumer Rules and Consumer Due Process Protocol purposes of ensuring that all parties are treated fairly and equitably and providing "evenhandedness in the administration of consumer-disputes resolution," any deference to a unilateral locale favoring the business is not appropriate. PIABA firmly believes the better rule would be to make the locale closest to the consumer the default locale in all cases. *See, e.g.*, FINRA Rule 12213 (providing that the hearing location closes to the customer's residence is the default for customer disputes administered by FINRA Dispute Resolution).

PIABA also notes that the caveats in the proposed rule allowing the arbitrator to "make a final determination on the locale" does not make the proposed rule fairer. Indeed, the appointed arbitrator is most likely to be located in the locale selected by AAA prior to appointment and therefore is unlikely to approve of any different locale, which would be less convenient for the arbitrator.

New Rule R-16 (Appointment of Arbitrator)

PIABA generally agrees with Rule 16 but proposes that AAA add additional provisions setting forth the process for parties to object to AAA about arbitrator appointments. One such way[1] to ensure a more uniform process for the objection of an arbitrator is to require parties to submit a written motion or by agreement by the parties to remove an arbitrator. By requiring a motion, the parties will have a clearer expectation of the timing of any responses, which affords a fairer process for addressing concerns about arbitrators.

PIABA also believes that the unilateral appointment of an arbitrator to a case is simply unfair to both parties. Without the ability to rank and strike prospective arbitrators based on their disclosures and award histories put blinders on both parties. That is patently unfair. PIABA would support an amendment to this rule requiring 1) that arbitrators be selected from a list of ten proposed arbitrators with a ranking/striking process like that used by FINRA; or 2) the right to at least one preemptive strike of an appointed arbitrator without cause, for both sides.

New Rule R-18 (Arbitrator Vacancy)

PIABA disagrees with this proposed rule change as written. Specifically, we believe that the rule should state that the arbitrator vacancy is filled by AAA unless the parties otherwise agree. Consider, for instance, FINRA Rules 12402 and 12403, which sets forth their process for the

replacement of an arbitrator in cases involving 1 and 3 arbitrators, respectively. The Rules read, in relevant part, as follows:

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[1] Consider also the reasons and processes for arbitrator challenges and objections under FINRA Rules at https://www.finra.org/arbitration-mediation/about/arbitration-process/arbitrator-selection#:~:text=In%20addition%20to%20allowing%20parties,arbitrator%20from%20the%20ranking%20list..

(g) Replacement of Arbitrators

(1) If an arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule.

(2) The Director will appoint as a replacement arbitrator the arbitrator who is the most highly ranked available arbitrator remaining on the combined list.

(3) If there are no available arbitrators on the combined list, the Director will appoint an arbitrator from the chairperson roster to complete the panel from names generated by the list selection algorithm. The Director will provide the parties information about the arbitrator as provided in Rule 12402(c) and the parties shall have the right to object to the arbitrator as provided in Rule 12407.

(f) Replacement of Public Arbitrators

(1) If a public arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule, unless the parties agree in writing to proceed with only the remaining arbitrators.

(2) The Director will appoint as a replacement arbitrator the public arbitrator who is the most highly ranked available public arbitrator remaining on the combined public list.

(3) If the next highest ranked available public arbitrator from the combined list is unable or unwilling to serve for any reason, the Director will return to the initial public list and appoint the next highest ranked available arbitrator to complete the three member panel.

(4) If all remaining arbitrators on the public list are unable or unwilling to serve for any reason, the Director will appoint a public arbitrator to complete the panel from names generated randomly by the list selection algorithm.

(5) The Director will provide the parties information about the arbitrator as provided in Rule 12403(b) and the parties shall have the right to object to the arbitrator as provided in Rule 12407.

As evidenced in these Rules, FINRA's default position is that it will appoint and replace an arbitrator if there is a vacancy. Parties should not give up their right to a full and fair hearing in the event

that an arbitrator is unable to perform his or her duties and continue serving on a Panel, so we believe AAA's rules, including through Rule 18, should likewise further that goal.

Rule 19 (Preliminary Hearing)

PIABA believes that Rule 19 needs to expressly state that the arbitrator(s) and the parties will cover discovery topics. For instance, consider FINRA Rule 12500, which details the initial prehearing conference. – which includes setting discovery related deadlines and briefing schedules. Discovery is often the most important part of the case for arbitrations,

and forcing the parties and arbitrator to set deadlines, confer on discovery issues, etc. early in the process will facilitate an expedient resolution.

New Rule R-20 – Discovery/Exchange of Information

PIABA believes this proposed rule represents an improvement over the current AAA Discovery Rule for Consumer cases, but PIABA does not believe the changes go nearly far enough. Under the AAA's current consumer rules, many consumers are prevented from obtaining key evidence to prove their claims, denying them a fundamentally fair hearing process. To be a fundamentally fair process, consumers must be entitled to the relevant evidence that will ensure a fair hearing is held. Discovery is a vital process in the search for truth. Many consumer cases involve disputes over hundreds of thousands of dollars of consumer's life savings. Under the current rules, and even under the new proposed rules, businesses will likely be able to withhold directly relevant evidence, admissions, and the veritable "smoking guns" that are often produced in the adversarial litigation process.

Document discovery is of the utmost importance in arbitration proceedings. PIABA acknowledges that certain discovery procedures in Arbitration are somewhat more limited than the procedures in court, with no guarantee of depositions, interrogatories, or requests for admissions and certain limitations on the use of subpoenas. Without full and fair disclosure of relevant documents, consumers are subject to "trial by ambush" in claims against sophisticated businesses who can control the information available to the consumer and are motivated to avoid producing any incriminating. PIABA appreciates that AAA makes it clear that, unlike the previous Exchange of Information Rule which left the decision of what materials to voluntarily exchange almost entirely to the parties, that the new rule does recognize that exchange of information must "safeguard[] each party's opportunity to fairly present its claims and defenses."

In court, parties are required to produce relevant documents and discovery materials without requests. *See, e.g.*, Fed R. Civ. P. 26 (requiring parties to affirmatively identify the relevant witnesses and produce documents upon which they may rely to support their claims/defenses). The Federal Rules ensure that parties are allowed to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case" without regard to whether the discovery would be admissible at trial. In many consumer arbitrations, the need for discovery and production of materials is significant. Indeed, in the FINRA Arbitration Forum, there is a "presumptively discoverable" Discovery Guide that lists a wide variety of materials that must be exchanged by the parties, absent exceptional circumstances. FINRA, DISCOVERY GUIDE (2013),

https://www.finra.org/sites/default/files/ArbMed/p394527.pdf; FINRA Rule 12506; Steven Caruso and Ellen Slipp, Discovery in FINRA Arbitration, FINRA's THE NEUTRAL CORNER (Vol. 2 – 2015). For investor claims in AAA Arbitration in particular, these same types of materials, at minimum, should be available for production. Other claims our members have filed to represent investors, including cryptocurrency related claims and other security- based claims including against phone carriers also necessitate the production of internal materials to establish and prove the claims asserted by the consumers, such as inadequate security processes, reviews, compliance, and procedures on behalf of the business. The AAA's rule does not provide clear enough guidance to the arbitrators on a party's right to access to discovery materials, and PIABA is concerned that at least some AAA arbitrators may be inclined to not permit consumers access to important relevant materials to which the consumer should be entitled.

In short, while the AAA's proposed rules are clearly an improvement over the current system, AAA's rules should more clearly acknowledge consumers' rights to access relevant discovery that helps prove and establish the consumers' claims. Access to fair discovery and document production in AAA Arbitration is essential for a fundamentally fair arbitration process.

New Rule R-22 "Date, Time, Place and Method of Hearing"

The proposed rule contains several portions that make good sense, such as the notice requirement at least 10 days in advance of a hearing date and requiring that the parties respond to requests for hearing dates in a timely and cooperative manner. However, PIABA does not support virtual hearings as the default method of hearing. Particularly since the Covid-19 pandemic disrupted arbitrations in various forums, studies have "revealed a 'remote penalty' imposed on claimants – a lower chance of prevailing in an arbitration when the hearing proceeds on videoconference as opposed to in person." Jill I. Gross, *Post Pandemic FINRA Arbitration: To Zoom or Not to Zoom?*, 52 Stetson L. Rev. 363, 365 (2023) (citing studies of arbitration outcomes in AAA, FINRA, JAMS, Kaiser, and Canadian forums). Accordingly, in PIABA's view, and to fulfill the AAA Consumer Rules and Consumer Due Process Protocol purposes of ensuring that all parties are treated fairly and equitably, and providing "evenhandedness in the administration of consumer-disputes resolution," it is important for in-person hearings to be the default rule. Parties could of course still stipulate to the use of virtual hearings. However, consumers should have the presumption of entitlement to a final hearing in-person, particularly where they bear the burden of proof.

New Rule R-24-Representation Under the Consumer Rules

PIABA fought for over a decade to prevent "non-attorney representatives" from representing parties in FINRA Arbitration, and FINRA adopted a rule prohibiting this blatant unauthorized practice of law except under specific circumstances where a law school legal clinic is representing a party. PIABA believes that the AAA should similarly bar "non- attorney representatives". Section (a) should therefore be amended to explicitly state that a party's representative must be an attorney licensed with at least one state bar unless the representative is from an authorized legal aid or law school clinic. "Non-Attorney Representatives" must be banned expressly.

PIABA also believes that arbitration is contractual by nature between the parties, not their counsel. As such, arbitrators lack jurisdiction to interfere with or hinder an attorney from withdrawing from a case. Arbitration is not a court of law where the attorneys are officers of the court that has jurisdiction over their conduct. Arbitrators lack that authority and the AAA should not have a rule that interferes with the relationship between party and counsel or makes the arbitrator the decider of ethical issues including requirements under

applicable bar rules. FINRA expressly notes that it lacks jurisdiction, in the context of sanctions, to "sanction a party's attorney for conduct or noncompliance because FINRA does not have jurisdiction over attorneys."[2] Therefore, AAA should remove subsection (c) of this rule.

New Rule R-31 Dispositive Motions

PIABA does not have a problem with section (a) of Rule 31. However, it believes dispositive motion sections (b) and (c) of the Rule do not go far enough for consumer protection.

In AAA Consumer Arbitration, discovery is limited and based upon the arbitrators' discretion. Accordingly, the only way for consumers to fully and fairly present their cases to arbitrators is through a full and fair evidentiary hearing. Dispositive motions strip consumers of such an opportunity and, therefore, should be discouraged in AAA Consumer Arbitration.

Current AAA Consumer Rule 33 (Dispositive Motions) allows for dispositive motions *only if* the arbitrator determines the moving party has shown "substantial cause" that the motion is likely to succeed and dispose of or narrow the issues in the case. Proposed AAA Consumer Rule 31 allows for dispositive motions where the arbitrator determines the moving party has shown the motion is "likely to succeed" and to dispose of or narrow the issues in the case." "Substantial cause" (in the current rule) is a much higher bar than "likely to succeed" (in the proposed rule) and should be kept in the revised rule. Otherwise, consumers will face more dispositive motions and risk losing their opportunity for a full and fair evidentiary hearing before they've had a chance to present their cases, or even receive relevant discovery.

In addition, for consumers to have a chance to successfully defend against dispositive motions, they will need to attach and refer to relevant documents and information to support their claims. Accordingly, the rule should also require discovery to be complete prior to any party being permitted to file a dispositive motion.

Finally, to ensure consumers have every opportunity to present the facts and arguments that support their cases and defend against dispositive motions, the rule should require the arbitrators to allow oral arguments *unless all parties waive them*.

New Rules R-36 (and R-1). Increase of paper case limits to $50,000.00.

The revised Rules increase the requested damage cutoff for required paper cases from $25,000.00 to $50,000.00. While this increase may appear to save consumers time and costs for cases

between $25,000.00 and $50,000.00, it would be extremely prejudicial to some consumers in cases for which discovery or a hearing is necessary to be able to adequately present their case.

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[2] https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf *at 60.*

For this reason, we believe that in cases between $25,000.00 and $50,000.00, the consumer should have the ability to choose whether the case would proceed on the papers or with a hearing. Such a provision is used in arbitrations administered by FINRA Dispute Resolution (Rule 12800), which requires claims for under $50,000.00 to be decided on the papers unless the customer requests a hearing. This change would further the goal of providing a fair and just forum for the resolution of consumer disputes.

New Rule R-41 (Communications)

PIABA takes issue with the purpose and scope of Rule 41(d), which states that AAA may initiate administrative communications with the parties or their representatives either jointly or individually. The term "administrative" communications must be defined, as our concern relates to how the parties may interpret that term to leverage AAA to improperly communicate with or relay information to arbitrators. Further, we believe that the Rule should also include the provision that no party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree. *See, e.g.*, FINRA Rule 12210 (Ex Parte Communications).

New Rule R-42 – Confidentiality

PIABA generally supports New Rule R-42 which appropriately limits the scope of confidentiality. PIABA supports the publishing of awards, but PIABA believes the names of the businesses should *not* be removed from the awards. The arbitration process will greatly benefit from increased transparency, including in providing full and fair disclosure of arbitrators' past service or patterns of decisions in favor of certain businesses.

The AAA's proposed rule properly acknowledges confidentiality orders could cover "trade secrets and confidential information." Confidentiality agreements in arbitration are increasingly sought by businesses in an inappropriate manner that would declare all documents as automatically confidential. "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). This is particularly poignant for a private arbitration process – one that businesses force customers into. Simply put, we believe that sunlight is the best disinfectant, and processes that seek to shroud the entirety of the arbitration process in confidentiality or opaque protections runs contrary to a fair arbitration process.

Of course, if confidentiality orders are made by the arbitrator, it should be recognized that parties claiming confidentiality of documents bear the burden of establishing the document's confidentiality and merely should comply with the recognized legal procedures and only properly cover documents *that are actually confidential or legally protected* and not seek to shift the burden of establishing confidentiality to the non-producing party.[3]

Many of the claims filed in AAA are similar cases or fact patterns arising from a failed product, system, or event, *e.g.*, investment products or strategies, crypto platform issues such as those involving Coinbase's security and compliance system, cell phone service security breach matters, etc. Those cases often involve production of the same exact documents in dozens, and often hundreds, of cases. AAA's guidance should more clearly acknowledge confidentiality orders should consider the nature of cases and provide for efficient production of confidential materials in multiple cases to reduce the burden on all parties. The Manual for Complex Litigation has multiple sections which discuss using discovery material from one case in other related cases.[4] Confidentiality orders that protect actually confidential documents while recognizing benefits of global production are *routinely* entered in state and federal courts around the country.[5] Confidentiality orders requiring production of documents for use in any related actions are also routine in complex litigation, including mass tort and MDL litigation.[6] The AAA Arbitration process, particularly where there are mass action claims or product based claims could significantly reduce burden and expense for the parties by acknowledging and expressly permitting for use of the documents in numerous cases, subject to compliance with the confidentiality provisions, in other or future related cases.

New Rule R-57 (and R-21) – Sanctions and Enforcement Powers of the Arbitrator

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[3] *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co. 331 F.3d 1122, 1130 (9th Cir. 2003) ("Under the federal rules, "A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted."); Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (""Blanket" protective orders require particularly "heavy burden," requiring a showing that disclosure will work a "clearly defined and very serious injury.").*

[4] *Manual for Complex Litigation, Fourth §§11.423, 20.14, 40.27 (Same Confidentiality Order provides: "any discovery material produced in this litigation may be used in all actions encompassed by this [insert product or other litigation name] litigation and in any other action brought by or on behalf of any other [insert product name] user who agrees to be bound by the terms of this order.")*

[5] *Rogers v. Brindle, No. 12108807, 2013 WL 12226948, *1 (Ga. Super. Jan. 31, 2013) (Trial Order) ("Any discovery material produced in this litigation may be used in all actions encompassed by this action **and** in any other action brought by or on behalf of any party regarding the allegations alleged in this lawsuit."); Sunrise Partners Ltd. v. Team Health Holdings, Inc., Nos. 2017-0154-TMR, et al., 2017 WL 2268995, *2 (Del.Ch. May 23, 2017) (Trial Order) ("Subject to the terms of a confidentiality order substantially similar to that entered in this Consolidated Action, **counsel and petitioners bringing any Related Action shall have access to all discovery**.")*

[6] *In re Roundup Products Liability Litigation, No. 3:16-md-02741-VC, *4 (N.D. Cal. Dec. 9, 2016) (Protective and Confidentiality Order).(allowing for confidential material to be used "for any other action brought by or on behalf of a former user of Monsanto glyphosate-containing products alleging injuries or other damages therefrom" subject to agreement to confidentiality provisions); In re Xarelto (Rivaroxaban) Products Liability Litigation, MDL No. 2592, *9 (E.D. La. May 4, 2015) (Pre-Trial Order No. 12) (permitting use of confidential documents by ""Any attorney of record for plaintiffs in other pending U.S. litigation alleging personal injury or economic loss arising from the alleged use, purchase, or payment of Xarelto for use in such other Xarelto action, provided that the proposed recipient is: (a) already operating under a Protective or Confidentiality Order in another jurisdiction where the Xarelto action is pending; or (b) agrees to be bound by this Order…").*

PIABA supports the AAA adding rules expressly providing Arbitrators with the authority to issue sanctions to parties who engage in abusive conduct and ignore orders. Proposed Rule 21 is like both the AAA Commercial Rules and the authority provided to arbitrators under the FINRA Code of Arbitration Procedure. PIABA is concerned, however, that the rule may go too far in subsection (e) because it is vague, too broad, and susceptible to misapplication and abuse. PIABA recommends that the AAA remove subsection (e) of the new proposed Rule 21.

With respect to new Rule 57 – Sanctions – PIABA supports providing arbitrators with authority to issue sanctions. However, the proposed rule, which is the same as that under the Commercial Rules, is not specific enough to give guidance to parties about available sanctions. FINRA rule 12212 – Sanctions – specifically sets forth what sanctions are available, including:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorney's fees, costs and expenses.
- Dismissal of a claim, defense, or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

Likewise, in FINRA Rule 12511 FINRA specifically advises parties and arbitrators that specific sanctions can be ordered for discovery abuse. Providing the parties and the arbitrators with clear guidance on what sort of sanctions could be ordered is critical to ensuring a fair and disclosure-based system. PIABA requests that the AAA include these specific examples of what sanctions arbitrators can order under the appropriate circumstances.

New Rule R-58 "Appeals"

This Rule should not be enacted, as AAA consumer arbitration decisions should not be appealable through a separate arbitration procedure. Some of the most consistently touted benefits of arbitration are the supposed expedience, finality, and cost-effectiveness. This Rule would greatly

diminish each of those three benefits. First, the appeals process would deprive the parties of the expeditious resolution of their disputes, as the appeal process can take a substantial amount of time to complete. Second, an appeal would obviously compromise the finality of any decision rendered by the arbitration panel, given that it could be overturned on appeal. It would also create another basis for the losing party to challenge the arbitration decision in court via a petition to vacate. Thus, if arbitration appeals were to become commonplace, it would likely spur an increase in related litigation. Of course, these subsequent court actions would further increase the amount of time the parties are involved in the dispute before its conclusion.

Appeals under the present rules also have the potential to lead to compromised results, where appeals panels make determinations based upon law or facts not in the record of the original arbitration hearing. *See, Hamilton v. Navient Solutions, LLC.,* No. 18 Civ. 5432 (PAC) (S.D.N.Y. February 14, 2019) (appeals panel partially overturned underlying arbitration decision based upon change in the law which arose after the close of the record). Given the inability to remand the case for a new trial, situations such as *Hamilton* present a serious issue that compromise the fairness of an appealed award that does not exist in court. In Hamilton, the parties presented their case in a manner that comported with the then- prevailing law, only to have that changed (along with the ultimate outcome of the case) without the ability to re-try the case and present new evidence.

PIABA appreciates the opportunity to comment on these proposed changes, and PIABA would like to contribute to improvements to the AAA Rule sets to ensure that consumers and investors are offered an affordable and fair arbitration forum.

Sincerely,

Adam Gana, President
Michael Bixby, EVP/President Elect
Joe Wojciechowski, Vice President

Attorney Comment #11

Attorney: **Anonymous**
Date Received: **2/28/25**

February 28, 2025

To the American Arbitration Association:

I appreciate the opportunity to comment regarding the AAA's current policies and procedures and how they may be modified to provide a more equitable and efficient results. These goals are certainly worthwhile, but the primary goal of any system designed to resolve disputes is to obtain the relevant facts.

The AAA retains and deserves its reputation as the most credible organization to manage consumer disputes, and perhaps the only such institution that has wide -spread credibility.

THE PROPOSED RESTRICTION ON LIVE TESTIMONY IN MOST CASES

My comments include substantial material relating to the problems that consumers face in purchasing vehicles in Florida. Florida has the third largest population in the United States and has a diverse population. However, my comments may illustrate the practical problems associated with a major segment of consumers purchasing vehicles. The application of the proposed rules is likely to prevent consumers from the opportunity to be heard.

The use of affidavits for key witnesses are not appropriate mechanisms to determine the truth. Nor will decisions based on lawyer prepared affidavits likely provide the necessary predicate to resolve disputes correctly. Rules that prohibit parties and key witnesses from testifying are likely to significantly reduce the credibility of the AAA process substantially.

The purchase of an automobile is one of the most expensive and important decisions that most families make, except the purchase of a home. One could argue that the purchase of vehicles is in fact the most significant purchase because many consumers buy a new or used automobile every 5 to 7 years, while they may only buy a new home 3-6 times in their lifetime.

In 2024 there were 15.9 million new vehicles sold in the United States and 16.8 million used cars sold. The Florida data is less available. In 2022 Florida sales of new vehicles was 1,367,572. However, the economic data demonstrates the importance of the auto industry in Florida. One report stated that in 2022 total state sales tax for new vehicles was 3.2 billion and 800.65 million for used vehicles.

My comments are intended to focus on the practical consequences of certain proposed changes in the AAA consumer litigation rules. Specifically, I am concerned about the proposal to prohibit witnesses from being called in consumer litigation unless the amount of issue reaches a $50,000 threshold. The consequence of such a rule is likely to effectively prevent consumers from a practical remedy. The consumer will have the burden of proof, and it is difficult to understand how consumers would be able to prevail in many cases when it is not allowed to testify or call adverse witnesses to establish the claim. Such restrictions are also likely to reduce the credibility of the AAA.

I also question whether precluding live testimony in the vast majority of cases will create substantial savings to the parties or the AAA that would justify the exclusion of live witnesses.

Litigation between automobile dealers and consumers are often “he said, she said,” type disputes and is precisely the type of conflict that requires cross-examination to make a reasoned judgment. If the new rules are enacted based on the proposal, the AAA will be faced with the situation where pre-existing contractual disclosures concerning arbitration will be seriously misleading.

Another serious issue relating to the $50,000 threshold is that the contracts already in place provide no disclosure regarding the $50,000 disclosure. How will the $50,000 disclosure be

determined? Does it include attorney's fees, or potential punitive damages? Under Florida law, parties are provided with exceeding broad authority under section 501.211(1) to seek declaratory and injunctive relief which would result in very substantial savings for consumers and would almost certainly exceed the $50,000 threshold.

No one would seriously question that the type of standard contract provisions used in Florida was used in the great majority of cases by major auto dealers. The Florida Forms are typically adopted with little or no significant changes from the model forms sold by Reynolds & Reynolds or similar providers. These forms are almost universally used by larger new car dealerships, as well as many or most smaller dealers.

These forms typically purport to state specifics to conform to some degree with state laws. The agreement used by major auto dealers in Florida include the designation "NO FADA…"—A reference that I assume refers to the "Florida Automobile Dealers Association." (That practice leads to some interesting potential antitrust considerations, which may help explain the commonality of such agreements.)

The AAA policy recognizes that these contracts are classic examples of one-sided adhesion agreements. However, it is unclear that the AAA position is given any substantial weight by many arbitrators. I suggest that the AAA randomly review a large recent number of AAA orders to determine if AAA policy has any actual impact on the decisions made by AAA arbitrators.

AAA POLICY RELATING TO RESPONDENT DEALERS -REJECTION OF AAA ARBITRATION

There are a number of issues that I believe that the AAA should consider addressing. I have had at least two cases where Auto Dealers have simply ignored the AAA and required my clients to litigate in state court. The contracts require Arbitration (except the small claims option) and have the standard waivers of class actions and forfeiture of the right to a jury trial.

A significant percentage of Respondent auto dealers simply refuse to arbitrate. The reasons are probably based on their desire to drag the case out in state court for as long as possible and also have the option to appeal any adverse ruling. **[Redacted]** The net result of the AAA policy or practice is to provide the Respondent with the option to either arbitrate the matter or litigate the case at their discretion. Plaintiffs do not have that option.

With all of the advantages that businesses have over consumers, it strikes me as unconscionable to allow the business the option of arbitration or litigation depending on the circumstances and the Respondents' preferences. Consumer Plaintiffs do not have that option.

There is a well-recognized enforcement mechanism to enforce the contractual terms— written notice to the Respondent that if they do not answer within a reasonable period of time, a default would be entered. The AAA is in a position to determine how common this strategy has become. The AAA responses to these letters would appear to foreclose any effort by the Plaintiff to compel the Respondent to arbitrate cases.

Another problem with the standard Arbitration clause fails to inform consumers regarding the reality of arbitration. The typical arbitration provision states:

DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN A LAWSUIT, AND OTHER RIGHTS YOU HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

The disclosure is highly misleading about the consumer's rights. For example, consider the following alternative:

The arbitration provision was written to protect the company, while allowing you to bring a complaint in arbitration. It does have certain advantages for you including a much quicker resolution of the dispute, and the seller may not be awarded attorney fees unless your claim is frivolous--without a legal basis or asserted in bad faith. Additionally, the American Arbitration Association generally considers most arbitration agreements to be one-sided. Even if the contract and /or arbitration agreement is held to be one-sided, it does not mean that you will prevail on your claim.

On the other hand, arbitration has a number of very important limitations. These include the following examples of the disadvantages of arbitration:

THE ARBITRATION ALTERNATIVE

(h) If your case requires significant discovery, you will probably be limited to perhaps one deposition if any, except in very small percentages of cases.

(i) Discovery is very limited in arbitration, and you will be at a very significant disadvantages if your case requires obtaining information from the Defendant dealer (Referred to as "respondent"), third parties and records of related misconduct.

(j) If you arbitrate your claim you have virtually no way to obtain review of the Arbitrator's order.

THE LITIGATION ALTERNATIVE

(k) If you litigate in court, you are very likely to be entitled to substantial discovery. Your counsel will almost always advance costs which is deducted from any recovery depending on the engagement agreement.

(l) Any adverse decision can be appealed so you are not dependent on one arbitrator to make the decision.

(m) As a practical matter, litigating a dispute in court will require you to hire an attorney who will require a significant percentage of your recovery, unless he is awarded fees by the court. Litigation in a state court will take substantially longer to resolve compared to arbitration.

(n) The advantages of litigation are likely to be reduced significantly if you waive a jury trial.

(o) You have the right to insist on removing these terms but only if the dealer agrees. Both parties need to initial the cross-out of the provision and be signed by you the customer and the sales manager or general manager who has authority.

THE AAA POLICY OF NOT PUBLISHING ORDERS EXCEPT WHEN THE PARTIES AGREE

The AAA current policy, as I understand it, is not to publish opinions unless the parties agree, and the names of the parties are suppressed. I am not convinced that this policy is necessary, but I understand why companies would strongly favor such policy. The problem is that the more pernicious the conduct, the greater the need for the public to be aware of the conduct.

There is a side effect of suppression of orders that creates additional advantages to businesses. That follows because businesses and their attorneys who practice regularly in defending arbitration cases. This advantage provides a substantial head start in evaluating the case as well as potential or designated arbitrators.

THE PROTECTION CONSUMERS CURRENTLY BENEFIT FROM AAA ARBITRATION

The AAA provides several significant advantages to consumers. First, AAA rules and policies recognize that most (or more likely virtually all) contracts are drafted by business lawyers serving their client's interest. The first advantage is the recognition of such contracts as classic adhesion contracts. However, this obvious and potentially significant recognition that these contracts are one-sided has not necessarily played any significant role in the decision. I concede my admittedly limited knowledge of AAA orders.

I urge the AAA to review representative collection of AAA consumer cases to see how many arbitrators give weight to that important principle and determine how arbitrators apply that mandate. In my limited experience regarding this issue, I do not recall any citation to the AAA policy in any order.

Nor have the arbitrators sought to distinguish or address in any manner the controlling Florida State Supreme court opinion on the issue. *See Basulto v. Hialeah Auto*, 141 So.3d 1145, 1160-61 (Fla. 2014) ("unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contract terms, which are unreasonably favorable to the other part.") The Florida Supreme Court held:

> "But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. *In such a case, the usual rule that the terms of the agreement are not to be questioned, should be abandoned, and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."* (1160)

EXAMPLES OF ONE-SIDED CONTRACTUAL TERMS AND CONDITIONS

The conduct involved in this case and common with virtually all retail auto dealers is characterized by the use of lengthy documents presented to the customer that have one- sided terms.

At the outset, it should be noted that many critical sections of the Buyer's Order and Retail Installment Sales Contract (Finance statement) contain very small print that are difficult to read—surprisingly even the critical Arbitration Provision and the first numbered statements that waive:1) Waiver of jury trial and required arbitration,2) Class action waiver; 3)"Discovery and Right to appeal in arbitration are generally more limited… The remainder of the disclosure is in small print including more one-sided provisions. However, lenders have a significant interest on recovering the money loaned.

But the problem is that consumers are overwhelmed with the mass of documents that they are required to execute – generally with a representative pointing out where the customer must sign. I had a client read all of the documents he was given, and it took him about 2½ hours to read all of the documentation.

The Federal Trade Commission, it its filing in the Federal Registry (Vol 89, No. 3, p 594) stated that:

> The Commission's recent enforcement action against a large multistate dealership group is illustrative of this point in that in the motor vehicle marketplace. In that matter, the Commission received 391 complaints – about add-ons and other issues – over a several month period prior to filing a complaint against the 13th largest dealership group in the country by revenue as of 2020. However, in the survey of the dealers' customers over the same time, 83% of respondents or at least 16,848 customers indicated they were subject to the dealers' unlawful practices related to add-ons alone."
>
> These "add-ons" involves the near universal practice in the retail auto industry to add on various service contracts, and other products that are often named in a manner that makes it almost impossible to determine what the product or service is that is being sold. For example, one Florida dealer sold a Silverado to a customer and added on $1,249 described as a "Chevy Warranty" and listed as a "Service contract". The Customer had purchased a new truck which had a warranty. A separate document states that she purchased the GM VSC CHVS Chevrolet Protection Plan for 60 months and $100 dollar disappearing deductible. There is no explanation of what the "product'' is and to what extent it is being provided for $1,248 or if the product or service is redundant. Without the contract, the

customer is subject to a serious disadvantage in understanding the transaction.

Nor does the customer receive the contract for the "add-ons" before they are required to execute the Buyer's Order. It is my understanding that typically the "add-ons" are sold by the "Finance Department," but the dealer employees are actually selling products offered for sale through the specialized finance company.

Another add-on is a $999 charge for prepping the vehicle and $399.50 for electronic filing. The dealers have characterized these charges as "negotiable", but these items are treated as non-negotiable 95-99 percent of the time. The actual cost for filing a title required by the state is about $ 80.

Another example involves a dealer who imposed the following costs:

(g) $9,995 market adjustment to the MSRP for the low demand 2024 Mitsubishi Eclipse;

(h) $3,380 for Comprehensive Care Auto Services. In the event anyone wonders what they are paying $3,380—they will have a hard time determining the product as "Comprehensive Care" and described as "Titanium warranty"

(i) $1,500 U.S, Warranty Corp – actually misdescribed since the product is GAP insurance,

(j) $399 for electronic filing ($80. Payment to the State

(k) $999 for detailing the new vehicle

That particular dealer ran the advertisement attached to which was remarkably misleading by treating "footnote disclaimers" that negated what appeared to be bargain offers. (The advertisement sent to the customer was immediately confiscated when she arrived at the dealership) The SALES MANAGER convinced the customer to sign the contract at $702.28 for 84 months but assured the customer that after 6 months the monthly payments would be reduced by 50 percent. Several other customers were targets of the same scam.

Large and small auto dealers' documents are prepared by *Reynolds & Reynolds Company* that serves primarily the auto industry. Rocket Research reports that *Reynolds & Reynolds* had sales of $903.2 million and approximately 4,800 employees. Although headquartered in Ohio, it also has an office in Tampa, Florida. According to Rocket Research, 70 percent of auto dealers conduct business with *Reynolds*.

The forms used by the dealers are completely "one-sided" form contracts that are commonly issued by a very high percentage if dealers, so that the consumer has little or no option. The critical Buyer's Order is a form document which at the bottom states "Law form N0 FADA -BOVIARB- CUST

(c) the *Reynolds and Reynolds Company* and CC7 36120-06/22. This form is widely used in the industry, and it is virtually impossible to buy a new or used vehicle that is not subject to such one-sided provisions.

The following list is typical for the types of concerns and conditions that ae used commonly or almost always used by auto-dealer:

- Require arbitration of almost all disputes or small claims court;
- Excluding class actions, resulting in immunizing bad actors so only a relatively small number of buyers obtain compensation
- Requiring a waiver of a jury trial;
- Adding additional burdensome terms are buried in the fine print and generally on the back of document being executed.

It is no surprise that these contracts are one-sided. But the extent of the one-sided nature of these agreements established the first of 2 prongs of unconscionability.

Examples from the Buyer's Order or other documentation:

a) One of the most unfair provisions allows the retailer to retain and sell the customer's vehicle even when no specific agreement was set on the purchase of the new (or used vehicle) being purchased from the dealer. This practice alongside non-refundable deposits puts the consumer in a position that has no leverage on the transaction, and the dealer can increase the net profit and price by adding "Add-ons" or simply not negotiating off the sticker price or refusing to sell the car at actual market prices. Customers are faced with the option of signing the contract or taking a taxi home and start to look for another vehicle. Of course, the customer can buy back the vehicle for 20 percent higher price of the trade-in price and possibly adding more taxes and add-ons. (This is a rough estimate.)

b) Another provision that allows the dealer to keep any deposit made by the buyer, if the consumer does not close on the transaction—regardless of the reason. Florida statue 501.976(10) requires a disclosure whether the deposit is non-refundable or not refundable.

c) Consumers are also strictly liable for all damages based on providing incorrect information regarding certain conditions of a trade-in—despite the access to the trade-in that the dealer can inspect the vehicle with its own mechanics. However, many dealers selling used vehicles avoid any serious inspection of the trade-in in order to avoid having to disclose problems to purchasers if you buy a vehicle and identify potential issues. (Some dealers such as CARMAX conduct thorough examination of vehicles and make repairs prior to selling the vehicle. They also offer a 90-day warranty so if a customer then purchases an extended service contracts, they will not have an issue with a pre-existing problem.)

d) The ***seller's*** right to cancel includes up to the assignment of the paper—which is in the control of the dealer. There is no comparable "out for the consumer."

e) Under the heading "Rebates, Incentives, and Discounts," The form agreement states: "We are not required to find or disclose all available rebates, incentives, or discounts for which you might be eligible***. If conditions apply to a rebate,incentive or discount, you*** must ***provide us with all necessary documentation, to verify your eligibility. By this agreement, all rebates, incentives, discounts, and other similar payments are assigned to us." Vehicle Buyer's Order. Form FADA- BOVIAARB19(10/19) (BACK OF BUYER'S ORDER) In other words, the dealer gets the incentive, and the customer may not even be aware of the incentive.***

Other documents are form documents used by the dealers and are prepared to advance the interest of the dealer in an entirely one-sided fashion. The finance documents are prepared by the finance company and their counsel to further the interests of the finance company and are one-sided with the customer having no ability to change the terms.

f) In fact, all of the documents used in the transactions protect the dealer, the finance company, and often the sale of various add-on products such as "warranties", magical products that protect the finish of a car, over-priced items.

g) As bad as the contractual documents used by dealers seem, the conduct of the dealers in explaining the contractual terms is even worse. Customers are not given critical documents relating to the add-on charges. Often dealers use a computer to show the customer the terms, and provide a brief explanation, intended todownplay the significance of terms that the customer asks about. Customers are routinely prevented from reviewing material terms by being rushed through by the finance department. Dealers will push their customers to sign documentations without a chance to review the mass of paperwork.

h) Some of the form contracts purport to allow the dealer to sue and recover one- way attorney fees. Florida law prohibits such one-way fee agreements in consumer transactions.

That case recognized that the dealer contract that courts should refuse to enforce oppressive terms and conditions. In fairness to the arbitrator, few other courts seem to take the Florida Supreme Court opinion seriously.

Additionally, the AAA gives the substantial benefit to consumers that they are protected from state law policies that impose liability on the losing party. Under the AAA current policy, a consumer is only liable for fees if the claim was frivolous. Presumably, the AAA recognizes consumers asserting their own claim are entitled to some additional room for error. I am confident that the AAA will continue to apply those two protections for consumers.

Another advantage that consumers are very likely to benefit from the AAA administration of cases is a much faster resolution. The primary benefit of the AAA's administration.

Besides the unique advantages that some businesses seek to unilaterally avoid AAA arbitration despite the obvious advantages there are a large number of advantages they enjoy as well that the typical Businesses enjoy. The most fundamental advantage that businesses enjoy are based on the contractual provisions uniformly have enforceable restrictions on class actions.

The claims of consumers are typically very modest, decreasing the incentives to competent counsel. Counsel for the consumer does have the significant benefit that the AAA process for consumers is relatively fast. Of course, the Respondent has the same advantage as to cost savings, but the cost is generally less significant as a cost of doing business.

The advantages overstate the advantages of Class action waivers to businesses in arbitration. Businesses can include waivers in almost any form of contract whether or not there is an arbitration clause.

The most significant advantage for defendants is that the Claimant has the burden of proof and the scope of discovery. As an example, at a preliminary hearing the arbitrator limited discovery regardless of the minimal burden—production of 1-3 pages as to the cost incurred by the dealer to purchase the automobile to support a claim of unconscionability. Without those facts, I will in all probability be unable to prove the claim. I fully expect that the dealer will be able to provide evidence of the improvements that they incurred preparing the vehicle for sale.

The difference is that the businesses are relying on their own documents and virtually all the evidence is in the exclusive possession of the Respondent. In every consumer case the restrictions on discovery of documents and the availability of witnesses cuts one way. The net effect is a substantial advantage to the business.

The "Plaintiff" lawyers who represent clients in Florida can generally not influence the behavior of the businesses except in limited circumstances. In Florida there is one specific tool that provides at least the possibility to protect consumers. The Florida Unfair and Deceptive Trade Practices Act (FDUTPA) that provides for very broad injunctive and declaratory relief:

Section 501.2111 of the Florida unfair and deceptive trade practices act states:

Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment, that an act or practice violates this part, and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

This provision as a practical matter is the only comprehensive manner to directly protect consumers. Although the power of a class action would provide more immediate relief, it is not available. The injunction remedy is the only practical way to protect consumers.

THE CONSEQUENCES OF THE $50,000 THRESHOLD TO ALLOW WITNESSES TO TESTIFY

The cost of the litigation will almost always exceed the "value of the case". Perhaps the proposed $50,000 minimum threshold is intended to reduce the cost for all of the parties. Certainly, the AAA has legitimate concerns about the administrative cost of hearings that live witnesses may involve.

However, parties now have the right to agree to restrict the witnesses that will testify. My experience is that even in cases with large stakes, the number of witnesses is restricted to one witness per party in an arbitration. The most troubling aspect of the proposed restriction is that the arbitrator will lose the opportunity to observe witnesses as they testify on direct and must have their veracity tested by cross examination. What is the actual savings in administrative cost really going to be in these circumstances. The current Proposal—if enacted—would deny both parties from being tested by cross examination.

Incremental protection may be modest. But individual suits are the only practical way to impose some limitations on such predatory conduct.

CAN STATE ATTORNEY GENERALS POLICE THE MARKETPLACE

Normally, the various State Attorney Generals offer the possibility of effective prosecution to deter unfair and deceptive conduct. However, In Florida, the AG has been remarkably hesitant to initiate such cases.

The AG states that it generally cannot accept complaints against businesses because Florida Law prohibits the AG from initiating investigations. Specifically, the Florida AG has taken the position that it has limited authority because the State Attorneys has that authority to investigate Unfair and Deceptive Acts and Practices. The exceptions include when more than one District is affected or situations the potential defendant sales products or services in more than one District. Section

501.203(2) The enforcing authority:

> " Enforcing Authority" means the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office's jurisdiction." Enforcing authority " means the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney, defer to the department and writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

In response to a public records request, The Attorney general promptly produced data for a 4-year period. The AG's response included all investigations that were opened and still pending and resolved cases. One investigation was resolved with an AVC (assurance of voluntary compliance) that included comprehensive safeguards for the public and a substantial Civil Penalty (Dated 9/12/2023) A review of the Order obtained by the AG was an extremely impressive victory for the public. The total number of non-public cases (including 2018) were about 8 ongoing investigations. The only case filed in court against auto dealers was the AVC previously referenced.

There have been several policies of the Florida AG that has limited consumer efforts to protect the public. Consumers have been told:

1) As discussed previously, a claim that only the State Attorney can investigate a claim;

2) The AG cannot accept a complaint against the dealer because the AG had no other complaints.

3) Consumers are told to complain to the Florida Department of Highway Safety and Motor Vehicles —which has limited authority.

Under the circumstances the only practical protection for consumers is private actions that will be resolved through the AAA. If a $50,000 threshold is applied, consumers will be at a substantial practical advantage caused by limited discovery, the inability to take depositions or to call witnesses at trial.

Attorney Comment #12

Attorney(s): **Anonymous**
Date Received: **2/28/25**

Hello,

I am a plaintiff's consumer protection lawyer and regularly represent claimants in AAA's consumer forum. I have a few comments about two of the proposed consumer rule changes that I have outlined below. I would be glad to provide additional commentary on these issues if requested.

R-36 Documents-Only Procedure

- Even in small claims court, consumers have the right to a trial.
- Generally, consumer arbitration agreements do not contain caps on damages that automatically relegate a consumer claim to a desk arbitration.
- The idea that the AAA would impose an arbitrary $50,000 cap and leave to the discretion of the arbitrator whether there will be a hearing or a desk arbitration will work as a systemic injustice to consumers.
- giving an arbitrator the discretion to do a desk arbitration—even if the claimant requests a hearing—is antithetical to the purpose of arbitration itself: the efficient and effective full adjudication of claims in an alternative forum.
- Under the constitution, a claim that does not exceed $50,000 is no less important than one that does.
- Consumers who appear once before the AAA are outmatched and outnumbered by repeat respondents who appear regularly before the AAA and its arbitrators. Arbitrators may be intimately familiar with a respondent's representation of its business practices, but a claimant is a stranger every time. And a consumer's claims, just like all other lawsuits, become the center of the consumers' world. Sometimes, a consumer has lost everything, but what if everything to them is less than $50,000?
- An arbitrator should have no discretion over whether a consumer elects a full hearing or a desk arbitration because a consumer has a constitutional right to a full and fair presentation of their claims in AAA, regardless of the value of their claims.

R-57 Sanctions

- This is a terrible idea. The proposed rule contains neither a check on an arbitrator's power nor an appeal or review process.

- In a court proceeding, if an attorney or party were subject to sanctions, there would be an appeal process and rules of civil procedure that can be leveraged to point out errors in a sanctions award. Here, that is absent.
- Further, giving an arbitrator the power to "limit any party's participation in the arbitration," or make "an adverse determination of an issue or issues" as a form sanction is likely unconstitutional.
- Even in arbitration, consumers have a constitutional due process right to have their cases heard fully and fairly.

Advocacy Group Comment #13

Attorney(s): **Stephanie Martz, Ceara Flake (National Retail Foundation); Michael W. McTigue, Jr., Meredith C. Slawe, Kurt Wm Hemr, Shaud G. Tavakoli, Colm P. McInerney, (Skadden Counsel for the National Retail Federation)**
Advocacy Group: **National Retail Federation**
City: **New York, NY**
Date Received: **2/28/25**

Before the
AMERICAN ARBITRATION ASSOCIATION

COMMENTS OF THE NATIONAL RETAIL FEDERATION TO THE AAA'S PROPOSED CHANGES TO THE CONSUMER ARBITRATION RULES

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The National Retail Federation ("NRF") is pleased to submit these comments in response to the American Arbitration Association's Draft Amendments to its Consumer Arbitration Rules ("Consumer Rules").[1]

THE NATIONAL RETAIL FEDERATION AND ITS MEMBERS

NRF is the world's largest retail trade association, representing stores, wholesalers, chain restaurants, and internet retailers from more than 45 countries. NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. Retail is the United States' largest private-sector employer, supporting one in four U.S. jobs—approximately 52 million workers.

Through this submission, NRF proposes certain changes to the Draft Amendments to the AAA Consumer Rules and provides a perspective on how the Draft Amendments could significantly impact its members and the retail industry.

EXECUTIVE SUMMARY

NRF lauds the AAA for undertaking a thorough review of the current rules with the goal of promoting transparency, efficiency, and fairness in AAA consumer arbitrations. The AAA has made strides in the past several years to curtail abuses in the arbitration process, particularly those stemming from attempts to misuse the AAA's Consumer Rules and Fee Schedule through mass arbitration. The proposed changes have the potential to advance this important progress for the benefit of the AAA, its arbitrators, and all stakeholders. NRF appreciates this opportunity to provide comments on the proposed amendments.

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[1] *These comments do not address the AAA's Draft Amendments to the Employment Arbitration Rules.*

By way of background, in 2011, the Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that consumer agreements requiring individual arbitration of disputes are enforceable. In the wake of *Concepcion*, many businesses implemented arbitration agreements with consumer-friendly terms—such as provisions that the business will pay all arbitration fees for non-frivolous claims—to provide a fair and effective forum for resolving small disputes. Claimants' attorneys acted swiftly to subvert these provisions through coercive mass arbitration.

The mass arbitration playbook is simple. A counsel for claimants submits or threatens to submit thousands or even tens of thousands of identical claims "to trigger an immediate obligation" by the business "to pay millions of dollars in fees."[2] Claimants' counsel does not intend "to obtain simultaneous decisions on the merits."[3] Indeed, "the firms filing mass arbitrations appear to lack the resources to manage these large numbers of claims."[4] One such firm—Labaton Keller Sucharow LLP—tacitly acknowledged this limitation in a recent white paper.[5] Instead, "the goal appears to be to use the threat of a huge fee payment to force companies to settle the claims *en masse, regardless of the underlying merits."6*

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[2] *Andrew J. Pincus et al., U.S. Chamber of Com. Inst. for Legal Reform, Mass Arbitration Shakedown: Coercing Unjustified Settlements at 18 (Feb. 2023) ("Mass Arbitration Shakedown"), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf.*

[3] *Id.*

[4] *Id.*

[5] *See Labaton Keller Sucharow, Toward a Proposed Estimation Framework for the Resolution of Mass Arbitrations (Feb. 11, 2025), available at https://www.labaton.com/news-insights/toward-a-proposed-estimation-framework-for-the-resolution-of-mass-arbitrations. Labaton proposed various workarounds to individualized arbitration, including bellwether proceedings, batching, and "estimation of claims," all of which are foreclosed under typical consumer arbitration agreements.*

[6] *Mass Arbitration Shakedown at 18–19.*

One mass arbitration firm recently laid bare this strategy in a slide deck prepared for a prospective litigation funder. As the firm explained, the strategy's model is to "weaponize[] consumer . . . arbitration clauses . . . by aggregating thousands of claims."[7] "Aggregating claims makes entrance fee to just defend prohibitively expensive."[8] After threatening claims, "[c]laimants' counsel will offer a settlement **slightly less than the AAA charge** . . . attempting to induce a quick resolution."[9]

The engine that drives this abusive practice is the large volume of claimants. Claimants' counsel will attract claimants through sensational social media advertisements promising payouts of hundreds or thousands of dollars. To inflate claimant counts, claimants' counsel and their agents cut corners by, for example, skipping diligence into whether their clients are actually customers of the company. Claimants' counsel frequently tout that consumers may sign up in "2-3 minutes." Claimants' counsel use misleading solicitations that lead claimants to believe that they are participating in a class action rather than bringing their own claim as a party in arbitration. And claimants' counsel use engagement letters that purport to waive the client's right to be informed of and make decisions regarding settlement.

The product of these cursory and misleading solicitation efforts and lack of client communication are mass arbitration claimant pools replete with individuals who (i) do not know they are claimants prosecuting individual arbitrations and instead believe they have signed up for

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[7] *(Ex. 1 at 3, available at https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjlawjrvr/ frankel-valvevzaiger--massarbpowerpoint.pdf.)*

[8] *(Id.)*

[9] *(Id.)*

a class action "payout"; (ii) never used the product or service that is the basis for the alleged liability; and/or (iii) have not authorized counsel to pursue claims on their behalf. Claimants are also not required to sign their demands for arbitration which may further obscure whether they are even aware of the proceedings.

To take just one example, a firm recently asserted a mass arbitration against L'Occitane, Inc., predicated on alleged privacy violations. Litigation stemming from this mass arbitration revealed that many of the purported claimants had not authorized claimants' counsel to prosecute claims on their behalf. One claimant stated: "[T]here seems to be a mistake here. . . . I never signed up for any kind of lawsuit or fight."[10] Another purported claimant stated:

> I am not a client of [claimants' counsel]. I never made a claim with them. All I did was click on an ad I saw on Instagram, which made a predatory claim. . . . I never filled out any paperwork[.] . . . I actually unsubscribed from them shortly after I realized they were probably a scam and I didn't want to get any predatory emails from them.[11]

A third purported claimant's son stated that his father—the purported claimant in the arbitration— "is now dead."[12] The court denied a motion to compel the claims to arbitration, holding that claimants' counsel had failed to demonstrate that any claimant visited the L'Occitane website—a foundational predicate of claimants' counsel's theory of liability.[13]

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[10] *(Ex. 2 (Decl. of Andrea M. Gumushian in Support of Plaintiff's Supplemental Brief in Opposition to Defendant's Motion to Compel Arbitration ("Gumushian Decl."), Ex. A, L'Occitane, Inc. v. Zimmerman Reed LLP, 2:24-cv-01103 (C.D. Cal. filed Apr. 10, 2024), ECF No. 50.)*

[11] *(Ex. 3 (Gumushian Decl. Ex. B).)*

[12] *(Ex. 4 (Gumushian Decl. Ex. C).)*

[13] *See L'Occitane, Inc. v. Zimmerman Reed LLP, No. CV 24-1103, 2024 WL 2227182, at *4 (C.D. Cal. Apr. 12, 2024).*

The L'Occitane example is striking but not unique. In another recent federal action in which a claimants' counsel sought to compel Samsung to arbitrate tens of thousands of claims before the AAA, the U.S. Court of Appeals for the Seventh Circuit held that the claimants' counsel had failed to provide evidence of an arbitration agreement for **any** of the almost 50,000 claimants they purported to represent. *See Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 619 (7th Cir. 2024).[14]

Even worse, businesses routinely uncover mass arbitration claimants who are deceased, fictitious, in active bankruptcy, or otherwise not legitimate claimants. In virtually every mass arbitration there are droves of claimants who are represented by one or more other law firms in connection with the same claims. In one such case the managing partner of a mass arbitration claimants' firm posed as a claimant in **two separate** mass arbitrations brought by **two other rival law firms** in an apparent attempt to surreptitiously obtain information about the business and his rivals' activities.[15]

NRF recognizes that the AAA has undertaken measures to address mass arbitration abuses. Chief among these measures is the AAA's initiative to develop the Supplementary Rules for Multiple Case Filings, in 2021. The AAA has since refined the Supplementary Rules (now

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[14] *Samsung had repeatedly informed the claimants' counsel that the underlying claims were meritless and even provided a supporting declaration. (Ex. 5.) Samsung was proven right when a court later dismissed the claims with prejudice. See G.T. v. Samsung Elecs. Am., Inc., --- F. Supp. 3d ---, No. 21-4976, 2024 WL 5195243 (N.D. Ill. Dec. 23, 2024). But even beyond the claims' lack of merit, Samsung's analysis revealed that the claimant pool included individuals who were dead, individuals who never resided in Illinois (and thus had no basis to bring the Illinois statutory claims asserted), and individuals also purportedly represented by other counsel pursuing the same claims against Samsung. (See Ex. 6 (Respondents-Appellants' Opening Br. and Short App'x at 44–45, Wallrich v. Samsung Elecs. Am., Inc., No. 23-02842 (7th Cir. filed Nov. 14, 2023), ECF No. 34.).)*

[15] *(See Ex. 7 (Petition for an Order Disqualifying Counsel, WarnerMedia Direct, LLC v. Zimmerman Reed LLP, Index No. 652500/2024 (Sup. Ct. N.Y. Cnty. filed May 15, 2024).)*

renamed as the "Mass Arbitration Supplementary Rules"), most recently in 2024 ("2024 Supplementary Rules"). The AAA also amended both the Supplementary Rules and its consumer fee schedule. As the AAA explained in a press release, these modifications were made after "listen[ing] to the needs of individuals and businesses involved in mass arbitrations" and are designed to "save time, reduce costs and foster constructive dialogue."[16] The changes included:

- Requiring each mass arbitration submission to "include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge." 2024 Supplementary Rules, MA-2. The AAA explained the "[n]ew attestation requirements" were designed to "help ensure accurate filings and pleadings, minimizing delays and unnecessary complexities."[17]
- Implementing a new *Consumer Mass Arbitration and Mediation Fee Schedule* that, among other things, significantly reduced the upfront fees that were required before a party could request the appointment of a Process Arbitrator.
- Expanding the Process Arbitrator's role so that the Process Arbitrator could "tackle[] potential hurdles early, allowing parties to focus on substantive issues."[18]

The introduction—and subsequent expansion—of the Process Arbitrator role has been a welcome development and in certain instances has helped expose abusive mass arbitration practices. For example, in one mass arbitration against a financial institution, a Process Arbitrator ordered all claimants to submit amended demands for arbitration including bank account numbers and facts sufficient to establish they met the requirements necessary to bring claims under the demands' theory of liability.[19] Claimants' counsel was unable to provide that information for the

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[16] *AAA® Announces Updated Mass Arbitration Supplementary Rules (January 16, 2025), available at https://www.prnewswire.com/news-releases/aaa-announces-updated-mass- arbitration-supplementary-rules-302035818.html.*

[17] *Supra n.16.*

[18] *Id.*

[19] *(See Ex. 8 (Order of Process Arbitrator, Mosley v. Wells Fargo & Co., No. 3:22-cv-01976 (S.D. Cal. Oct. 27, 2022), ECF No. 22-20).)*

vast majority of their putative clients, and later submissions revealed that nearly half the claimants were never qualified to bring the claims they asserted.[20]

Unfortunately, there remain gaps in the current AAA rules and procedures that enable mass arbitration claimants' counsel to exploit the AAA's arbitration procedures and fee schedules. The AAA has stated that it "introduced . . . attestation requirements" to "ensure filing integrity."[21] But this rule has not had the intended effect: Claimants' counsel often submit a perfunctory affirmation that merely parrots the language of the rule. Claimant pools remain riddled with dead claimants, claimants unaware they have committed to prosecuting an arbitration, and claimants already represented by other counsel in connection with the same claims, among other defects. Although the expanded Process Arbitrator role is welcome, the Process Arbitrator, the AAA, and the respondent business are still subject to the burden and expense of investigating and defending against many claims that should never have been filed and that would result in sanctions in court proceedings. In addition, individual Process Arbitrators often interpret the contours of their role inconsistently, creating uncertainty, inconsistency across matters, and frustration among the parties.

Our members view the substantially reduced initial fees for appointment of a Process Arbitrator as a positive development. That said, our members have found themselves in situations where a Process Arbitrator fails to investigate issues raised by the respondent business, resulting

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[20] *(See Ex. 9 (Defs.' Notice of Mot. and Mot. to Dismiss or Transfer at 1, Penuela v. Wells Fargo Bank, N.A., No. 4:24-cv-00766 (N.D. Cal. filed May 28, 2024), ECF No. 19) (after the Process Arbitrator ordered the provision of additional information, claimants' counsel conceded that it "could not provide*

the basic information required by the Process Arbitrator for 89% of claimants, and that 41.5% of claimants never had and could never have had the claim they asserted . . . in their demands").)

[21] *Kendal Enz, AAA Enhances Arbitration with New Mass Arbitration Rules (Jan. 30, 2024).*

in thousands of frivolous claims proceeding—and a significant administrative fee burden for the business. We appreciate that "[t]he AAA-ICDR's commitment is to ensure that its fees do not interfere with its mission to resolve disputes fairly and efficiently" and recommend the AAA consider further changes in this area.[22]

In short, businesses remain subject to settlement coercion resulting from mass arbitration tactics that were the impetus for the original Supplementary Rules. As a result, our members are continuing to assess whether to choose or continue to designate the AAA as the forum for consumer disputes.

The amendments to the Consumer Rules have the potential to further curb mass arbitration abuse. NRF proposes modifications to the proposed rules (and some existing rules) as detailed below to that end and to further promote a fundamentally fair and efficient arbitration process.

NRF also suggests that the AAA solicit feedback and engage in discussions with arbitrators, judges, scholars, and other stakeholders regarding the proposed rules and their potential impact on the AAA's mission. NRF further requests the opportunity to provide reply comments in response to any initial comments submitted, consistent with the model of notice-and-comment rulemaking procedures for administrative agency rulemaking.

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[22] *Adam Shoneck, Mass Arbitration - How Did We Get Here & Where Are Now?, AAA (June 6, 2024).*

DISCUSSION[23]

I. The Proposed Rules Should Specify That An Arbitrator May Issue Sanctions Against Both A Party And Its Counsel

NRF recommends that the AAA modify Proposed R-57 to clarify that an arbitrator may impose sanctions on a party **or its counsel** and to expand the grounds on which the arbitrator may issue sanctions.

Proposed R-57, entitled "Sanctions," is a new rule that provides, *inter alia*, that "[t]he arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these Rules or with an order of the arbitrator." Proposed R-57(a). NRF welcomes this expansion of the arbitrator's authority. But we propose amending Proposed R-57 to clarify that the arbitrator may award sanctions against a party **and/or** its counsel. We further propose amending Proposed R-57 to permit sanctions where a party **and/or its counsel** fails to comply with obligations under the Rules, an order of the arbitrator, governing rules of professional conduct, or the AAA-ICDR Standards. Making clear that the arbitrator may sanction counsel, and expanding the scope of sanctionable conduct, would provide the arbitrator another method of addressing improper conduct by counsel. This would be a particularly powerful tool in mass arbitration matters rife with misconduct as outlined above. We note that many arbitrators have expressed frustration that they lacked the power under the existing rules to sanction a party's counsel to address misconduct.

This proposed clarification would also be consistent with the Draft Amendments to Current R-55, entitled "Declining or Ceasing Arbitration." Current R-55 states that "[t]he AAA in its sole

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[23] *The comments set forth herein reflect NRF's views on the current and proposed rules as applied to individual arbitrations, including arbitrations that are part of a mass arbitration. For ease of reference, the Comments will refer to a current Consumer Rule as "Current R-__" and a proposed new Consumer Rule as "Proposed R-__."*

discretion may decline to accept a Demand for Arbitration or stop the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative." The proposed revisions to Current R-55, set forth in Proposed R-10, expand the circumstances in which the AAA may cease or decline administration of an arbitration, including "where a party or the party's representative fails to abide by the American Arbitration Association-International Centre for Dispute Resolution Standards of Conduct for Parties and Representatives." Proposed R-10(a)(i). In turn, the AAA-ICDR Standards provide, *inter alia*, that "failure" by "Participants in AAA cases" (with "Participants" defined as "parties and their representatives") to comply with the AAA-ICDR Standards "may result in the AAA's declining to further administer a particular case or caseload." Thus, the AAA-ICDR Standards already contemplate that the AAA may sanction counsel for breach of the standards by way of declining to administer further cases brought by them. Proposed R-57 should provide similar authority for an arbitrator to sanction counsel.

II. The Proposed Rules Should Provide that an Arbitration Must Be Closed in Favor of Court Proceedings Where the Parties Dispute Which Agreement Controls

NRF recommends that the AAA modify Proposed R-5, "Answers and Counterclaims," to provide that the AAA will **close** an arbitration in favor of court proceedings where the parties dispute which agreement controls and the competing agreements materially conflict. The current Proposed R-5 (i) permits the AAA to administer arbitrations where the parties dispute which agreement controls and (ii) purports to vest in arbitrators the ability to resolve that dispute. This rule is unfair to respondents and would lead to wasteful proceedings because a dispute as to which agreement applies must be resolved in court.

A. The AAA Should Not Administer an Arbitration Where the Parties Dispute Which Agreement Controls

Proposed R-5 provides that, where the parties dispute which agreement applies to a claim, the AAA will administer the arbitration in accordance with the agreement invoked by the claimant. *See* Proposed R-5(d). NRF proposes that this rule be modified to provide that the AAA will **not** administer and will instead **close** arbitrations where the parties disagree as to the operative agreement and there are material differences between the disputed agreements. This modification will harmonize the rule with binding law and promote fairness and efficiency.

An arbitration cannot proceed where the parties do not have an agreement to arbitrate. *See, e.g.*, *LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distrib., Teamsters Local 63,* 849 F.2d 1236, 1241 n.3 (9th Cir. 1988) (plaintiff "entitled to injunctive relief once it established that it was no longer under a contractual duty to arbitrate"). A court must resolve a dispute as to the governing agreement. *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 145 (2024) ("[A] court needs to decide what the parties have agreed to—*i.e.*, which contract controls."). But under Proposed R- 5(d), the AAA would administratively decide such a dispute in the claimant's favor by permitting administration under the agreement proffered by the claimant even where the respondent disputes which agreement controls. That is fundamentally unfair to the respondent.

Proceeding with administration as contemplated under Proposed R-5 before a court resolves a dispute as to which agreement applies would also be unfair, inefficient and a waste of resources for additional reasons. In some cases, a respondent may assert that the controlling agreement requires claims to be resolved in another arbitration forum or in court. In those cases, allowing arbitration to proceed with the AAA under the agreement invoked by the claimant would result

in unnecessary effort and expense advancing an arbitration if a court ultimately holds that the parties did not agree to arbitrate with the AAA. The parties would then be required to start over in another forum. In other cases, a respondent may assert that the controlling agreement contains a different arbitration agreement than the agreement advanced by the claimants but where both agreements designate the AAA as the arbitral forum. Administering arbitrations in these cases would also be manifestly inefficient where the agreements are materially different, such as with respect to pre-dispute notice requirements, other conditions precedent, or applicable procedures for mass filings.

By proceeding with administration as contemplated under Proposed R-5 before a court resolves a dispute as to which agreement applies, the AAA would become an outlier among alternative dispute resolution forums. JAMS, for example, closes arbitrations where the parties raise a dispute as to the controlling agreement and the forum clause in an updated agreement does not name JAMS. Indeed, in a recent matter, counsel to hundreds of claimants attempted to commence arbitrations with JAMS under an outdated version of the respondent's service agreement that designated JAMS as the forum for disputes. The respondent objected, explaining that it had updated its service agreement with customers to designate a different arbitration provider as the forum for disputes.[24] JAMS agreed and declined to administer the arbitrations.[25]

Consequently, where the parties dispute which among materially conflicting agreements control, the AAA should defer to a court to resolve that threshold dispute and decline to administer the arbitration.

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[24] *(See Ex. 10 (Decl. of Albert Y. Pak in Support of Pet. to Compel Arbitration ("Pak. Decl."), Ex. F, Pilon v. Discovery Commc'ns, LLC, No. 1:24-cv-04760 (S.D.N.Y. filed June 21, 2024), ECF No. 4.)*

[25] *(See Ex. 11 (Pak. Decl., Ex. I).)*

B. The Rule Should Not Provide That An Arbitrator May Resolve A Dispute As To Which Agreement Controls

Proposed R-5 also provides that where the parties dispute which arbitration agreement applies, the arbitrator will make a "final determination" on the issue. Proposed R-5(d). This proposed rule is contrary to *Coinbase*: a court, not an arbitrator, must make a final determination as to which contract controls. Although *Coinbase* governs, the conflicting Proposed Consumer Rule 5(d) may confuse arbitrators and lead some arbitrators to render unenforceable decisions on a threshold issue that a court must decide.

III. The Proposed Rules Should Retain The Monetary Threshold For Documents- Only/Desk Arbitration

NRF recommends that the AAA revert Proposed R-1(f) and Proposed R-36 to retain the current dollar threshold for documents-only/desk arbitration and to guarantee the right to a hearing upon request where either party seeks injunctive relief.

Pursuant to Proposed R-1(f) and Proposed R-29, the maximum amount for a documents-only/desk arbitration would double, from $25,000 to $50,000. This means that where no disclosed claims or counterclaims exceed $50,000, the dispute shall be resolved by the submission of documents only/desk arbitration. *See* Proposed R-1(f) and Proposed R-36; *compare* Current R- 1(g), *with* Current R-28 (providing that the maximum for a documents-only/desk arbitration is $25,000). In addition, under the current rules, a hearing may be ordered even for desk arbitrations where "any party requests an in-person or telephonic hearing **or** the arbitrator decides that a hearing is necessary." Current R-29 (emphasis added). Proposed R-36 seeks to amend these provisions by stating that in desk arbitrations, a party's request for "a virtual or telephonic hearing" will only be granted where "the arbitrator decides that a hearing is necessary." Further, a party's request for "an in-person

hearing" will be granted only where "the arbitrator finds that an in-person hearing is necessary for a fundamentally fair process." *Id.*

NRF believes that the $50,000 threshold is too high considering that the typical consumer arbitration involves claims of smaller monetary value. Furthermore, the right to a hearing is often of particular significance to a business, particularly where injunctive relief is sought. Accordingly, we propose that the maximum amount for a documents-only/desk arbitration remain at $25,000. We further propose that the rule guarantee the right to a hearing where the claimant seeks injunctive relief. We also propose that Proposed R-1(f) be modified to clarify—as is clear from Proposed R-36—that any party may request a hearing even where the dispute does not reach the monetary threshold set forth in Proposed R-1(f).

f) **The AAA's Determination That An Arbitration Agreement Satisfies The *Consumer Due Process Protocol* Should Be Final**

NRF recommends that the AAA modify Proposed R-1(c) to provide that the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol* is final and cannot be appealed to, or reversed by, an arbitrator.

Current R-1(d) provides:

> The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Under current practice, should a party challenge the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol*, the AAA will refer the issue to an

arbitrator—or, in the case of a mass arbitration, sometimes a Process Arbitrator—for a final determination.

The AAA's proposed revisions would codify this practice. The proposed rule provides that "[t]he AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*." Proposed R-1(c). It further provides:

> If the AAA proceeds with administration and a party disagrees on whether the agreement meets these Rules and the *Consumer Due Process Protocol*, they can bring the issue to an arbitrator for a final decision. If the arbitrator finds that the agreement does not comply, they have the authority to adjust the proceedings to ensure they meet the Rules, *Consumer Due Process Protocol*, and the terms of the arbitration agreement.

Id.

NRF's members have often been frustrated with this practice in AAA arbitrations. Businesses incur substantial cost and devote considerable resources in drafting, updating, and providing customers notice of terms. Those terms are reviewed by the AAA; the AAA confirms that the arbitration agreement complies with the *Consumer Due Process Protocol*; and the AAA places the arbitration agreement on its public Registry in accordance with Current R-12. At the culmination of this process, businesses and consumers have the expectation that their agreement that is publicly listed on the AAA Registry will govern their disputes. This expectation is upended when an arbitration agreement is thereafter challenged for purported non-compliance with the *Consumer Due Process Protocol*. Allowing claimants to appeal the AAA's determination serves only to delay a resolution of a consumer's dispute, whether or not the appeal is successful. This delay is exacerbated where an arbitrator reverses the AAA's determination that an agreement meets the *Consumer Due Process Protocol*. In such cases, the parties may be forced to start over again in another forum.

Moreover, the AAA should not create a new right or vehicle to challenge an arbitration agreement outside of existing law. The *Consumer Due Process Protocol* establishes procedural (not substantive) rights that only the AAA may address conclusively as an administrative matter when the agreement is reviewed and approved by the AAA. Indeed, the AAA routinely makes final determinations affecting numerous rights enshrined in the *Consumer Due Process Protocol*, such as selecting neutrals; establishing and enforcing neutral disclosure requirements; assessing whether neutrals are independent and impartial; and making final determinations regarding disqualification requests. Assessing whether an agreement complies with the *Consumer Due Process Protocol* is likewise an administrative determination that the AAA may conclusively make without an appeal process. Enabling the AAA to do so would give consumers and businesses certainty regarding the agreement that controls their disputes and streamline arbitration proceedings, thus promoting the "fundamentally-fair ADR process" at the core of the *Consumer Due Process Protocol*.

Accordingly, NRF proposes that the AAA amend the Consumer Rules to provide that the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol* is final and **not** subject to review by an arbitrator or Process Arbitrator. This approach would have many benefits—facilitating consistency, ensuring that businesses and their customers may rely on the AAA's review, and reducing costly post-review challenges—and no drawbacks. It would also not prejudice consumers' rights: they may still challenge an arbitration agreement on other grounds available under existing law. As the AAA aptly notes, its determination that an agreement complies with the *Consumer Due Process Protocol* "cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause." Current R-12; Proposed R-12.

V. The Proposed Rules Should Require The Claimant And Claimant's Counsel To Certify That The Claimant Has Satisfied Mandatory Pre-Arbitration Dispute Resolution Requirements

NRF recommends that the AAA add to Proposed R-4 a mandate that a claimant and claimant's counsel must provide a certification that the claimant has satisfied any pre-arbitration contractual dispute resolution requirements with the filing of a demand.

Many consumer arbitration agreements contain mandatory notice and pre-arbitration informal dispute resolution procedures that the parties must undertake before commencing arbitration. In the overwhelming majority of consumer disputes, these requirements facilitate a prompt, cost-effective, and mutually beneficial outcome and enable the parties to avoid arbitration entirely. But some claimants fail to properly comply with pre-arbitration dispute resolution requirements, resulting in potentially avoidable time and expense in arbitration proceedings. This problem is particularly acute in the context of mass arbitrations. In these matters, claimants' counsel's business model is to extract settlements untethered from the merits of the claims asserted based on the threat of many arbitrations—and their attendant fees—rather than to resolve claims on terms that are satisfactory to individual claimants. It is therefore unsurprising that mass arbitration claimants' counsel routinely flout pre-arbitration dispute resolution requirements.

To ensure compliance with pre-arbitration contractual dispute resolution requirements, NRF recommends that the AAA add to Proposed R-4, entitled "Filing Requirements," under the "Information to be included with any arbitration filing" (Proposed R-4(a)(iv)), the following as a new subsection (h): "a certification from the claimant and the claimant's counsel that claimant, before submitting the demand for arbitration, has satisfied any pre-arbitration contractual dispute resolution requirements.

VI. The Proposed Rules Should Retain The Parties' Right To Agree That Another Set Of AAA Rules Applies Even Where The Underlying Dispute Is A Consumer Matter

NRF recommends that Proposed R-1(a) be revised so that the parties retain the ability—permitted under Current R-1(a)—to agree that another set of rules (for example, the Commercial Arbitration Rules ("Commercial Rules")) applies even where the underlying matter is consumer in nature.

Proposed R-1(a) states:

> The parties shall be deemed to have made the Consumer Arbitration Rules ("Rules") a part of their arbitration agreement when they have provided for arbitration by the American Arbitration Association ("AAA") or have an arbitration agreement within a consumer agreement. *If no rules are specified or there is a different set of AAA rules named in the arbitration agreement, these Rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA.* To ensure that you have the most current information, see our web site at www.adr.org.

(emphasis added).

The emphasized text indicates that parties cannot agree to the application of another set of rules aside from the Consumer Rules in consumer matters. In contrast, Current R-1(a) permits the parties to agree that another, non-consumer set of rules may apply. *See* Current R-1(a)(3) ("The parties shall have made these Consumer Arbitration Rules ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and . . . 3) the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules.").

Thus, the parties should continue to have the ability to agree upon the application of other sets of AAA rules in their agreements. In some instances, it may be preferable that another set of rules apply even if the matter is consumer in nature and in all events parties should retain the right to agree to this.

VII. The Proposed Rules Should Provide That Where A Party's Representative Fails To Comply With The AAA-ICDR Standards Of Conduct, That Representative Must Be Removed But The Arbitration May Otherwise Proceed

NRF recommends that the AAA modify Proposed R-10 such that a party may not avoid arbitration and proceed in court where the party or its counsel fails to comply with the AAA-ICDR Standards of Conduct.

NRF appreciates the proposed consolidated rule, Proposed R-10 (entitled "Declining or Ceasing Administration"), to set forth the circumstances in which the AAA will decline to administer an arbitration or cease to administer a pending arbitration. Among the proposed scenarios in which the AAA will decline or cease to administer an arbitration under the proposed rule is where "a party **or** the party's representative" fails to comply with the AAA-ICDR Standards of Conduct. Proposed R-10(a)(i) (emphasis added). NRF agrees with the animating principle behind this rule: all parties and counsel should abide by the basic standards of conduct set forth therein.

That said, where the AAA finds that a party's representative has failed to comply with the AAA-ICDR Standards of Conduct, it would be unfair to permit that same party—potentially represented by the same counsel—to proceed with their claim in court. Accordingly, we recommend that Proposed R-10(a)(i) be amended to provide that where the AAA determines that a party's representative has failed to comply with the AAA-ICDR Standards of Conduct, that representative must be removed as counsel in the arbitration but the arbitration may then proceed. The AAA should provide the party a set amount of time to obtain new counsel or proceed without representation in the arbitration.

VIII. The Proposed Rules Should Continue To Provide For A Limited Exchange Of Information

NRF recommends that the AAA revise Proposed R-20 to retain the more limited information exchange provided for in Current R-22 as a matter of fundamental fairness and

efficiency. The value of consumer arbitration is in streamlining the resolution of small-dollar disputes to the benefit of the consumer and the business. Proposed R-20 strays from this foundational purpose.

As the Supreme Court has explained, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," should not be "shorn away" such that "arbitration . . . wind[s] up looking like the litigation it was meant to displace." *Epic Sys. Corp. v. Murphy Oil USA*, 584 U.S. 497, 509 (2018). Applying this principle in the context of pre-arbitration disclosure, courts have repeatedly emphasized the limited nature of discovery in arbitration. *See Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F. 3d 900, 901–02 (7th Cir. 2017) ("[N]othing in the Federal Arbitration Act requires an arbitrator to allow **any** discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate.") (emphasis added); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992) ("[P]arties who agree to arbitrate relinquish the right to liberal pretrial discovery allowed by the federal rules . . . ." (citing *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980))).

This precept is even more applicable in consumer arbitrations. *See Surkhabi v. Tesla, Inc.*, No. 22-13155, 2022 WL 19569540, at *5 (C.D. Cal. Oct. 27, 2022) (explaining that while under the Consumer Rules, "[i]f any party asks[,] . . . the arbitrator may direct specific documents [and other] information to be shared . . . [and that the consumer and business] identify [the] witnesses[,] . . . no other exchange of information is permitted unless the arbitrator determines it [is] necessary" (citation omitted)); *Gavrilovic v. T-Mobile USA, Inc.*, No. 21-12709, 2022 WL 1086136, at *6 (E.D. Mich.

Mar. 25, 2022) (rejecting contention that discovery under the Consumer Rules is too limited in comparison to federal proceedings because "[d]iscovery limitations . . . are common in arbitration"), *report and recommendation adopted*, No. 21-CV-12709, 2022 WL 1085674 (E.D. Mich. Apr. 11, 2022); *see also Liu v. Equifax Info. Servs., LLC*, No. 22-cv-10638, 2024 WL 308089, at *9 n.4 (D. Mass. Jan. 26, 2024) (discussing limited discovery permitted under the Consumer Rules).

The AAA has long shared this recognition that information exchange in consumer arbitration should be narrowly tailored. The Introduction to the present Consumer Rules provides that "[a]rbitration is usually faster and cheaper than going to court." Consistent with that understanding—and consistent with the generally small monetary value of claims that are brought in individual AAA consumer arbitrations—Current R-22, entitled "Exchange of Information between the Parties," provides that, "**keeping in mind that arbitration must remain a fast and economical process**, the arbitrator may direct (1) specific documents and other information to be shared between the consumer and business, and (2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing." Current R-22(a) (emphasis added). Beyond that, "[n]o other exchange of information . . . is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process." Current R-22(c).

The current standard provides for a limited exchange of information consistent with the goals of keeping consumer arbitration a "fast and economical process" while granting the arbitrator discretion to permit additional information exchange if needed. This standard creates a framework that allows for consumer arbitrations to proceed in an efficient and expedient fashion. Current R.22(a).

The Draft Amendments undermine that efficiency by seeking to dramatically expand the limited scope of information exchange. Proposed R-20, entitled "Exchange of Information," states:

> The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

Proposed R-20(a). Per Proposed R-20(b), the arbitrator may now, on their own initiative or at a party's request, "require the parties to exchange documents in their possession or custody on which they intend to rely" as well as requiring the parties to produce documents "in response to reasonable document requests" that are "relevant and material to the outcome of disputed issues."

Proposed R-20(b). The arbitrator may now also determine "reasonable search parameters" for ESI which should "balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them." *Id.* The proposed revisions also specify that one of the issues that "should" be discussed during the preliminary hearing is "prehearing exchange of information." Proposed R-19(b).

NRF is concerned that expanding the scope of the exchange of information in this manner would result in the type of expansive, burdensome discovery that is a feature of litigation in court and is antithetical to the objectives of consumer arbitration. Expanding the scope of information exchange would not only lead to inefficient and drawn-out proceedings, but also enable parties to demand broad discovery for improper purposes, such as discovery "fishing" expeditions; to drive up the costs of arbitration to manufacture settlement pressure; and to obtain information intended for use in proceedings other than in the arbitration in which that information is sought. Should the AAA implement Proposed R-20—which is misaligned with principles of proportionality and efficiency in individual consumer arbitrations—businesses may wish to consider alternative arbitration providers.

The amended rule would also remove many of the flexibilities and efficiencies codified in Current R-22, and thus remove one of the reasons that parties agree to arbitration in the first place. That rule

appropriately provides the arbitrator discretion to determine the scope of information exchange, while generally limiting that scope given the underlying types of consumer claims at issue and to ensure that consumer arbitrations remain efficient.

IX. Subsection (c) of Proposed R-31 Should Be Removed

NRF proposes that the AAA remove subsection (c) of Proposed R-31 because it creates an unnecessary impediment to dispositive motion practice. Safeguarding the ability to present dispositive motions that may otherwise ferret out meritless claims at the early stages of arbitrations is critical. That is all the more true given the proliferation of mass arbitrations that are often predicated on frivolous and poorly-vetted claims.

Proposed R-31 adds, in subsection (c) of the rule applicable to dispositive motions: "Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion." Proposed R-31(c). This addition to the rule makes it more difficult for a party to obtain leave to file a dispositive motion yet does not appear to further the goals of efficiency and economy animating the rule.

Under subsection (b) of Proposed R-31, the arbitrator must already determine that the movant has shown that a motion is "likely to succeed and to dispose of or narrow the issues in the case" before granting leave to file a dispositive motion. Where those standards are met, the arbitrator will necessarily have already determined that briefing and a decision on the motion will facilitate a speedier and more efficient resolution of the arbitration. If a dispositive motion is not permitted in these circumstances, the parties will be forced to proceed with information exchange (which would be more expansive under the proposed rules) and through a final merits hearing to award on issues that "likely"

could have been resolved through a dispositive motion. Those efforts are necessarily more onerous than briefing a dispositive motion. In short, subsection (c) will serve only to cause arbitrators to second-guess their determination regarding the likelihood of success of the motion.[26]

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[26] *It is notable that the AAA proposes expanding the scope of exchange of information—thus slowing arbitrations and making them more costly to prosecute and defend—while at the same time proposing to limit the availability of dispositive motions because of the time and cost involved in briefing motions.*

We therefore recommend that the AAA strike subsection (c) from Proposed R-31. Should the AAA implement subsection (c) of Proposed R-31, businesses may wish to consider alternative arbitration providers.

X. Subsection (e) of Proposed R-32 Should Be Removed

NRF proposes that the AAA remove subsection (e) of Proposed R-32 because it may be inconsistent with the Federal Arbitration Act ("FAA"), is unfair to potential witnesses, and is likely to cause confusion and lead to inefficiency.

Proposed R-32(e) implies that an arbitrator may issue an order requiring a witness to attend a hearing before the arbitrator "at a time and location where the witness is willing and able to appear voluntarily **or can legally be compelled to do so**." (emphasis added). But there may be no such place. For example, under Section 7 of the FAA, an arbitrator may legally compel a witness to attend a hearing only within a specified geographical range. 9 U.S.C. § 7; Fed. R. Civ. P. 45(c). Moreover, "Section 7 does not authorize district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via video conference." *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc*., 939 F.3d 1145, 1160 (11th Cir. 2019).

Proposed R-32(e) contemplates that an arbitrator may hold a merits hearing in multiple locations to enable the arbitrator to issue enforceable witness subpoenas. But nothing in Section 7 of the FAA or Rule 45 of the Federal Rules of Civil Procedure incorporated into Section 7 permits such a procedure. *See, e.g.*, *Campaign Registry, Inc. v. Tarone*, No. 24 Civ. 2314, 2024 WL 3105524, at *2 (S.D.N.Y. June 24, 2024) ("courts across the country have concluded 'that the arbitrator is sitting where the underlying arbitration is being administered—not the place of production" (internal quotation marks and citation omitted)); *Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc.*, No. 1:11-CV-2829, 2011 WL 13319343, at *4 (N.D. Ga. Oct. 7, 2011)

("[T]his Court has no authority to expand its jurisdiction to enforce arbitration subpoenas when the arbitrators are sitting outside this judicial district, and this Court concludes that there is no evidence in this case that the arbitrators, or a majority of them, are sitting in this district."), *report and recommendation adopted*, 2011 WL 13319422 (N.D. Ga. Oct. 28, 2011). Nor would a split hearing location be efficient or fair to the parties or a potential witness.

In addition, Proposed R-32(e) is unfair because it provides that a party need only "represent[]" that a witness is "essential," without more, to seek an order compelling testimony. Although Proposed R-32(e) should be removed for the reason set forth above, if it is not, NRF proposes that the AAA modify the proposed rule to clarify that (i) a party must make a **showing** that the witness is essential and (ii) the opposing party must have an opportunity to rebut that contention.

XI. NRF Proposes A Rule That AAA Will Hold An Administrative Conference With Claimant Where Responding Party Has Reasonable Belief That Claimant Is Unaware Of Or Has Not Authorized Proceedings

NRF proposes that the AAA implement a new rule permitting a respondent to request an administrative conference to be attended by a claimant where the respondent has a reasonable belief

that claimants' counsel is proceeding without authorization. Such a rule would help to curb abuse of the AAA arbitration process that has become a hallmark of mass arbitration.

As noted above, in mass arbitration matters businesses routinely uncover claimants who are dead, fictitious, in active bankruptcy, or otherwise not legitimate. In addition, in many mass arbitration matters, purported claimants have confirmed to the business that they had not authorized filings or did not even know any arbitration had been filed on their behalf. Because claimants' counsel recruit clients through online marketing and sign-up forms that counsel and lead generators tout take only "two minutes" to complete, many claimants are confused about the nature of a mass arbitration. Indeed, claimants often believe they are signing up to receive a portion of a class action settlement rather than to prosecute an individual arbitration.

NRF proposes a rule to address issues of apparent lack of claimant authorization, whether that issue surfaces at the inception of an arbitration or at any subsequent point during the proceedings. Specifically, NRF proposes a rule providing:

In circumstances where the Respondent has a reasonable belief that the Claimant is unaware of the arbitration or has not authorized the prosecution of an arbitration on the Claimant's behalf, and to ensure the integrity of the arbitration process, the Respondent may request that the Claimant personally attend either (i) the initial administrative conference with the AAA or (ii) a separate administrative conference with the AAA should the initial administrative conference have already taken place, in either case (with the arbitrator present if one has been appointed). The conference may be telephonic or virtual.

XII. The Proposed Rules Should Clarify That An Arbitrator Continues To Have Discretion To Award Fees And Expenses Against A Party

Current R-44 provides that "[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case." Current R-44(a). The rule further allows the arbitrator to assess costs in any interim award "as the arbitrator decides is appropriate." *Id.* And the rule provides that (i) the arbitrator may also allocate costs "to any party upon the arbitrator's determination that the party's claim or counterclaim was filed for purposes of harassment or is patently frivolous," Current R-44(c), and (ii) "[i]n the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-4, R-5, and R-7 in favor of any party, subject to the provisions and limitations contained in the Costs of Arbitration section," Current R- 44(d).

Proposed R-46 retains the arbitrator's authority to award any relief "that the parties could have received in court, including awards of attorney's fees and costs." Proposed R-46(a). It also preserves the arbitrator's authority to award "administrative fees, arbitrator compensation or expenses to a business . . . upon the arbitrator's determination that a claim or counterclaim against the business was filed for purposes of harassment or is patently frivolous." Proposed R-46(c). However, the proposed rule otherwise limits the arbitrator's ability to award costs to the business only where such an award "may be required by applicable law." Proposed R-46(c).

It is not clear why the AAA proposes adding this restriction. NRF objects to any change to Current R-44 that would constrain the arbitrator's authority to issue an award of costs in favor of the business. We therefore suggest that the AAA revert Proposed R-46 to the language of Current R-44.

XIII. The Proposed Rules Should Be Revised To Remove The AAA's Automatic Right To Publish Awards

NRF proposes that the AAA amend Proposed R-42 to preclude the AAA from publishing awards without the consent of the parties. This proposed amendment would preserve the confidentiality of AAA arbitration proceedings—a core feature distinguishing arbitration from court proceedings.

Proposed R-42(c) retains Current R-43(c)'s provision that "[t]he AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published." NRF objects to this rule permitting the AAA to publish an arbitral award (even in redacted form) without both parties' consent. Even where the names of the parties are redacted, the identity of the parties is often apparent or can readily be ascertained from data the AAA separately publishes about arbitrations.

Moreover, the purpose of permitting the AAA to publish arbitration awards is unclear. As noted, the AAA already publishes data about arbitrations that would allow stakeholders to glean important information without reviewing underlying arbitral awards. And many arbitration agreements provide that fully satisfied awards cannot be entered in court. The AAA should not subvert these contractual guarantees by publishing awards without the consent of the parties.

XIV. The Proposed Rules Should Be Clarified To Provide That The Small Claims Court Determines Its Own Jurisdiction

The AAA has proposed revisions to R-9, entitled "Small Claims Option for the Parties." NRF suggests several changes to Proposed R-9.

As an initial matter, if either party contests a small claims court's jurisdiction, that court— and not the AAA or an arbitrator—should decide its own jurisdiction. Under the existing practice, a party contesting small claims court jurisdiction may merely assert that the claims at issue exceed the court's monetary jurisdiction. The AAA and/or the arbitrator will then deny the request to close the arbitration

without further investigation. We recommend recognizing that the small claims court can and should make that determination. This modification would be in line with *Consumer Due Process Protocol*, Principle 5, which provides that "[c]onsumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."

As such, we propose the following amendments to R-9:

Proposed R-9(a) states if a claim falls "within the jurisdictional limit of the appropriate small claims court," either party "may elect to waive arbitration and proceed in small claims court." This proposed rule should be amended to specify that the small claims court will decide whether the claim falls within its jurisdictional limit.

Proposed R-9(b) states that where a party commences arbitration, that same party can thereafter decide to proceed to small claims court and the AAA will close the arbitration. *See* Proposed R-9(b) ("If a claim is filed by a party with the AAA and that same party then notifies the AAA and the opposing party that they would prefer to proceed in small claims court, the AAA will administratively close the claim."). This is a change from the current R-9(b), which states that **either** party can make this request. But it is unclear from this proposed revision what happens if an arbitrator has already been appointed—*i.e.*, whether the AAA will still close the arbitration or whether it will refer the issue to the arbitrator. It is also unclear what happens if the other party contests small claims court jurisdiction. Proposed R-9(b) should clarify what happens in such circumstances: if the respondent contests whether the small claims court has jurisdiction, the arbitration should still be closed by the AAA—irrespective of whether an arbitrator has been appointed—and the respondent may argue before the small claims court whether that court has jurisdiction.

Finally, Proposed R-9(c) states that if the respondent requests that the claims be decided in small claims court, then "the AAA shall make an initial, administrative determination whether the case should remain in arbitration, subject to a final determination by the arbitrator." This rule should be revised to provide that, in such circumstances, the arbitration should be closed by the AAA—irrespective of whether an arbitrator has been appointed—and if the claimant contests the small claims court's jurisdiction, then the claimant may do so before that court.

We further suggest that the Supplementary Rules be similarly amended to provide that, at a party's request, a Process Arbitrator will close the cases in favor of small claims court. Presently, those rules state that a Process Arbitrator has the authority only to determine "[w]hether the cases should be closed, and the parties proceed in small claims court." 2024 Supplementary Rules, MA- 6(c)(vii)(a).

XV. The Proposed Rules Should Provide That Either Party May Request an In-Person Hearing

NRF recommends that the AAA modify Proposed R-22 to ensure that a party is guaranteed the right to an in-person hearing absent hardship of the other party as a matter of fundamental fairness.

Proposed R-22 provides that "[t]he hearing shall be held virtually or by other means as approved by the arbitrator unless the parties agree otherwise, or the arbitrator determines that an in-person hearing is necessary for a fundamentally fair process." We submit that the proposed default of a virtual hearing is unfair and inconsistent both with the concept of due process and with the *Consumer Due Process Protocol*. *See Consumer Due Process Protocol*, Principle 1 (providing that "[a]ll parties are entitled to a fundamentally-fair ADR process"); *id.*, Principle 12 ("All parties are entitled to a fundamentally-fair arbitration hearing.").[27] Proposed R-22 should be amended to remove the default to virtual hearings (while still allowing for virtual hearings if all parties agree), and to further provide that

an arbitrator should grant a party's request for an in-person hearing absent a finding that there would be actual hardship to the party opposing the in-person hearing.

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[27] *NRF objects to the current language of Supplementary Rule, MA-5, for similar reasons. See Supplementary Rule, MA-5 ("Virtual hearings are the preferred method of evidentiary hearings for cases subject to these Supplementary Rules. However, where in-person hearings are required, and in the absence of party agreement, the AAA-ICDR will identify one or more locales where hearings may take place. In any such determination, the AAA-ICDR will consider the positions of the parties; relative ability of the parties to travel; and factors such as the location of performance of the agreement, the location of witnesses and documents, relative costs, and the location of any prior court proceedings, among other factors presented by the parties.").*

i) **The Proposed Rules Should Clarify That Mediation Is Not Mandatory And Any Party Has The Right To Opt Out**

Proposed R-11, entitled "Mediation," provides that "[d]uring the AAA's administration of the arbitration or at any time while the arbitration is pending, the AAA may refer the parties to mediation, or the parties may request mediation." It is not clear whether mediation is mandatory in circumstances where the AAA "refer[s] the parties to mediation."

NRF objects to any rule that would impose mandatory mediation on the parties. We therefore recommend that the AAA amend Proposed R-11 to clarify that it does not impose mandatory mediation. Any mediation should proceed only with consent of all the parties, and any party may choose to opt out of mediation. This modification would bring Proposed R-11 in line with Supplementary Rule, MA-9 (providing, *inter alia*, that "[w]ithin 120 calendar days from the established due date for the Answer, the parties shall initiate a global mediation of the Mass Arbitration pursuant to the applicable AAA-ICDR mediation procedures or as otherwise agreed to by the parties," but "[a]ny

party may unilaterally opt out of mediation upon written notification to the AAA-ICDR and the other parties to the arbitration").

j) **The Proposed Rules Should Clarify that Arbitrators May Grant a Stay**

NRF recommends that the AAA modify Current R-23 to expressly state that an arbitrator may grant a stay of proceedings for good cause shown. Current R-23 provides that "[t]he arbitrator may issue any orders necessary to . . . achieve a fair, efficient, and economical resolution of the case." We believe the correct reading of this broad rule is that it empowers arbitrators to enter a discretionary stay of proceedings where warranted. Many arbitrators agree but some do not. To eliminate any doubt on this question, we propose modifying the rule to expressly state that the arbitrator may grant a stay.

4) **The Proposed Rules Should Clarify That In the Event Of A Potential Disqualification The Parties May Provide Input Before Any Decision**

NRF proposes that the AAA modify Proposed R-17 to clarify that all parties are to be afforded the right to be heard on a potential arbitrator removal. Current R-19 provides that, where a party objects to an arbitrator or the AAA raises whether an arbitrator should continue to serve of its own accord, the AAA will decide the issue "[a]fter gathering the opinions of the parties." Current R-19(b). Proposed R-17 no longer provides that the AAA will gather the opinions of the parties. NRF proposes reincorporating this language.

5) **The Proposed Rules Should Permit A Party To Object To Continuing The Arbitration When There Is A Vacancy On The Arbitral Panel**

Proposed R-18(b) provides: "In the event of a vacancy in a panel of neutral arbitrators, after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise." NRF is concerned that

this change could result in arbitrations proceeding with incomplete panels and in circumstances where a party's party-appointed arbitrator is no longer serving on the panel.

Therefore, we propose that the AAA clarify the proposed rule to provide that in the event of a vacancy in the panel prior to a merits hearing, a substitute arbitrator shall be appointed unless all the parties agree otherwise. We further propose that the AAA modify the proposed rule to provide that in the event of a vacancy after a merits hearing has commenced, the hearing is to be postponed until a substitute arbitrator is appointed unless all parties agree to proceed before the remaining panel members.

6) **Parties Should Be Required To Disclose Litigation Funding And Arbitrators Should Be Required To Disclose Any Connections To Litigation Funders**

Proposed R-16(a) provides that the arbitrator "shall disclose to the AAA . . . any past or present relationship with the parties or their representatives." NRF recommends that the AAA supplement this proposed rule to provide that (i) the parties must disclose any litigation financing received and the persons or entities providing litigation funding in connection with the arbitration and (ii) the arbitrator must disclose to the AAA any past or present relationships with any identified litigation funder. A funder effectively "invests" in an arbitration, paying money in exchange for an interest in any proceeds the arbitration may produce. Thus, the funder is essentially a "real party in interest" adverse to the respondent.[28]

XXI. The Proposed Rules Should Clarify That Deadlines Are To Be On Business Days

NRF recommends that the AAA modify Proposed R-28 to clarify that deadlines are to fall on business days. The Consumer Rules set time periods for certain deadlines measured in calendar days. *See, e.g.*, Current R-2(c) (answers due 14 calendar days after the date the AAA notifies the parties that the Demand for Arbitration was received and all filing requirements were met); Current R-47 (request for

correction of award due 20 calendar days after award transmitted and response due 10 calendar days thereafter). Arbitrators likewise routinely set time periods for deadlines measured in calendar days.

NRF recommends that the AAA modify Proposed R-28 to clarify that, where a time period for a deadline is set under the Consumer Rules or by an arbitrator measured in calendar days, where the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. This proposal would bring the Consumer Rules in line with comparable court rules, *see, e.g.*, Fed. R. Civ. P. 6(a), and would avoid burdening parties, arbitrators, and the AAA with de minimis requests for extensions of time and the prospect of work over weekends and holidays.

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[28] *Indeed, in some matters the funder is able to exercise control over the litigation, including with respect to settlement.*

CONCLUSION

Dated: February 28, 2025

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NRF appreciates the opportunity to submit, and the AAA's consideration of, these comments. We recommend that the AAA solicit additional input from stakeholders and thought leaders before making any changes to the consumer rules. The AAA should make all comments that they have received available to the public and provide an opportunity for reply to those comments to allow for a transparent process. The undersigned are available to meet and discuss these comments or any questions the AAA may have.

Advocacy Group Comment #14

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Advocacy Group: **National Retail Federation**
City: **Washington, DC**
Date Received: **2/28/25**

Before the

AMERICAN ARBITRATION ASSOCIATION

COMMENTS OF THE RESTAURANT LAW CENTER TO THE AAA'S PROPOSED CHANGES TO THE CONSUMER ARBITRATION RULES

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The Restaurant Law Center is pleased to submit these comments in response to the American Arbitration Association's Draft Amendments to its Consumer Arbitration Rules ("Consumer Rules").[1]

THE RESTAURANT LAW CENTER AND ITS MEMBERS

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry

comprises over one million restaurants and other food service outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. The Restaurant Law Center represents a broad and diverse group of owners and operators, from large national outfits and franchisors with hundreds of locations to small single-location, family-run neighborhood restaurants and bars, and everything in between. Restaurants and other food service providers are the second largest private sector employers in the United States.

Through this submission, the Restaurant Law Center provides the AAA with a perspective on how the Draft Amendments to the Consumer Rules may have the potential to significantly impact its members and their industry, and therefore why it proposes certain changes to these Draft Amendments.

EXECUTIVE SUMMARY

The Restaurant Law Center commends the AAA for taking the initiative to conduct a comprehensive review of the Consumer Rules with the objective of increasing transparency, promoting fairness in line with its *Consumer Due Process Protocol*, improving overall efficiency, and codifying standards of ethics and conduct applicable to parties and their representatives. These

[1] These comments do not address the AAA's Draft Amendments to the Employment Arbitration Rules.

proposed changes have the potential to build on the AAA's recent efforts to curb abuses in the arbitration process, particularly through the attempted weaponization of the AAA's Consumer Rules and Fee Schedule with mass arbitration. Because the amended Consumer Rules will apply in tandem with the Mass Arbitration Supplementary Rules, those amendments should be crafted to take into account the impact they will have on not just individual consumer arbitrations but also on any mass arbitrations administered under the Consumer Rules.[2]

Mass arbitration is a tactic where a counsel for claimants submits—or threatens to submit—thousands or even tens of thousands of identical claims to an arbitral forum. The firms pursuing these claims usually lack the ability to prosecute all of the many arbitrations concurrently. But that (and typically the merits of the underlying claims) does not matter to them. Their objective is not to arbitrate claims to an award. Instead, their objective is to force a business to choose between paying millions of dollars in administrative fees or paying a windfall settlement unrelated to the merits of the claims.[3]

As one firm explained in a presentation prepared for a litigation funder, the model is to "weaponize[] consumer . . . arbitration clauses . . . by aggregating thousands of claims." (Ex. 1 at

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[2] *As Neil B. Currie, a Vice President of the AAA, has explained, "[t]he Supplementary Rules supplement one of [the AAA's] base rule sets, addressing the unique aspects of mass arbitration." Interview with Neil B. Currie, Vice President of the AAA, in The Future of Mass Arbitration, Today's General Counsel (2023), at 15.*

[3] *A recent U.S. Chamber of Commerce white paper described the tactic: "Here's the gambit: the lawyers file simultaneously tens of thousands of essentially-identical arbitration demands, triggering an immediate, massive bill to businesses for arbitration fees—often totaling hundreds of millions of dollars. Even if the claims are meritless, or completely frivolous, the business is between a rock and a hard place: it is either pressured to settle (or abandon arbitration altogether) or forced to pay that huge fee bill simply to have the chance to defend itself. And that sunk cost cannot be recovered even if the business wins every single arbitration." U.S. Chamber of Commerce Institute for Legal Reform, Arbitration Shakedown: Coercing Unjustified Settlements (Feb. 2023) ("Chamber White Paper"), at 2.*

3.[4]) "Aggregating claims makes entrance fee to just defend prohibitively expensive." (*Id.*) After threatening claims, "[c]laimants' counsel will offer a settlement slightly less than the AAA charge . . . attempting to induce a quick resolution." (*Id.*)

Claimants' counsel in the mass arbitration space—who are often repeat players—identify "target" businesses whose consumer arbitration agreements contain features that will further their mass arbitration scheme.[5] As one firm explained to a litigation funder, one such feature is "use of the AAA as an

arbitration provider." (Ex. 1 at 6.) Claimants' counsel further assert claims that they contend do not require much individualized proof. Often they pursue claims that have already been asserted by other firms in putative class actions, literally "copying and pasting" those other firms' allegations into their own demands for arbitration. (*See id.* (describing "[p]assive . . . approach" involving attempts to "copycat existing legal theories").

Claimants' counsel will then entice claimants through salacious social media advertisements promising large payouts. Because the goal is to maximize the number of claimants—and thereby to drive up the applicable AAA fees, rather than to identify claimants with legitimate claims—these solicitations are frequently misleading. They may falsely imply that the target business has already been found to have violated the law, or fail to explain whether the consumer is signing up for an arbitration or a class action. They often fail to adequately describe the arbitration process or the risks involved, particularly the risk that the consumer may be liable

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[4] *Available at https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjlawjrvr/frankel-valvevzaiger--massarbpowerpoint.pdf.*

[5] *As the Chamber's white paper explains, lawyers bringing mass arbitration claims "seem only to be seeking to leverage the fact that arbitration is subsidized by businesses to make it too expensive for businesses to defend themselves. No one should applaud the misuse of arbitration programs as a tool for extracting payoffs from targeted businesses." Chamber White Paper at 45.*

for costs should an arbitrator find that a consumer brought claims that are frivolous or brought for an improper purpose.

The online solicitations will generally contain a link to a "claims form," often boasting that consumers can complete these forms in "a couple of minutes." The form will ask a couple of basic questions, such as whether the consumer owned or used the product or service in question and where the consumer resided at the time. Once the consumer fills this form out, they are then taken to an

electronic copy of the firm's engagement letter. This automated online interaction may be the totality of the firm's investigation of each individual consumer's claims prior to that individual's becoming a client of the firm.

Thus, mass arbitration claimants' counsel, in their zeal to aggregate large numbers of claimants to maximize leverage over businesses, often conduct little if any client vetting. As a result, the typical mass arbitration claimant pool frequently includes legions of claimants who (i) never used the product or service that is the basis for alleged liability; (ii) do not know they are asserting claims in arbitration against a business; (iii) believe they signed up to collect a portion of a class action settlement; and/or (iv) have not authorized counsel to pursue claims on their behalf. These issues are exacerbated by the fact that the AAA rules do not require the claimant to sign the demand for arbitration.

For example, in a recent federal action in which a claimants' counsel sought to compel Samsung to arbitrate tens of thousands of claims before the AAA, the U.S. Court of Appeals for the Seventh Circuit held that the claimants' counsel had failed to provide evidence of an arbitration agreement for **any** of the almost 50,000 claimants they purported to represent. *See Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 619 (7th Cir. 2024).[6] Businesses routinely uncover mass arbitration claimants who are dead, fictitious, in active bankruptcy, or otherwise not legitimate claimants.[7] In some cases, members of the mass arbitration plaintiffs' bar have posed as claimants in mass arbitrations brought by rival counsel in an apparent attempt to improperly derive information about the business and their rival's activities. (*See* Ex. 4 (Petition for an Order Disqualifying Counsel, *WarnerMedia Direct, LLC v. Zimmerman Reed LLP*, Index No. 652500/2024 (Sup. Ct. N.Y. Cnty. filed May 15, 2024).)

The Restaurant Law Center appreciates that the AAA has taken steps to address these widespread mass arbitration abuses. The AAA first promulgated a set of supplementary rules relating to mass arbitration in the consumer and employment space, the Supplementary Rules for Multiple Case Filings, in 2021 ("2021 Supplementary Rules"), which apply when "twenty-five or more similar Demands for Arbitration (Demand(s)) [were] filed against or on behalf of the same party or related parties . . . where representation of the parties is consistent or coordinated across the cases." 2021 Supplementary Rules, MC-1(b). The 2021 Supplementary Rules further mandated

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[6] *The Restaurant Law Center, together with other business and trade associations, submitted an amicus brief to the Seventh Circuit in Wallrich raising concerns about abusive mass arbitration practices. Br. of Chamber of Commerce of the U.S. of Am, Consumer Tech. Ass'n, Nat'l Retail Fed'n, Rest. Law Ctr., Am. Bankers Ass'n, and CTIA – Wireless Ass'n as Amici Curiae in Supp. of Respondents-Appellants and Reversal, Wallrich v. Samsung Elecs. Am., Inc., No. 23-2842 (7th Cir. filed Nov. 21, 2023), ECF No. 39.*

[7] *Samsung had repeatedly informed the claimants' counsel that the underlying claims were meritless and even provided a supporting declaration. (Ex. 2.) Samsung was proven right when a court later dismissed the claims with prejudice. See G.T. v. Samsung Elecs. Am., Inc., --- F. Supp. 3d ---, No. 21-4976, 2024 WL 5195243 (N.D. Ill. Dec. 23, 2024). But even beyond the claims' lack of merit, Samsung's analysis revealed that the claimant pool included individuals who were dead, individuals who never resided in Illinois (and thus had no basis to bring the Illinois statutory claims asserted), and individuals also purportedly represented by other counsel pursuing the same claims against Samsung. (See Ex. 3 (Respondents-Appellants' Opening Br. and Short App'x at 44- 45, Wallrich v. Samsung Elecs. Am., Inc., No. 23-02842 (7th Cir. filed Nov. 14, 2023), ECF No. 34.).)*

that a separate demand for arbitration be submitted for each claimant and "[e]ach Demand must include complete contact information for all parties and representatives," *id.*, MC-2, and created a mechanism whereby a single individual would be appointed as a "Process Arbitrator" "to hear and determine the administrative issue(s) for all of the cases included in the Multiple Case Filing affected by such administrative issue(s)," *id.*, MC-6(b).

The AAA has since refined the Supplementary Rules (now renamed as the "Mass Arbitration Supplementary Rules") on several occasions. Its most recent amendments were in 2024 ("2024

Supplementary Rules"). The AAA amended both the Supplementary Rules and its consumer fee schedule. As the AAA explained in a press release, these modifications were made as a result of "listen[ing] to the needs of individuals and businesses involved in mass arbitrations" and are designed to "save time, reduce costs and foster constructive dialogue."[8] The changes included:

- Requiring each mass arbitration submission to "include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge." 2024 Supplementary Rules, MA-2. The AAA explained the "[n]ew attestation requirements" were designed to "help ensure accurate filings and pleadings, minimizing delays and unnecessary complexities."[9]
- Introducing a new *Consumer Mass Arbitration and Mediation Fee Schedule* that, among other things, significantly reduced the upfront fees that were required before a party could request the appointment of a Process Arbitrator.
- Expanding the Process Arbitrator's role so that the Process Arbitrator could "tackle[] potential hurdles early, allowing parties to focus on substantive issues."

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[8] *AAA® Announces Updated Mass Arbitration Supplementary Rules (January 16, 2025), available at https://www.prnewswire.com/news-releases/aaa-announces-updated-mass-arbitration-supplementary-rules-302035818.html.*

[9] *Supra n.8.*

The introduction—and subsequent expansion—of the Process Arbitrator role has been a welcome development and in certain instances has helped expose abusive mass arbitration practices. For example, in one mass arbitration against a financial institution, a Process Arbitrator ordered all claimants to submit amended demands for arbitration including bank account numbers and facts sufficient to establish they met the requirements necessary to bring claims under the demands' theory of liability. *See* Order of Process Arbitrator, *Mosley v. Wells Fargo & Co.*, No. 22-cv-01976-DMS-AGS (S.D. Cal. Oct. 27, 2022), ECF No. 22-20. Claimants' counsel was unable to provide that information for

the vast majority of their putative clients, and later submissions revealed that nearly half the claimants were never qualified to bring the claims they asserted.[10]

Unfortunately, there continue to be gaps in the AAA rules and procedures that enable mass arbitration claimants' counsel to weaponize the AAA arbitration procedures and fee schedules. The AAA has stated that it "introduced a flat Initiation Fee and attestation requirements" in response "to the increasing number of mass arbitration cases since 2018, primarily driven by arbitration clauses in consumer-business and employee-employer contracts" and to "ensure filing integrity."[11] Unfortunately, in reaction to the attorney attestation requirement, claimants' counsel often submit a perfunctory affirmation that simply parrots the language of that rule. The experience of our members is that this requirement has not actually resulted in claimants' counsel performing

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[10] *See Defs.' Notice of Mot. and Mot. to Dismiss or Transfer at 1, Penuela v. Wells Fargo Bank, N.A., No. 4:24-cv-00766 (N.D. Cal. filed May 28, 2024), ECF No. 19 (after the Process Arbitrator ordered the provision of additional information, claimants' counsel conceded that it "could not provide the basic information required by the Process Arbitrator for 89% of claimants, and that 41.5% of claimants never had and could never have had the claim they asserted . . . in their demands").*

[11] *Kendal Enz, AAA Enhances Arbitration with New Mass Arbitration Rules (Jan. 30, 2024).*

any increased diligence on their claimants: mass arbitrations continue to be commenced involving dead claimants, claimants unaware they have signed up, claimants already represented by other counsel on the same claims, and so forth. And, thus, while the expanded Process Arbitrator role is to be welcomed, the Process Arbitrator, the AAA, and the respondent business are still left to deal with many claims that should never have been submitted in the first instance. In addition, individual Process Arbitrators often interpret the contours of their role inconsistently, creating uncertainty, inconsistency across matters, and frustration among the parties.

The significantly reduced upfront fees to obtain appointment of a Process Arbitrator are a welcome step. But our members have experienced situations where a Process Arbitrator abdicates their responsibility to investigate issues that have been raised with the mass filing, and thus thousands of frivolous claims are still permitted to proceed resulting in significant administrative fees. We appreciate that "[t]he AAA-ICDR's commitment is to ensure that its fees do not interfere with its mission to resolve disputes fairly and efficiently" and urge it to consider further changes in this area.[12]

As a result, businesses remain pressured to settle claims that are without merit and brought for purposes of extortion rather than on behalf of legitimate claimants seeking relief for actual injuries. Businesses are therefore continuing to evaluate whether to move away from arbitration agreements designating the AAA as the forum to resolve their consumer disputes.

The amendments to the Consumer Rules have the potential to be a further step in the right direction. But to fulfill their promise and the AAA's overarching goal of facilitating a

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[12] *Adam Shoneck, Mass Arbitration - How Did We Get Here & Where Are Now?, AAA (June 6, 2024).*

fundamentally fair and efficient arbitration process, the Restaurant Law Association proposes below various modifications of the Draft Amendments.

Before any changes to the rules are implemented, however, the Restaurant Law Center recommends that the AAA provide time for additional dialogue between the AAA and thought leaders such as academics, neutrals, judges, and other stakeholders regarding the policy implications of the proposed changes. In the alternative, the Restaurant Law Center proposes that the AAA permit stakeholders the opportunity to provide reply comments in response to any initial comments submitted. This approach would be consistent with notice-and-comment rulemaking procedures for administrative agency rulemaking and would permit the AAA to receive more comprehensive feedback before issuing final rules.

DISCUSSION[13]

g) **Proposed R-1(a): The Parties Should Retain The Right To Agree That Another (Non-Consumer) Set Of AAA Rules Applies Even Where The Underlying Dispute Is A Consumer Matter**

The Restaurant Law Center recommends that the AAA revert Proposed R-1(a) so that the parties retain the ability—permitted under Current R-1(a)—to agree that another set of rules (such as the Commercial Arbitration Rules ("Commercial Rules")) apply even where the underlying matter is consumer in nature.

Proposed R-1(a) states:

> The parties shall be deemed to have made the Consumer Arbitration Rules ("Rules") a part of their arbitration agreement when they have provided for arbitration by the American Arbitration Association ("AAA") or have an arbitration agreement within a consumer agreement. *If no rules are specified or there is a different set of AAA rules named in the arbitration agreement, these Rules and any*

[13] *The comments set forth herein reflect the Restaurant Law Center's views on the current and proposed rules as applied to individual arbitrations, including arbitrations that are part of a mass arbitration. For ease of reference, the Comments will refer to a current Consumer Rule as "Current R-__" and a proposed new Consumer Rule as "Proposed R-__."*

> *amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA.* To ensure that you have the most current information, see our web site at www.adr.org.

(emphasis added).

The italicized text appears to indicate that parties may no longer agree that another set of rules aside from the Consumer Rules applies to consumer matters. This contrasts with Current R- 1(a), which does provide parties with that ability. *See* Current R-1(a)(3) ("The parties shall have made these Consumer Arbitration Rules ("Rules") a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA"), and . . . 3) the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules.").

The parties should retain the flexibility to agree to the application of other sets of AAA rules in their agreements. There may be good reason that arbitration under a particular agreement, even if consumer in nature, is better served by applying the Commercial Rules or potentially another set of AAA rules.

II. Proposed R-1(c): The AAA's Determination That An Arbitration Agreement Satisfies The *Consumer Due Process Protocol* Should Be Final

The Restaurant Law Center recommends that the AAA modify Proposed R-1(c) to provide that the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol* is final and cannot be appealed to, or reversed by, an arbitrator.

Current R-1(d) provides:

> The AAA administers consumer disputes that meet the due process standards contained in the *Consumer Due Process Protocol* and the *Consumer Arbitration Rules*. The AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*. Should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Under current practice, should a party challenge the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol*, the AAA will refer the issue to an arbitrator—or, in the case of a mass arbitration, sometimes a Process Arbitrator—for a final determination.

The AAA's proposed revisions would codify this practice. The proposed rule provides that "[t]he AAA will accept cases after the AAA reviews the parties' arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*." Proposed R-1(c). It further provides:

Id.

If the AAA proceeds with administration and a party disagrees on whether the agreement meets these Rules and the *Consumer Due Process Protocol*, they can bring the issue to an arbitrator for a final decision. If the arbitrator finds that the agreement does not comply, they have the authority to adjust the proceedings to ensure they meet the Rules, *Consumer Due Process Protocol*, and the terms of the arbitration agreement.

The Restaurant Law Center's members have often been frustrated with this practice in AAA arbitrations. Businesses incur substantial cost and devote considerable resources in drafting, updating, and providing customers notice of terms. Those terms are reviewed by the AAA; the AAA confirms that the arbitration agreement complies with the *Consumer Due Process Protocol*; and the AAA places the arbitration agreement on its public Registry in accordance with Current R-12. At the culmination of this process, businesses and consumers have the expectation that their agreement that is publicly listed on the

AAA Registry will govern their disputes. This expectation is upended when an arbitration agreement is thereafter challenged for purported non-compliance with the *Consumer Due Process Protocol*. Allowing claimants to appeal the AAA's determination serves only to delay a resolution of a consumer's dispute, whether or not the appeal is successful. This delay is exacerbated where an arbitrator reverses the AAA's determination that an agreement meets the *Consumer Due Process Protocol*. In such cases, the parties may be forced to start over again in another forum.

Moreover, the AAA should not create a new right or vehicle to challenge an arbitration agreement outside of existing law. The *Consumer Due Process Protocol* establishes procedural (not substantive) rights that only the AAA may address conclusively as an administrative matter when the agreement is reviewed and approved by the AAA. Indeed, the AAA routinely makes final determinations affecting numerous rights enshrined in the *Consumer Due Process Protocol*, such as selecting neutrals; establishing and enforcing neutral disclosure requirements; assessing whether neutrals are independent and impartial; and making final determinations regarding disqualification requests. Assessing whether an agreement complies with the *Consumer Due Process Protocol* is likewise an administrative determination that the AAA may conclusively make without an appeal process. Enabling the AAA to do so would give consumers and businesses certainty regarding the agreement that controls their disputes and streamline arbitration proceedings, thus promoting the "fundamentally-fair ADR process" at the core of the *Consumer Due Process Protocol*.

Accordingly, the Restaurant Law Center proposes that the AAA amend the Consumer Rules to provide that the AAA's determination that an arbitration agreement satisfies the *Consumer Due Process Protocol* is final and **not** subject to review by an arbitrator or Process Arbitrator. This approach would have many benefits—facilitating consistency, ensuring that businesses and their

customers may rely on the AAA's review, and reducing costly post-review challenges—and no drawbacks. It would also not prejudice consumers' rights: they may still challenge an arbitration agreement on other grounds available under existing law. As the AAA

aptly notes, its determination that an agreement complies with the *Consumer Due Process Protocol* "cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause." Current R-12; Proposed R-12.

III. Proposed R-1(f) and Proposed R-36: The Parties Should Retain The Monetary Threshold For Documents-Only/Desk Arbitration

The Restaurant Law Center recommends that the AAA revert Proposed R-1(f) and Proposed R-36 to retain the current dollar threshold for documents-only/desk arbitration and to guarantee the right to a hearing upon request where either party seeks injunctive relief.

Pursuant to Proposed R-1(f) and Proposed R-29, the maximum amount for a documents-only/desk arbitration would double, from $25,000 to $50,000. This means that where no disclosed claims or counterclaims exceed $50,000, the dispute shall be resolved by the submission of documents only/desk arbitration. *See* Proposed R-1(f) and Proposed R-36; *compare* Current R- 1(g), *with* Current R-28 (providing that the maximum for a documents-only/desk arbitration is $25,000). In addition, under the current rules, a hearing may be ordered even for desk arbitrations where "any party requests an in-person or telephonic hearing, **or** the arbitrator decides that a hearing is necessary." Current R-29 (emphasis added). Proposed R-36 seeks to amend these provisions by stating that in desk arbitrations, a party's request for "a virtual or telephonic hearing" will only be granted where "the arbitrator decides that a hearing is necessary." Further, a party's request for "an in-person hearing" will be granted only where "the arbitrator finds that an in-person hearing is necessary for a fundamentally fair process." *Id.*

The Restaurant Law Center believes that the $50,000 threshold is too high considering that the typical consumer arbitration involves claims of smaller monetary value. Furthermore, the right to a hearing is often of particular significance to a business, particularly where injunctive relief is sought. Accordingly, we propose that the maximum amount for a documents-only/desk arbitration remain at $25,000. We further propose that the rule guarantee the right to a hearing where the claimant seeks injunctive relief. We also propose that Proposed R-1(f) be modified to clarify—as is clear from Proposed R-36—that any party may request a hearing even where the dispute does not reach the monetary threshold set forth in Proposed R-1(f).

k) **Proposed R-4: Claimant And Claimant's Counsel Should Be Required To Certify That The Claimant Has Satisfied Mandatory Pre-Arbitration Dispute Resolution Requirements**

The Restaurant Law Center recommends that the AAA add to Proposed R-4 a mandate that a claimant and claimant's counsel must provide a certification that the claimant has satisfied any pre-arbitration contractual dispute resolution requirements with the filing of a demand.

Many consumer arbitration agreements contain mandatory notice and pre-arbitration informal dispute resolution procedures that the parties must undertake before commencing arbitration. In the overwhelming majority of consumer disputes, these requirements facilitate a prompt, cost-effective, and mutually beneficial outcome and enable the parties to avoid arbitration entirely. But some claimants fail to properly comply with pre-arbitration dispute resolution requirements, resulting in potentially avoidable time and expense in arbitration proceedings. This problem is particularly acute in the context of mass arbitrations. In these matters, claimants' counsel's business model is to extract settlements untethered from the merits of the claims asserted based on the threat of many arbitrations—and their attendant fees—rather than to resolve claims on terms that are satisfactory to individual

claimants. It is therefore unsurprising that mass arbitration claimants' counsel routinely flout pre-arbitration dispute resolution requirements.

To ensure compliance with pre-arbitration contractual dispute resolution requirements, the Restaurant Law Center recommends that the AAA add to Proposed R-4, entitled "Filing Requirements," under the "Information to be included with any arbitration filing" (Proposed R- 4(a)(iv)), the following as a new subsection (h): "a certification from the claimant and the claimant's counsel that claimant, before submitting the demand for arbitration, has satisfied any pre-arbitration contractual dispute resolution requirements."

7) **Proposed R-5: The Rule Should Provide that an Arbitration Must Be Closed in Favor of Court Proceedings Where the Parties Dispute Which Agreement Controls**

The Restaurant Law Center recommends that the AAA modify Proposed R-5, "Answers and Counterclaims," to provide that the AAA will **close** an arbitration in favor of court proceedings where the parties dispute which agreement controls and the competing agreements materially conflict. The current Proposed R-5 (i) permits the AAA to administer arbitrations where the parties dispute which agreement controls and (ii) purports to vest in arbitrators the ability to resolve that dispute. This rule is unfair to respondents and would lead to wasteful proceedings because a dispute as to which agreement applies must be resolved in court.

- **The AAA Should Not Administer an Arbitration Where the Parties Dispute Which Agreement Controls**

Proposed R-5 provides that, where the parties dispute which agreement applies to a claim, the AAA will administer the arbitration in accordance with the agreement invoked by the claimant. *See* Proposed R-5(d). The Restaurant Law Center proposes that this rule be modified to provide that the AAA will **not** administer and will instead **close** arbitrations where the parties disagree as to the operative

agreement and there are material differences between the disputed agreements. This modification will harmonize the rule with binding law and promote fairness and efficiency.

An arbitration cannot proceed where the parties do not have an agreement to arbitrate. *See, e.g.*, *LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distrib., Teamsters Local 63,* 849 F.2d 1236, 1241 n.3 (9th Cir. 1988) (plaintiff "entitled to injunctive relief once it established that it was no longer under a contractual duty to arbitrate"). A court must resolve a dispute as to the governing agreement. *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 145 (2024) ("[A] court needs to decide what the parties have agreed to—*i.e.*, which contract controls."). But under Proposed R-5(d), the AAA would administratively decide such a dispute in the claimant's favor by permitting administration under the agreement proffered by the claimant even where the respondent disputes which agreement controls. That is fundamentally unfair to the respondent.

Proceeding with administration as contemplated under Proposed R-5 before a court resolves a dispute as to which agreement applies would also be unfair, inefficient and a waste of resources for additional reasons. In some cases, a respondent may assert that the controlling agreement requires claims to be resolved in another arbitration forum or in court. In those cases, allowing arbitration to proceed with the AAA under the agreement invoked by the claimant would result in unnecessary effort and expense advancing an arbitration if a court ultimately holds that the parties did not agree to arbitrate with the AAA. The parties would then be required to start over in another forum. In other cases, a respondent may assert that the controlling agreement contains a different arbitration agreement than the agreement advanced by the claimants but where both agreements designate the AAA as the arbitral forum. Administering arbitrations in these cases would also be manifestly inefficient where the

agreements are materially different, such as with respect to pre-dispute notice requirements, other conditions precedent, or applicable procedures for mass filings.

By proceeding with administration as contemplated under Proposed R-5 before a court resolves a dispute as to which agreement applies, the AAA would become an outlier among alternative dispute resolution forums. JAMS, for example, closes arbitrations where the parties raise a dispute as to the controlling agreement and the forum clause in an updated agreement does not name JAMS. Indeed, in a recent matter, counsel to hundreds of claimants attempted to commence arbitrations with JAMS under an outdated version of the respondent's service agreement that designated JAMS as the forum for disputes. The respondent objected, explaining that it had updated its service agreement with customers to designate a different arbitration provider as the forum for disputes. (Ex. 5.) JAMS agreed and declined to administer the arbitrations. (Ex. 6.)

Consequently, where the parties dispute which among materially conflicting agreements control, the AAA should defer to a court to resolve that threshold dispute and decline to administer the arbitration.

B. The Rule Should Not Provide That An Arbitrator May Resolve A Dispute As To Which Agreement Controls

Proposed R-5 also provides that where the parties dispute which arbitration agreement applies, the **arbitrator** will make a "final determination" on the issue. Proposed R-5(d). This proposed rule is contrary to *Coinbase*: a court, not an arbitrator, must make a final determination as to which contract controls. Although *Coinbase* governs, the conflicting Proposed Consumer Rule 5(d) may confuse arbitrators and lead some arbitrators to render unenforceable decisions on a threshold issue that a court must decide.

VI. R-9: The Rule Should Be Clarified To Provide That The Small Claims Court Determines Its Own Jurisdiction

The AAA has proposed revisions to R-9, entitled "Small Claims Option for the Parties." The Restaurant Law Center suggests several changes to Proposed R-9.

As an initial matter, if either party contests a small claims court's jurisdiction, that court— and not the AAA or an arbitrator—should decide its own jurisdiction. Under the existing practice, a party contesting small claims court jurisdiction may merely assert that the claims at issue exceed the court's monetary jurisdiction. The AAA and/or the arbitrator will then deny the request to close the arbitration without further investigation. We recommend recognizing that the small claims court can and should make that determination. This modification would be in line with *Consumer Due Process Protocol*, Principle 5, which provides that "[c]onsumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."

As such, we propose the following amendments to R-9:

Proposed R-9(a) states if a claim falls "within the jurisdictional limit of the appropriate small claims court," either party "may elect to waive arbitration and proceed in small claims court." This proposed rule should be amended to specify that the small claims court will decide whether the claim falls within its jurisdictional limit.

Proposed R-9(b) states that where a party commences arbitration, that same party can thereafter decide to proceed to small claims court and the AAA will close the arbitration. *See* Proposed R-9(b) ("If a claim is filed by a party with the AAA and that same party then notifies the AAA and the opposing party that they would prefer to proceed in small claims court, the AAA will administratively close the claim."). This is a change from the current R-9(b), which states that **either** party can make this request. But it is unclear from this proposed revision what happens if an arbitrator has already been

appointed—*i.e.*, whether the AAA will still close the arbitration or whether it will refer the issue to the arbitrator. It is also unclear what happens if the other party contests small claims court jurisdiction. Proposed R-9(b) should clarify what happens in such circumstances: if the respondent contests whether the small claims court has jurisdiction, the arbitration should still be closed by the AAA—irrespective of whether an arbitrator has been appointed—and the respondent may argue before the small claims court whether that court has jurisdiction.

Finally, Proposed R-9(c) states that if the respondent requests that the claims be decided in small claims court, then "the AAA shall make an initial, administrative determination whether the case should remain in arbitration, subject to a final determination by the arbitrator." This rule should be revised to provide that, in such circumstances, the arbitration should be closed by the AAA—irrespective of whether an arbitrator has been appointed—and if the claimant contests the small claims court's jurisdiction then the claimant may do so before that court.

We further suggest that the Supplementary Rules be similarly amended to provide that, at a party's request, a Process Arbitrator will close the cases in favor of small claims court. Presently, those rules state that a Process Arbitrator has the authority only to determine "[w]hether the cases should be closed and the parties proceed in small claims court." 2024 Supplementary Rules, MA- 6(c)(vii)(a).

VII. Proposed R-10: The Rule Should Be Amended To Provide That Where A Party's Representative Fails To Comply With The AAA-ICDR Standards Of Conduct, That Representative Must Be Removed But The Arbitration May Otherwise Proceed

The Restaurant Law Center recommends that the AAA modify Proposed R-10 such that a party may not avoid arbitration and proceed in court where the party or its counsel fails to comply with the AAA-ICDR Standards of Conduct.

The Restaurant Law Center appreciates the proposed consolidated rule, Proposed R-10 (entitled "Declining or Ceasing Administration"), to set forth the circumstances in which the AAA will decline to administer an arbitration or cease to administer a pending arbitration. Among the proposed scenarios in which the AAA will decline or cease to administer an arbitration under the proposed rule is where "a party **or** the party's representative" fails to comply with the AAA-ICDR Standards of Conduct. Proposed R-10(a)(i) (emphasis added). The Restaurant Law Center agrees with the animating principle behind this rule: all parties and counsel should abide by the basic standards of conduct set forth therein.

That said, where the AAA finds that a party's representative has failed to comply with the AAA-ICDR Standards of Conduct, it would be unfair to permit that same party—potentially represented by the same counsel—to proceed with their claim in court. Accordingly, we recommend that Proposed R-10(a)(i) be amended to provide that where the AAA determines that a party's representative has failed to comply with the AAA-ICDR Standards of Conduct, that representative must be removed as counsel in the arbitration but the arbitration may then proceed. The AAA should provide the party a set amount of time to obtain new counsel or proceed without representation in the arbitration.

VIII. Proposed R-11: The Rule Should Clarify That Mediation Is Not Mandatory And Any Party Has The Right To Opt Out

Proposed R-11, entitled "Mediation," provides that "[d]uring the AAA's administration of the arbitration or at any time while the arbitration is pending, the AAA may refer the parties to mediation, or the parties may request mediation." It is not clear whether mediation is mandatory in circumstances where the AAA "refer[s] the parties to mediation."

The Restaurant Law Center objects to any rule that would impose mandatory mediation on the parties. We therefore recommend that the AAA amend Proposed R-11 to clarify that it does not impose mandatory mediation. Any mediation should proceed only with consent of all the parties, and any

party may choose to opt out of mediation. This modification would bring Proposed R-11 in line with Supplementary Rule, MA-9 (providing, *inter alia*, that "[w]ithin 120 calendar days from the established due date for the Answer, the parties shall initiate a global mediation of the Mass Arbitration pursuant to the applicable AAA-ICDR mediation procedures or as otherwise agreed to by the parties," but "[a]ny party may unilaterally opt out of mediation upon written notification to the AAA-ICDR and the other parties to the arbitration").

IX. Proposed R-17: The Rule Should Clarify That In the Event Of A Potential Disqualification The Parties May Provide Input Before Any Decision

The Restaurant Law Center proposes that the AAA modify Proposed R-17 to clarify that all parties are to be afforded the right to be heard on a potential arbitrator removal. Current R-19 provides that, where a party objects to an arbitrator or the AAA raises whether an arbitrator should continue to serve of its own accord, the AAA will decide the issue "[a]fter gathering the opinions of the parties." Current R-19(b). Proposed R-17 no longer provides that the AAA will gather the opinions of the parties. The Restaurant Law Center proposes reincorporating this language.

X. Proposed R-18: The Rule Should Be Amended To Permit A Party To Object To Continuing The Arbitration When There Is A Vacancy On The Arbitral Panel

Proposed R-18(b) provides: "In the event of a vacancy in a panel of neutral arbitrators, after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise." The Restaurant Law Center is concerned that this change could result in arbitrations proceeding with incomplete panels and in circumstances where a party's party-appointed arbitrator is no longer serving on the panel.

Therefore, we propose that the AAA clarify the proposed rule to provide that in the event of a vacancy in the panel prior to a merits hearing, a substitute arbitrator shall be appointed unless all the

parties agree otherwise. We further propose that the AAA modify the proposed rule to provide that in the event of a vacancy after a merits hearing has commenced, the hearing is to be postponed until a substitute arbitrator is appointed unless all parties agree to proceed before the remaining panel members.

XI. Proposed R-20: The Consumer Rules Should Continue To Provide For A Limited Exchange Of Information

The Restaurant Law Center recommends that the AAA revise Proposed R-20 to retain the more limited information exchange provided for in Current R-22 as a matter of fundamental fairness and efficiency. The value of consumer arbitration is in streamlining the resolution of small-dollar disputes to the benefit of the consumer and the business. Proposed R-20 strays from this foundational purpose.

As the Supreme Court has explained, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," should not be "shorn away" such that "arbitration . . . wind[s] up looking like the litigation it was meant to displace." *Epic Sys. Corp. v. Murphy Oil USA*, 584 U.S. 497, 509 (2018). Applying this principle in the context of pre-arbitration disclosure, courts have repeatedly emphasized the limited nature of discovery in arbitration. *See Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC*, 876 F. 3d 900, 901–02 (7th Cir. 2017) ("[N]othing in the Federal Arbitration Act requires an arbitrator to allow **any** discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate.") (emphasis added); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992) ("[P]arties who agree to arbitrate relinquish the right to liberal pretrial discovery allowed by the federal rules . . . ." (citing *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980))).

This precept is even more applicable in consumer arbitrations. *See Surkhabi v. Tesla, Inc.*, No. 22-13155, 2022 WL 19569540, at *5 (C.D. Cal. Oct. 27, 2022) (explaining that while under the Consumer Rules, "[i]f any party asks[,] . . . the arbitrator may direct specific documents [and other] information to be shared . . . [and that the consumer and business] identify [the] witnesses[,]

. . . no other exchange of information is permitted unless the arbitrator determines it [is] necessary" (citation omitted)); *Gavrilovic v. T-Mobile USA, Inc.*, No. 21-12709, 2022 WL 1086136, at *6 (E.D. Mich. Mar. 25, 2022) (rejecting contention that discovery under the Consumer Rules is too limited in comparison to federal proceedings because "[d]iscovery limitations . . . are common in arbitration"), *report and recommendation adopted*, No. 21-CV-12709, 2022 WL 1085674 (E.D. Mich. Apr. 11, 2022); *see also Liu v. Equifax Info. Servs., LLC*, No. 22-cv-10638, 2024 WL 308089, at *9 n.4 (D. Mass. Jan. 26, 2024) (discussing limited discovery permitted under the Consumer Rules).

The AAA has long shared this recognition that information exchange in consumer arbitration should be narrowly tailored. The Introduction to the present Consumer Rules provides that "[a]rbitration is usually faster and cheaper than going to court." Consistent with that understanding—and consistent with the generally small monetary value of claims that are brought in individual AAA consumer arbitrations—Current R-22, entitled "Exchange of Information between the Parties," provides that, "**keeping in mind that arbitration must remain a fast and economical process**, the arbitrator may direct (1) specific documents and other information to be shared between the consumer and business, and (2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing." Current R-22(a) (emphasis added). Beyond that, "[n]o other exchange of information . . . is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process." Current R-22(c).

The current standard provides for a limited exchange of information consistent with the goals of keeping consumer arbitration a "fast and economical process" while granting the arbitrator discretion to permit additional information exchange if needed. This standard creates a framework that allows for consumer arbitrations to proceed in an efficient and expedient fashion. Current R.22(a).

The Draft Amendments undermine that efficiency by seeking to dramatically expand the limited scope of information exchange. Proposed R-20, entitled "Exchange of Information," states:

> The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

Proposed R-20(a). Per Proposed R-20(b), the arbitrator may now, on their own initiative or at a party's request, "require the parties to exchange documents in their possession or custody on which they intend to rely" as well as requiring the parties to produce documents "in response to reasonable document requests" that are "relevant and material to the outcome of disputed issues." Proposed R-20(b). The arbitrator may now also determine "reasonable search parameters" for ESI which should "balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them." *Id.* The proposed revisions also specify that one of the issues that "should" be discussed during the preliminary hearing is "prehearing exchange of information." Proposed R-19(b).

The Restaurant Law Center is concerned that expanding the scope of the exchange of information in this manner would result in the type of expansive, burdensome discovery that is a feature of litigation in court and is antithetical to the objectives of consumer arbitration. Expanding the scope of information exchange would not only lead to inefficient and drawn-out proceedings, but also enable

parties to demand broad discovery for improper purposes, such as discovery "fishing" expeditions; to drive up the costs of arbitration to manufacture settlement pressure; and to obtain information intended for use in proceedings other than in the arbitration in which that information is sought. Should the AAA implement Proposed R-20—which is misaligned with principles of proportionality and efficiency in individual consumer arbitrations—businesses may wish to consider alternative arbitration providers.

The amended rule would also remove many of the flexibilities and efficiencies codified in Current R-22, and thus remove one of the reasons that parties agree to arbitration in the first place. That rule appropriately provides the arbitrator discretion to determine the scope of information exchange, while generally limiting that scope given the underlying types of consumer claims at issue and to ensure that consumer arbitrations remain efficient.

XII. Proposed R-22: The Rule Should Be Amended To Provide That Either Party May Request An In-Person Hearing

The Restaurant Law Center recommends that the AAA modify Proposed R-22 to ensure that a party is guaranteed the right to an in-person hearing absent hardship of the other party as a matter of fundamental fairness.

Proposed R-22 provides that "[t]he hearing shall be held virtually or by other means as approved by the arbitrator unless the parties agree otherwise or the arbitrator determines that an in-person hearing is necessary for a fundamentally fair process." We submit that the proposed default of a virtual hearing is unfair and inconsistent both with the concept of due process and with the *Consumer Due Process Protocol*. *See Consumer Due Process Protocol*, Principle 1 (providing that "[a]ll parties are entitled to a fundamentally-fair ADR process"); *id.*, Principle 12 ("All parties are entitled to a fundamentally-fair arbitration hearing.").[14] Proposed R-22 should be amended to remove the default to virtual hearings (while still allowing for virtual hearings if all parties agree), and to further provide that an arbitrator should grant

a party's request for an in-person hearing absent a finding that there would be actual hardship to the party opposing the in-person hearing.

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[14] *The Restaurant Law Center objects to the current language of Supplementary Rule, MA- 5, for similar reasons. See Supplementary Rule, MA-5 ("Virtual hearings are the preferred method of evidentiary hearings for cases subject to these Supplementary Rules. However, where in-person hearings are required, and in the absence of party agreement, the AAA-ICDR will identify one or more locales where hearings may take place. In any such determination, the AAA-ICDR will consider the positions of the parties; relative ability of the parties to travel; and factors such as the location of performance of the agreement, the location of witnesses and documents, relative costs, and the location of any prior court proceedings, among other factors presented by the parties.").*

XIII. Current R-23: The AAA Should Clarify that Arbitrators May Grant a Stay

The Restaurant Law Center recommends that the AAA modify Current R-23 to expressly state that an arbitrator may grant a stay of proceedings for good cause shown. Current R-23 provides that "[t]he arbitrator may issue any orders necessary to . . . achieve a fair, efficient, and economical resolution of the case." We believe the correct reading of this broad rule is that it empowers arbitrators to enter a discretionary stay of proceedings where warranted. Many arbitrators agree but some do not. To eliminate any doubt on this question, we propose modifying the rule to expressly state that the arbitrator may grant a stay.

XIV. Proposed R-28: The Rule Should Clarify That Deadlines Are To Be On Business Days

The Restaurant Law Center recommends that the AAA modify Proposed R-28 to clarify that deadlines are to fall on business days. The Consumer Rules set time periods for certain deadlines measured in calendar days. *See, e.g.*, Current R-2(c) (answers due 14 calendar days after the date the AAA notifies the parties that the Demand for Arbitration was received and all filing requirements were met); Current R-47 (request for correction of award due 20 calendar days after award transmitted and response

due 10 calendar days thereafter). Arbitrators likewise routinely set time periods for deadlines measured in calendar days.

The Restaurant Law Center recommends that the AAA modify Proposed R-28 to clarify that, where a time period for a deadline is set under the Consumer Rules or by an arbitrator measured in calendar days, where the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. This proposal would bring the Consumer Rules in line with comparable court rules, *see, e.g.*, Fed. R. Civ. P. 6(a), and would avoid burdening parties, arbitrators, and the AAA with de minimis requests for extensions of time and the prospect of work over weekends and holidays.

XV. Proposed R-31: Subsection (c) of the Proposed Rule Should Be Removed

The Restaurant Law Center proposes that the AAA remove subsection (c) of Proposed R- 31 because it creates an unnecessary impediment to dispositive motion practice. Safeguarding the ability to present dispositive motions that may otherwise ferret out meritless claims at the early stages of arbitrations is critical. That is all the more true given the proliferation of mass arbitrations that are often predicated on frivolous and poorly-vetted claims.

Proposed R-31 adds, in subsection (c) of the rule applicable to dispositive motions: "Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion." Proposed R-31(c). This addition to the rule makes it more difficult for a party to obtain leave to file a dispositive motion yet does not appear to further the goals of efficiency and economy animating the rule.

Under subsection (b) of Proposed R-31, the arbitrator must already determine that the movant has shown that a motion is "likely to succeed and to dispose of or narrow the issues in the case" before granting leave to file a dispositive motion. Where those standards are met, the arbitrator will necessarily have already determined that briefing and a decision on the motion will facilitate a speedier and more efficient resolution of the arbitration. If a dispositive motion is not permitted in these circumstances, the parties will be forced to proceed with information exchange (which would be more expansive under the proposed rules) and through a final merits hearing to award on issues that "likely" could have been resolved through a dispositive motion. Those efforts are necessarily more onerous than briefing a dispositive motion. In short, subsection (c) will serve only to cause arbitrators to second-guess their determination regarding the likelihood of success of the motion.[15]

We therefore recommend that the AAA strike subsection (c) from Proposed R-31. Should the AAA implement subsection (c) of Proposed R-31, businesses may wish to consider alternative arbitration providers.

XVI. Proposed R-32: Subsection (e) of the Proposed Rule Should Be Removed

The Restaurant Law Center proposes that the AAA remove subsection (e) of Proposed R- 32 because it may be inconsistent with the Federal Arbitration Act ("FAA"), is unfair to potential witnesses, and is likely to cause confusion and lead to inefficiency.

Proposed R-32(e) implies that an arbitrator may issue an order requiring a witness attend a hearing before the arbitrator "at a time and location where the witness is willing and able to appear voluntarily **or can legally be compelled to do so**." (emphasis added). But there may be no such place. For example, under Section 7 of the FAA, an arbitrator may legally compel a witness to attend a hearing only within a specified geographical range. 9 U.S.C. § 7; Fed. R. Civ. P. 45(c). Moreover, "Section 7 does not authorize

district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via video conference." *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019).

Proposed R-32(e) contemplates that an arbitrator may hold a merits hearing in multiple locations to enable the arbitrator to issue enforceable witness subpoenas. But nothing in Section 7

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[15] *It is notable that the AAA proposes expanding the scope of exchange of information—thus slowing arbitrations and making them more costly to prosecute and defend—while at the same time proposing to limit the availability of dispositive motions because of the time and cost involved in briefing motions.*

of the FAA or Rule 45 of the Federal Rules of Civil Procedure incorporated into Section 7 permits such a procedure. *See, e.g.*, *Campaign Registry, Inc. v. Tarone*, No. 24 Civ. 2314, 2024 WL 3105524, at *2 (S.D.N.Y. June 24, 2024) ("[C]ourts across the country have concluded that the arbitrator is sitting where the underlying arbitration is being administered—not the place of production" (internal quotation marks and citation omitted)); *Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc.*, No. 1:11-CV-2829-JEC, 2011 WL 13319343, at *4 (N.D. Ga. Oct. 7, 2011)

("[T]his Court has no authority to expand its jurisdiction to enforce arbitration subpoenas when the arbitrators are sitting outside this judicial district, and this Court concludes that there is no evidence in this case that the arbitrators, or a majority of them, are sitting in this district."), *report and recommendation adopted*, No. 1:11-CV-2829-JEC, 2011 WL 13319422 (N.D. Ga. Oct. 28, 2011). Nor would a split hearing location be efficient or fair to the parties or a potential witness.

In addition, Proposed R-32(e) is unfair because it provides that a party need only "represent[]" that a witness is "essential," without more, to seek an order compelling testimony. Although Proposed R-32(e) should be removed for the reason set forth above, if it is not, the Restaurant Law Center proposes that the AAA modify the proposed rule to clarify that (i) a party must

make a **showing** that the witness is essential and (ii) the opposing party must have an opportunity to rebut that contention.

XVII. Proposed R-42(c): The Rule Should Be Revised To Remove The AAA's Automatic Right To Publish Awards

The Restaurant Law Center proposes that the AAA amend Proposed R-42 to preclude the AAA from publishing awards without the consent of the parties. This proposed amendment would preserve the confidentiality of AAA arbitration proceedings—a core feature distinguishing arbitration from court proceedings.

Proposed R-42(c) retains Current R-43(c)'s provision that "[t]he AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published." The Restaurant Law Center objects to this rule permitting the AAA to publish an arbitral award (even in redacted form) without both parties' consent. Even where the names of the parties are redacted, the identity of the parties is often apparent or can readily be ascertained from data the AAA separately publishes about arbitrations.

Moreover, the purpose of permitting the AAA to publish arbitration awards is unclear. As noted, the AAA already publishes data about arbitrations that would allow stakeholders to glean important information without reviewing underlying arbitral awards. And many arbitration agreements provide that fully satisfied awards cannot be entered in court. The AAA should not subvert these contractual guarantees by publishing awards without the consent of the parties.

XVIII. Proposed R-46: The AAA Should Clarify That An Arbitrator Continues To Have Discretion To Award Fees And Expenses Against A Party

Current R-44 provides that "[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance

with the law(s) that applies to the case." Current R-44(a). The rule further allows the arbitrator to assess costs in any interim award "as the arbitrator decides is appropriate." *Id.* And the rule provides that (i) the arbitrator may also allocate costs "to any party upon the arbitrator's determination that the party's claim or counterclaim was filed for purposes of harassment or is patently frivolous," Current R-44(c), and (ii) "[i]n the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-4, R-5, and R-7 in favor of any party, subject to the provisions and limitations contained in the Costs of Arbitration section," Current R- 44(d).

Proposed R-46 retains the arbitrator's authority to award any relief "that the parties could have received in court, including awards of attorney's fees and costs." Proposed R-46(a). It also preserves the arbitrator's authority to award "administrative fees, arbitrator compensation or expenses to a business . . . upon the arbitrator's determination that a claim or counterclaim against the business was filed for purposes of harassment or is patently frivolous." Proposed R-46(c). However, the proposed rule otherwise limits the arbitrator's ability to award costs to the business only where such an award "may be required by applicable law." Proposed R-46(c).

It is not clear why the AAA proposes adding this restriction. The Restaurant Law Center objects to any change to Current R-44 that would constrain the arbitrator's authority to issue an award of costs in favor of the business. We therefore suggest that the AAA revert Proposed R-46 to the language of Current R-44.

XIX. Proposed R-57: The Rule Should Specify That An Arbitrator May Issue Sanctions Against Both A Party And Its Counsel

The Restaurant Law Center recommends that the AAA modify Proposed R-57 to clarify that an arbitrator may impose sanctions on a party **or its counsel** and to expand the grounds on which the arbitrator may issue sanctions.

Proposed R-57, entitled "Sanctions," is a new rule that provides, *inter alia*, that "[t]he arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these Rules or with an order of the arbitrator." Proposed R-57(a). The Restaurant Law Center welcomes this worthwhile expansion of the arbitrator's authority. However, we propose amending Proposed R-57 to clarify that the arbitrator may award sanctions against a party **and/or** its counsel. We further propose amending Proposed R-57 to permit sanctions where a party **and/or its counsel** fails to comply with obligations under the Rules, an order of the arbitrator, governing rules of professional conduct, or the AAA-ICDR Standards.

Making clear that the arbitrator may sanction counsel, and expanding the scope of sanctionable conduct, would provide the arbitrator another method of addressing improper conduct by counsel. This would be a particularly powerful tool in mass arbitration matters rife with misconduct as outlined above. We note that many arbitrators have expressed frustration that they lacked the power under the existing rules to sanction a party's counsel to address misconduct.

This proposed clarification would also be consistent with the Draft Amendments to Current R-55, entitled "Declining or Ceasing Arbitration." Current R-55 states that "[t]he AAA in its sole discretion may decline to accept a Demand for Arbitration or stop the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative." The proposed revisions to Current R-55, set forth in Proposed R-10, expand the circumstances in which the AAA may cease or decline administration of an arbitration, including "where a party or the party's representative fails to abide by the American Arbitration Association-International Centre for Dispute Resolution Standards of Conduct for Parties and Representatives." Proposed R-10(a)(i). In turn, the AAA- ICDR Standards provide, *inter alia*, that

"failure" by "Participants in AAA cases" (with "Participants" defined as "parties and their representatives") to comply with the AAA-ICDR Standards "may result in the AAA's declining to further administer a particular case or caseload." Thus, the AAA-ICDR Standards already contemplate that the AAA may sanction counsel for breach of the standards by way of declining to administer further cases brought by them. Proposed R-57 should provide similar authority for an arbitrator to sanction counsel.

XX. The Restaurant Law Center Proposes A Rule That AAA Will Hold An Administrative Conference With Claimant Where Responding Party Has Reasonable Belief That Claimant Is Unaware Of Or Has Not Authorized Proceedings

The Restaurant Law Center proposes that the AAA implement a new rule permitting a respondent to request an administrative conference to be attended by a claimant where the respondent has a reasonable belief that claimants' counsel is proceeding without authorization. Such a rule would help to curb abuse of the AAA arbitration process that has become a hallmark of mass arbitration.

As discussed above, in mass arbitration matters businesses routinely uncover claimants who are dead, fictitious, in active bankruptcy, or otherwise not legitimate. In addition, in many mass arbitration matters, purported claimants have confirmed to the business that they had not authorized filings or did not even know any arbitration had been filed on their behalf. Because claimants' counsel recruit clients through online marketing and sign-up forms that counsel and lead generators tout take only "two minutes" to complete, many claimants are confused about the nature of a mass arbitration. Indeed, claimants often believe they are signing up to receive a portion of a class action settlement rather than to prosecute an individual arbitration.[16]

The Restaurant Law Center proposes a rule to address issues of apparent lack of claimant authorization, whether that issue surfaces at the inception of an arbitration or at any subsequent point during the proceedings. Specifically, the Restaurant Law Center propose a rule providing:

> In circumstances where the Respondent has a reasonable belief that the Claimant is unaware of the arbitration or has not authorized the prosecution of an arbitration on the Claimant's behalf, and to ensure the integrity of the arbitration process, the Respondent may request that the Claimant personally attend either (i) the initial administrative conference with the AAA or (ii) a separate administrative conference with the AAA should the initial administrative conference have already taken place, in either case (with the arbitrator present if one has been appointed). The conference may be telephonic or virtual.

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[16] As also noted above, the Consumer Rules do not require the claimant to sign their demand for arbitration.

CONCLUSION

The Restaurant Law Center proposes that the AAA afford time for additional dialogue and input on any proposed rule changes from stakeholders and thought leaders, including academics, mediators, arbitrators, judges, and others, before making any changes to the consumer rules. At a minimum, the AAA should make all comments that they have received available to the public and allow for reply to those comments as a matter of transparency. The Restaurant Law Center appreciates the opportunity to submit, and the AAA's consideration of, these comments. The undersigned are available to meet and discuss these comments or any questions the AAA may have.

Dated: February 28, 2025

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Advocacy Group Comment #15

Attorney(s): **Deborah White**
Advocacy Group: **Retail Litigation Center**
City: **Washington, DC**
Date Received: **2/28/25**

February 28, 2025

American Arbitration Association
120 Broadway, Floor 21
New York, NY 10271

Dear American Arbitration Association,

Thank you for the opportunity to submit public comments on the proposed amendments to the American Arbitration Association's (AAA's) Consumer Arbitration Rules. The RLC appreciates the transparency from the AAA in posting proposed amendments to its rules and considering input from all stakeholders as it crafts these important Rules. The RLC's comments are accompanied by three addenda:

Addendum 1 – Comparison of RLC's revisions with select existing and proposed amended rules.

Addendum 2 – RLC's amicus brief in *Wallrich v. Samsung*, with exhibits.

Addendum 3 – Copies of select sources cited.

Contents

(I) Introduction

The Retail Litigation Center, Inc. (the "RLC") is a 501(c)(6) nonprofit trade association that represents over 60 national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC's members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC also counts more than 20 law firms as members of its association.

The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant evolutions in the legal landscape.

In addition to filing more than 250 amicus briefs in federal and state courts of all levels since its founding in 2010, the RLC also convenes retail and law firm members on issues of importance to the industry. It offers educational programming and collaborative opportunities to retail litigators on a wide variety of issues, including arbitration.

(m) The RLC, Arbitration, and Mass Arbitration

Many of the RLC's members enter into arbitration agreements with consumers and employees because arbitration allows all parties to resolve disputes "efficiently while avoiding the costs associated with traditional litigation." Retail Litigation Center Brief as *Amicus Curiae*, *Epic Systems Corp. v. Lewis*, at 1-2, Docket Nos. 16-285; 16-300; 16-307 (U.S. 2017). Members of the RLC partner with a variety of arbitration services, including but not limited to AAA.

For years, the RLC has helped educate courts on arbitration as a "fair, inexpensive, and less adversarial" alternative to litigation. Retail Litigation Center Brief as *Amicus Curiae*, *Uber & Lyft v. CA*, Docket Nos. 23-1130, 23-1132 (U.S. 2024) (urging the Supreme Court to check attempts to circumvent "the FAA's strong protection for individual arbitration"); *see also* Retail Litigation Center Brief as *Amicus Curiae*, *Coinbase v. Bielski*, Docket No. 22-105 (U.S. 2023); Retail Litigation Center Brief as *Amicus Curiae*, *Viking River v. Moriana*, Docket No. 20-1573 (U.S. 2022). The RLC continues to show up as a voice for the retail industry combatting hostility to arbitration. *See e.g.,* Retail Litigation Center Brief as *Amicus Curiae*, *Comcast v. Ramsey,* Docket No. 24-365 (U.S. 2024) (explaining how the "*McGill* rule robs parties of arbitration's benefits and directly conflicts with [the Supreme Court's] decision in *Concepcion*.").

Recently, the RLC has also educated courts on attempts to exploit the individualized nature of arbitration by using social media to manufacture thousands of identical, simultaneous demands to leverage arbitration fees for the purpose of forcing early settlements primarily to benefit the attorneys bringing the claims. The RLC filed an amicus brief in *Wallrich v. Samsung*, drawing attention to the ethical concerns inherent in today's mass arbitration model. Retail Litigation Center as *Amicus Curiae*, *Wallrich v. Samsung*, Docket No. 23-2842 (7th Cir. 2023) (hereinafter, "RLC's *Samsung* Amicus Brief"). That brief and exhibits to it supporting the RLC's arguments accompanies these Comments as Addendum 2.

In bilateral arbitration, "[e]ach plaintiff's claim is distinct, and each plaintiff is individually represented, not 'merely' a class member." Decl. of Richard Zitrin ¶ 4, *Abernathy v. DoorDash, Inc.*, No. 19-7545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1; *see also* J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1350 (2022) ("The second distinctive feature of the mass-arbitration model is that its claims proceed individually rather than being merged into something like a single class action or MDL consolidation."). Arbitration providers understand this fact keenly as they experience the challenge of administering thousands of unique claims. *See e.g., Sega v. JAMS*, Complaint,

Case No. 258T CV 02240 (Sup. Ct., County of Los Angeles) (alleging a particular arbitration provider "does not have the capability to manage [each claim in a mass arbitration] like an individual arbitration.").

Because mass arbitrations are simply a large group of bilateral arbitrations, the AAA's Proposed Amendments to its Consumer and Employment Arbitration Rules will apply to mass arbitrations (in addition to the Mass Arbitration Supplemental Rules, which provide valuable additional processes in the mass arbitration context). As a result, it is essential to understand the underlying drivers of mass arbitration and incorporate unique considerations from that background into the proposed amendments.

A. Mass Arbitration Campaigns Are Profit-Driven, Not Dispute-Driven

Mass arbitrations are generated through solicitations by attorneys who will financially benefit from a settlement. Indeed, the purpose of mass arbitration is to leverage the dollar value of arbitration fees multiplied by a large number of claimants to force early settlement. Instead of consumers or employees who believe they have been wronged seeking counsel, attorneys with financial incentives spearhead the claims. A Ninth Circuit decision issued today noted the concerning motivations behind a mass arbitration that began with a group of "100,978 identical demands" (though somehow eventually trimmed back to 7,300 actually going forward in arbitration), saying that the "true motivation underlying the mass arbitration tactic deployed here, [] appears to be geared more toward racking up procedural costs to the point of forcing [the defendant] to capitulate to a settlement than proving the allegations of data breach to seek appropriate redress on the merits." *Jones v. Starz Entertainment, LLC*, No. 24-1645, Slip. Op., 5, 14 (9th Cir., Feb. 28, 2025).

A closer look at the drivers of mass arbitration is helpful before proceeding to specific recommendations for ensuring fair dispute resolution processes in that context. Maria Glover, an academic proponent of mass arbitrations, identified two preconditions for fueling mass arbitrations: (1) targeted use of developing technology to attract claimants; and (2) litigation funding. Both reveal the profit-motivation for mass arbitrations, divorced from valid consumer or employment disputes.

1. Targeted Use of Social Media & Technology to Attract Claimants

The first condition identified by Professor Glover is the growth of social media and increasingly sophisticated technology, which can be used to mass-solicit claimants and, in some cases, "help individuals initiate arbitration proceedings in exchange for a cut of any eventual payout." J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1338-39 (2022). Law firms are dependent on social media and sophisticated online marketing to generate a "mass" of claimants that then asserts hydraulic pressure against a target. Mass arbitrations that have ended up in court (where filings are available to the public) include counsel allegedly representing 30,000 claimants (*Uber Techs, Inc. v. Am. Arb. Ass'n, Inc.*); 50,000 claimants (*Wallrich v. Samsung*); and over 100,000 claimants (*Starz v. Keller Postman*). In order to obtain this volume of claimants, "potentially

misleading client solicitations are the first seeds of many mass arbitration harvests." Ann Marie Mortimer, *Emerging Mass Arbitrations May Be Ideal Proving Ground for AI*, Bloomberg (Nov. 9, 2023). The RLC's *Samsung* amicus brief included the below screenshot saying, "You May Be Entitled to Compensation up to $5,000" and listing a deadline a few months away.

Addendum 2, RLC's *Samsung* Amicus Brief, at 12. This and other examples of solicitations like "Sign Up in 2 Mins" (*id*, at 12) obfuscate the fact that respondents to the advertisement are retaining an attorney to represent them in an individual proceeding rather than merely seeking to recover in a class action (with a court approved settlement amount and deadline that would track the type of marketing seeking arbitration claimants). Even where firms purport to confirm representation, individuals have reported confusion (in multiple cases) over whether they are represented by counsel and, if so, for what legal claims. *See e.g.,* Addendum 3, Exhibit 2 (Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)); Addendum 2, Exhibit 5 (Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14) (initially stating that the counsel who had claimed to represent him and filed a claim initiating an arbitration on his behalf was "not my legal representative" and "falsely represented me in this class action lawsuit" before filing a contradictory letter saying he was represented by four different law firms).

2. Litigation Funding

The second underlying condition Professor Glover identified is the increase of litigation funding that "enables a party with no relationship to a lawsuit to pay some or all of the litigant's cost in exchange for a cut of any ultimate award." Glover, *Mass Arbitration*, at 1339. The purpose of litigation funding is to generate profits for large, sophisticated funders – it is a financial transaction based on an assessment of risk and return on investment. Litigation funding is not motivated by ensuring fair and efficient resolution of real disputes, as illustrated by a pitch for litigation funding for mass arbitration that was made publicly available on the docket of a case in 2023. The deck reveals the funder's strategy of "[i]dentifying 25-30 ripe targets," which it went on to define as those with an arbitration agreement with "favorable" terms and a valuation that is "high enough so they aren't judgment proof and can settle for hundreds of millions of dollars, but low enough that $200 million+ in arbitration fees creates an existential crisis[.]" RLC Addendum 3, Ex. 2, RLC Addendum 3 0014 (Mass Arbitration Strategy and Investment Opportunity).

Betraying the idea that those bringing these claims are seeking to vindicate individual interests, the pitch expressly relied on the intent to avoid arbitration (in preference of forcing settlement) as it stressed that at the time the most "completed arbitrations seen to-date is 160" in order to give comfort to the proposed funder that the campaign can use a cudgel of fees for thousands of claimants without the risk of actually proceeding with the cost of arbitrating to achieve a result for those claimants. At no point did the pitch explain that – for counsel following the rules of professional responsibility – the decision of whether to resolve claims by settlement or go forward with arbitrations is actually in the hands of the clients and, thus, counsel cannot provide assurances that thousands of arbitrations may not proceed.

The strategy is further illustrated by an affirmation under penalty of perjury filed by the managing partner of a claimants' law firm, which illuminates both the tactics of mass arbitration prosecutors and the eagerness of multiple firms to profit from the same alleged claims against large target companies. Specifically, in this case, the law firm managing partner represented a group of claimants in a mass arbitration based on Video Privacy Protection Act claims and that same attorney also signed up as a *claimant* in two different mass arbitrations (initiated by two competing law firms) under the same theory against the same company. Exhibit 4, RLC Addendum 3 0064 (Affirmation in Opposition to Petition for an Order Pursuant to CPLR Section § 7502 Disqualifying Counsel and for Additional Relief, *WarnerMedia Direct, LLC v. Zimmerman Reed*, Index No. 652500/2024 (County of New York, June 28, 2024)) (hereinafter "Affirmation in Opposition to Petition"). The affirmation states that the partner terminated the services of the competing law firm representing him in the mass arbitration against the company but the other firm still filed a demand for arbitration in his name eight months later without telling him. *Id.* at ¶ 9 ("While I terminated Labaton on August 1, 2023, Labaton apparently filed a demand for arbitration with the American Arbitration Association ("AAA") on my behalf on April 12, 2024, **which I did not learn about until I read the Petition in this proceeding**.") (emphasis added). The suit alleged that the partner (and two other representatives from his firm, including an associate involved in mass arbitrations) signed up for the competing mass arbitrations in order to obtain confidential information – such as potential settlement numbers – in order to advance the mass arbitration in which he was representing his own group of claimants. Exhibit 3, RLC Addendum 3 0029 (Petition, *WarnerMedia Direct, LLC v. Zimmerman Reed*, Index No. 652500/2024 (County of New York, May 15, 2024)). While the partner denied the alleged motivations, he conceded the underlying concerning conduct and acknowledged the impropriety by immediately withdrawing as a claimant in the two competing arbitrations. RLC Addendum 3, Exhibit 4 (Affirmation in Opposition to Petition). Regardless of the motivations, the undisputed factual background – including the filing of a demand for arbitration on behalf of an attorney without that attorney himself knowing – shines light on the concerning practices occurring in mass arbitrations.

B. Where AAA Comes In

Arbitration providers, such as AAA, can mitigate some of the ethical issues the RLC has identified by amending their rules and processes, as well as by enforcing standards already in place. The Mass Arbitration Supplementary Rules that AAA[1] issued in early 2024 lay important groundwork for ensuring that AAA can fairly administer real disputes. The RLC and its members appreciate the Supplementary Rules and encourage AAA to continue considering how the dynamics of today's mass arbitration model could preclude "fair, efficient, respectful, and collaborative conflict resolution[.]" AAA Vision.

As noted above, the AAA's Proposed Amendments to its Consumer and Employment Arbitration Rules will apply to bilateral arbitrations initiated in the context of a mass arbitration just like it does to bilateral arbitrations outside the context. Accordingly, the RLC's perspective in commenting on the

proposed amendments contemplates both scenarios and seeks to illuminate steps the AAA can take to continue to ensure that AAA is facilitating fair arbitrations for all parties.

III. Proposed Amendments – New Rules

New Rule 11 – Mediation

Proposed New Rule 11, "Mediation," would allow the AAA to refer parties to mediation administered by AAA at any time after a demand for arbitration is filed. The RLC respectfully disagrees that such a rule is necessary and asks AAA to omit the proposed new rule.

Counter-parties to an arbitration frequently interact with each other in a variety of ways before filing a demand for arbitration. Indeed, some arbitration agreements contain express pre-arbitration dispute resolution procedures. Some claimants reach out to a business attempting to resolve a dispute prior to filing an arbitration. At any of those points, parties may – and often do – choose to mediate the dispute before taking the step of filing an arbitration. If mediation is unsuccessful, the parties may not want to spend the money and time on yet another mediation referred by the AAA, as anticipated in the proposed new Rule 11. And parties are always free to mediate if they choose, regardless of whether they are ordered to do so by an arbitrator.

In addition, proposed new Rule 11 would require the mediation to be administered by AAA. Parties who have mediated the same dispute before initiating arbitration may want to use the mediator they had previously used – outside of AAA's administration – if the parties do decide to mediate again. The desire to use a mediator with particular experience may be especially important in the mass arbitration context, where such a mediator might be familiar with the parties and dynamics of mass arbitration and could make a measurable difference in resolving the claims. While AAA's Mass Arbitration Supplemental Rule 9 also anticipates mediation, it is not clear that it would preempt proposed new Rule 11 in the

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[1] *The RLC is dedicated to advancing the interests of its members among all arbitration providers. The RLC's Comments are limited to AAA's processes and actions to date because of the nature of this submission but the RLC is committed to engaging equally with other arbitration providers, should it have a similar opportunity.*

Consumer Rules (particularly outside the 120 days following the Answer deadline that is expressly contemplated in MA-9). Moreover, Mass Arbitration Rule 9 expressly allows any party to "unilaterally opt out of mediation." If the AAA moves forward with the currently proposed new rule 11 contemplating AAA referral to mediation, AAA should include a similar provision allowing a party to opt-out.

New Rule 42 – Confidentiality

The proposed new Rule 42 governing confidentiality includes the following subpart: "The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published."

The RLC urges AAA to remove the above subpart. One of the many advantages of arbitration is the privacy it provides to both parties. The proposed new Rule 42 does not explain where AAA may "publish" awards, so more information is needed before the public could provide fully informed comments on publication. However, any form of publication that makes such awards available beyond the parties has the potential to threaten the privacy of the proceeding. This is particularly the case because AAA provides public information on parties that appear before it and which party prevails in cases that reach an arbitration award. Thus, it may be possible (and even easy in some contexts) to identify parties to an arbitration based on the content of the award even with the names of parties and witnesses redacted.

Accordingly, the RLC recommends removing sub-part (c) of proposed New Rule 42. If AAA retains the ability to publish awards, the rules should at a minimum require AAA to obtain the consent of both parties and to provide an opportunity for parties to offer redactions of any sensitive information in awards beyond merely parties and witnesses before publication.

New Rule 43 – Majority Decision

The proposed new Rule 43 (sub-part b) adds the ability for one member of an arbitral panel (the chairperson) to resolve disputes related to the exchange of information or procedural matters without consulting the full panel if the parties do not object to the practice. **If AAA retains the ability of a party to object to the chairperson solely deciding exchange of information or procedural matters**, the RLC supports the adoption of the rule.

New Rule 57 – Sanctions

The RLC strongly supports the addition of the proposed new Rule 57 on Sanctions. While the RLC hopes a sanctions rule is rarely needed, it is a critical tool for arbitrators to have in place should circumstances necessitate its use.

Unfortunately, some of the problematic conduct in mass arbitrations includes attorney "representation" without an informed and knowing client – or more to the point: without the informed and knowing consent of tens of thousands of clients. *See e.g.,* Addendum 3, Exhibit 2 (Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)); Addendum 2, Exhibit 5 (Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14). Today's Ninth Circuit opinion noted that claimants' counsel sent "a single email . . . on behalf of 7,213" claimants purporting to disqualify an arbitrator on all their behalf within fifteen days of the naming of the arbitrator (which would equal 480 people per day if

claimants' counsel were to have a discussion with each claimant about the question). *Jones v. Starz Entertainment, LLC*, No. 24-1645, Slip. Op., 7 (9th Cir., Feb. 28, 2025).

Recently, multiple individuals who were originally listed as claimants in a mass arbitration filed declarations about their understanding (or lack thereof) of claims that a law firm was attempting to advance purportedly on their behalf. *See e.g.,* Addendum 3, Exhibit 2 (Declarations of ID, MS, SA, DE, DL, MD, *Tubi v. Keller Postman*, Exhibits 23-28 to First Amended Complaint, Case No. Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024)); Addendum 2, Exhibit 5 (Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14). As one example, a purported former claimant in a mass arbitration against Tubi stated he was "not aware of [claimants' law firm] representing me in my claim against Tubi" and, though he acknowledged clicking on an ad about a possible claim, said that he did "not know what the claim was based on, but I feel like the ad was meant to trick people into thinking they had a valid claim and that the claim would not involve much participation." Exhibit 1, RLC Addendum 3 0008(Declaration of DE).

Another declarant (a paralegal) said that the first time she learned that a demand for arbitration was filed in her name was after she decided not to pursue her claim and that the contents of the demand did not reflect her "statements, thoughts, or opinions." Exhibit 1, RLC Addendum 3 0002 (Declaration of LD). As noted above, this is not the first time a "claimant" has discovered his or her name was being used to prosecute an arbitration and then told a court that they did not knowingly agree to that proceeding. *See e.g.,* Lang Letter, *Kohl's, Inc. v. Lang*, No. 2023CV001652 (Wis. Cir. Ct., Waukesha County, Nov. 13, 2023), ECF No. 14; Exhibit 4, RLC Addendum 3 000130 (Affirmation in Opposition to Petition).

As a result, the sanctions rule should expressly authorize sanctions to be imposed against counsel violating ethical rules as opposed to sanctions being imposed against just the claimants themselves. Unknowing consumers or employees should not be penalized if and when those individuals do not even realize they are engaged in an adversarial process with a company – often because they are tricked or confused by a mass solicitation on social media. But arbitrators need tools to hold counsel accountable for abuse of the arbitral process.

Accordingly, the RLC recommends that the AAA amend the proposed new Rule 57 as follows[2]:

R-57. Sanctions

(a) The arbitrator may, upon a party's request, order appropriate sanctions where a party, counsel to a party, or other party representative fails to comply with ~~its~~ their obligations under these Rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of

[2] *Throughout these Comments, proposed new wording is included in red and proposed omissions from the original proposed amendments are stricken.*

evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.

- The arbitrator may, upon a party's request, order appropriate sanctions against counsel appearing in an arbitration proceeding where the counsel fails to comply with their ethical obligations, the AAA Standards of Conduct for Parties and Representatives, or the standards described in Rule 11 to the Federal Rules of Civil Procedure.
- The arbitrator must provide a party, counsel to a party, or other party representative that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

New Rule 58 – Appeals

The RLC takes no position on the need for proposed new Rule 58. However, if the AAA does proceed with the proposed Rule 58, the RLC recommends revising the proposed rule to omit the pre- condition of complying with the Consumer Due Process Protocol because the agreement will have already been reviewed and approved by AAA for compliance with its Due Process Protocol under separate AAA rules.

~~If the parties' arbitration agreement provides for the appeal of an arbitration award, the AAA will administer the appellate arbitration process only if it complies with the Consumer Due Process Protocol and the filing and arbitrator fees in connection with the appellate arbitration process are borne and allocated in accordance with the Consumer Arbitration Fee Schedule. In such cases,~~ The AAA will administer ~~the~~ its own appellate arbitration process pursuant to these Rules if the parties' arbitration agreement provides for the appeal of an arbitration award and if the appellate arbitration filing and arbitrator fees are borne and allocated in accordance with the Consumer Arbitration Fee Schedule.

IV. Proposed Amendments – Existing Rules

Rule 2 – Judicial Intervention

The proposed amendment to Rule 2 contemplates extending the arbitration suspension period from 30 days to 90 days when judicial intervention is sought. The RLC supports amending this section of Rule 2 and appreciates the AAA's acknowledgment that a judicial determination will rarely be made within 30 days. However, the proposed amendments are not sufficient. Instead, the RLC encourages the AAA : 1) to extend the time during which parties can evaluate whether to seek judicial review from 30 days to 90 days; and 2) to remove the timeline for suspending arbitration

administration until a determination is reached in the judicial proceeding.

Realistically, parties may need more than 30 days to determine whether judicial intervention is necessary. This is especially the case in mass arbitrations, where claimants' counsel's strategy is often to surprise the company and the company may need to evaluate a variety of legal issues before it can determine whether judicial review is appropriate, such as whether the filed arbitration agreement even applies to all the claimants. Accordingly, the RLC respectfully urges AAA to extend the timeline in the first sentence of Rule 2 for deciding whether to seek judicial review from 30 days to 90 days.

Additionally, judicial proceedings take an unknown amount of time and their results may have a profound impact on the pending arbitration. Thus, the RLC recommends removing the timeline for suspending arbitration during judicial review so that the parties can obtain a determination from the court before arbitration commences.

> If, within ~~30~~ 90 calendar days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration ~~for 90 calendar days~~ to permit the party to obtain an order regarding the arbitration from the court~~, with the authority to extend that time period on its' own initiative or at the request of a party for good cause shown. Any request by a party to extend the time period must be made before the expiration of the initial suspension or any approved extension.~~

Rule 4 – Content of the Demand

As discussed with respect to proposed new Rule 57 above, AAA should enhance protections guaranteeing that each purported claimant is a legitimate consumer with a claim related to the demand for arbitration. Toward that end, the RLC proposes that AAA include an additional element in each arbitration demand to help ensure each claimant is actually a consumer subject to the invoked arbitration agreement.

For example, in the mass arbitration campaign against Tubi, Tubi's "analysis showed that approximately 40% of the claimants' email addresses either were not in [Tubi's] database or were affiliated with accounts that had not streamed content or advertising within the statute of limitations period." *Tubi v. Keller Postman*, First Amended Complaint, paragraph 55, at 25, Case No. 1:24-cv-01616 (D.D.C. Nov. 25, 2024). If the firm prosecuting the mass arbitration had "conducted even a simple inquiry, it would have learned that several thousand claims" were invalid on their face. *Id* at 26. Accordingly, the RLC suggests the following addition to Rule 4.

h) The following information must be included ~~Information to be included~~ with any arbitration filing includes:

- The name of each party;

- The address of each party and, if known, the telephone number and email address;
- the identifier associated with the disputed transaction, account, or other activity (e.g., account number, purchase ID, customer loyalty number, etc.), when one exists;
- if applicable the name, address, telephone number, and email address of any known representative for each party;

Rule 5(d) – Controlling Arbitration Agreement

The proposed amendments include the following new subpart (d) to Rule 5(d):

(d) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.

The RLC strongly disagrees with the above sub-part. It is essential for fundamental fairness that the AAA administer the arbitration governed by the controlling arbitration agreement. Arbitration claimants may inadvertently submit an old or unrelated arbitration provision. Or, particularly in mass arbitration campaigns, an attorney may selectively choose an arbitration provision's terms most favorable to its position without conducting proper due diligence to ensure that every respondent to a mass arbitration solicitation was actually subject to that provision. In either of those cases, the determination of which agreement is controlling is a necessary pre-condition to administering the arbitration – critically, failing to do so could impose arbitration on parties who actually were not even subject to an arbitration agreement. **Accordingly, the RLC recommends removing subpart d to Rule 5.**

Rule 12 – Business Notification and Publicly Accessible Consumer Clause Registry

Rule 12 requires businesses that use AAA's arbitration services to submit consumer arbitration agreements to AAA for review for compliance with the Consumer Due Process Protocol before any arbitrations can commence. Businesses pay AAA a fee for the review and an annual fee to continue to have the agreement appear on AAA's Registry. Consumers and businesses rely on AAA's review and approval of the agreement for compliance with its standards and expect that parties will be able to resolve disputes in the manner both agreed on by the parties and sanctioned by the AAA in its review determination.

Despite this reliance, AAA does not always stand behind its determination of compliance with *its own rules*. The RLC recommends the AAA change course on this approach and instead honor the reliance parties place on the organization to evaluate and determine compliance with its own Consumer Due Process Protocol. The RLC recognizes the AAA's review cannot binding determinations on an agreement's compliance with local, state,

or federal law (external standards) but the RLC encourages AAA to stand behind its own determination of compliance with its own rules (internal standards).

Accordingly, the RLC proposes the following revisions to Rule 12:

> (b) Upon receiving the arbitration agreement, the AAA will review the agreement for material compliance with due process standards contained in the Consumer Due Process Protocol and the Consumer Arbitration Rules (see Rule R-1(c)). The AAA's review of a consumer arbitration clause and determination whether to administer arbitrations pursuant to that clause ~~is only an administrative determination by the AAA and~~ is a binding determination on the question of an agreement's compliance with AAA's Consumer Due Process Protocol. That determination cannot be relied upon or construed as a legal opinion or advice regarding the enforceability of the arbitration clause under local, state, or federal law. There is a nonrefundable review fee detailed in the Consumer Arbitration Fee Schedule to register a clause.

Rule 14 – Fixing of Locale

The RLC recommends extending the time to dispute determination of locale from 14 to 60 days. Typically, determinations of locale do not need to be made urgently in the administration of an arbitration. Two weeks from notice of the filing of a Demand is a very short turn-around if AAA does not use its discretion to adjust the date. All parties could benefit from additional time to determine if locale may be disputed.

> (c) Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within ~~14~~ 60 calendar days after the AAA sends notice of the filing of the Demand or by the date established by the AAA.

Rule 18 – Vacancies

The amendment to Rule 18 allows an arbitration to proceed when a panel member seat becomes vacant unless both parties agree otherwise. The RLC encourages the AAA to revise the amendment to allow either party to oppose proceeding with the arbitration in the event of a vacancy.

> (a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may declare the office vacant. Vacancies shall be filled in accordance with applicable provisions of these Rules.
>
> (b) In the event of a vacancy in a panel of neutral arbitrators, after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless ~~the parties agree otherwise~~ a party requests otherwise.

Rule 22 – Date, Time, Place, and Method of Hearing

The proposed amendments to Rule 22 would require hearings to proceed virtually unless: 1) the parties both agree the hearing should be in-person; or 2) the arbitrator determines that an in-person hearing is necessary to ensure the fundamental fairness of the process.

The RLC disagrees with the proposal. Parties to arbitration should be able to proceed in person without requiring mutual consent. Testimonial evidence often requires credibility determinations that, in some cases, may be made more effectively in-person.

The proposed amendment would also allow the arbitrator to decide the location of the hearing, even though a separate AAA rule governs locale. The RLC recommends that AAA delete the determination of place and method from this rule.

> The arbitrator shall set the date and time~~, place and method~~ for each hearing. ~~The hearing shall be held virtually or by other means as approved by the arbitrator unless the parties agree otherwise or the arbitrator determines that an in-person hearing is necessary for a fundamentally fair process.~~ The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

Rule 31 – Motions

The proposed amended Rule 31 combines Consumer Rules 24 and 33. The RLC urges AAA to clarify that parties can agree to different terms in their arbitration provisions and recommends removing the final sub-part of the proposed amended rule. Specifically, new subpart (c] adds a new consideration requiring arbitrators to evaluate the time and cost associated with briefing as a determining factor. This requirement is particularly concerning in connection with sub-part b, which only allows arbitrators to allow the filing of a dispositive motion if that motion is likely to succeed and dispose of or narrow issues in the case. Thus, the final proposed sub-part envisions arbitrators denying leave to allow motions that are likely to successfully dispose of issues in a case. Adding an additional requirement would itself be inefficient.

Subject to differing terms in the parties agreement:

l) The arbitrator has the sole discretion to allow or deny the filing of a written motion and the arbitrator's decision is final.

m) Where a party seeks to file a dispositive motion, the arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines the moving party has shown that the motion is likely to succeed and to dispose of or narrow the issues in the case.

n) ~~Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion.~~

Rule 33 – Written Statements and Post-Hearing Evidence

The proposed amendments to Rule 33's provision for witness testimony in writing (rather than in-person) changes the type of evidence from "declaration or affidavit" to "written statement." The RLC encourages the AAA to replace "written statements" with "declaration or affidavit." If a witness is not appearing in person and wants their testimony to be considered as evidence, that person should have to provide testimony under oath as is customary in an affidavit or declaration.

V. Conclusion

The Retail Litigation Center commends AAA for soliciting and considering public comments on its proposed rule change and strongly recommends that all such comments be published on AAA's website. The AAA is a valued partner of businesses, consumers, and employees in dispute resolution and many of the proposed amendments will enhance the AAA's ability to help resolve disputes fairly and efficiently. As discussed above, some amendments could use further consideration to ensure all parties to an arbitration proceed fully informed, well-represented, and with all attendant rights necessary in effective dispute resolution.

Sincerely,

Deborah White, President
Larissa Whittingham, Litigation Counsel
Retail Litigation Center

Advocacy Group Comment #16

Attorney(s): **Celia Winslow (American Financial Services Association); Daryl Joseffer, Jennifer B. Dickey, Jonathan D. Urick (US Chamber Litigation Center); Matthew D. Web (US Chamber of Commerce Institute for Legal Reform); Jessica Simmons (Alliance for Automotive Innovation); Andrew J. Pincus, Kevin Ranlett, Daniel E. Jones (Mayer Brown)**
Advocacy Groups: **US Chamber of Commerce, American Financial Services Association, Alliance for Automotive Innovation**
City: **Washington, DC**
Date Received: **2/28/25**

February 28, 2025

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), the American Financial Services Association ("AFSA"), and the Alliance for Automotive Innovation ("AAI"), we write in response to the AAA's invitation for public comment on the proposed amendments to the AAA Consumer Arbitration Rules and the AAA Employment Rules and Mediation Procedures.

As we discuss below, while some of these proposed changes are beneficial, others raise significant concerns for our respective members.

Contents

Introduction

The Chamber, AFSA, and AAI thank the AAA for providing this opportunity to comment on the proposed new Consumer and Employment Arbitration Rules.

The U.S. Chamber of Commerce is the world's largest business association, with hundreds of thousands of direct members nationwide, and indirectly representing the interests of millions of businesses of every size, in every industry sector, and from every region of the country. The U.S. Chamber of Commerce Institute for Legal Reform ("ILR") is a program of the U.S. Chamber of Commerce dedicated to championing a fair legal system that promotes economic growth and opportunity. The U.S. Chamber of Commerce Litigation Center is the litigation arm of the U.S. Chamber of Commerce and fights for business at every level of the U.S. judicial system, on virtually every issue affecting business. The Chamber and its ILR and Litigation Center have written extensively and care deeply about arbitration issues.

The AFSA is the national trade association for the consumer credit industry, with members ranging in size from large international financial services firms to single-office, independently owned consumer finance companies. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The AAI is an automotive industry trade association whose members collectively manufacture more than 95% of all new cars and light trucks sold in the U.S. AAI's members include Ford Motor Company, General Motors, Stellantis/FCA, BMW, Ferrari, Honda, Hyundai, Isuzi, Jaguar, Kia, Mazda, Mercedes-Benz, Mitsubishi, Nissan, Porsche, Subaru, Toyota, Volkswagen, and Volvo, as well as numerous global Tier I and Tier II automotive component suppliers, battery producers, and semiconductor makers.

Many Chamber, AFSA, and AAI members and affiliates depend on arbitration as a low- cost and efficient mechanism to resolve disputes of all types—including consumer and workplace disputes—in a fair and swift manner. The Chamber, AFSA, and AAI have long supported arbitration as a beneficial dispute resolution mechanism for all parties, including consumers and workers. Indeed, based on our

experience and those of our respective members, arbitration allows businesses to reach fair resolutions of disputes with customers, clients, users, workers, and independent contractors, while avoiding the high cost of litigation in court. This in turn allows businesses to keep prices affordable and sustain economic growth.

We therefore appreciate the AAA's invitation for comments from stakeholders on the proposed rule changes. The guiding principles behind our comments are straightforward: Arbitration should be fair to all parties; it should allow for the resolution of disputes in a practical and cost-effective way that is at least as efficient as the resolution of individual claims in court; and it should honor party choice and procedural flexibility—characteristics that are the hallmarks of arbitration.

In Part I of these Comments, we address specific proposed changes to the Consumer and Employment Rules. As noted above, many of the proposed amendments are positive developments. But additional changes or clarifications are warranted to protect the efficiency and fairness of arbitration for all parties; we suggest revisions to the proposed rules based on the real-world experience of Chamber, AFSA, and AAI members and feedback we have received from them. Among other things:

o) The standards governing when the Consumer and Employment Rules apply should be simpler and more predictable than set forth in the proposed rules. The proposed rules lack clarity about when the Consumer or Employment Rules apply to standalone arbitration agreements, submission agreements, and arbitration clauses in certain types of consumer-like and independent-contractor contracts.

p) Filing requirements should include additional identifying information from claimants and signed certifications from claimants and their counsel. These requirements will help deter filings in the names of claimants who are unaware of the proceedings, do not have arbitration agreements with the business (because they actually are not its customers or workers), or simply do not exist (or are deceased). These problems have become pervasive.

q) The proposed changes improperly curtail parties' ability to file dispositive motions. That impediment would make arbitrations more expensive and inefficient. Under the AAA's proposed changes, the parties will still have to argue those threshold legal issues to the arbitrator. But the change would make them to wait until the hearing to do so—forcing the parties, the arbitrator, and witnesses to waste resources preparing for and participating in a hearing that will (in many instances unnecessarily) cover all other legal and factual issues.

r) The proposed Consumer Rules should not mandate documents-only desk arbitrations over a party's objection. To be sure, purely legal issues often can be resolved on the papers. But when a case turns on disputed factual issues, parties should be entitled to a hearing at which they can cross-examine the witnesses so the arbitrator can assess credibility. And in many mass arbitrations, claimants' counsel have sought desk arbitrations in an apparent effort to conceal the claimant's lack of

involvement—or even that the claimant is fictitious or has no idea that an arbitration has been filed in his or her name. Accordingly, any party should have the right to request at least a telephonic or virtual hearing.

s) The proposed new procedures for exchange of information will needlessly make arbitration more expensive and less fair. The rules instead should specify what must be exchanged in every case (witness lists and the documents on which the parties intend to rely), then authorize additional targeted discovery if approved by the arbitrator as necessary for a fair process. By contrast, the proposed rules appear to allow parties to conceal documents on which they intend to rely or to allow for the same unrestricted document discovery that makes court proceedings so burdensome and expensive for consumers, workers, and businesses alike. And troublingly, the proposed rules also authorize arbitrators to propound their own discovery requests to the parties, which contravenes norms of party-led discovery and frustrates party efforts to agree to limit discovery to reduce the cost of dispute resolution.

In Part II, we address the important subject of mass arbitrations—an issue that the proposed amendments do not address directly and that cries out for further changes to AAA rules and fee schedules. In adopting the Mass Arbitration Supplementary Rules and new fee schedules for mass arbitrations in January 2024, the AAA took a constructive first step towards addressing the worst abuses in mass arbitration filings. But abusive mass arbitrations continue unabated. These campaigns seek to weaponize those AAA mass arbitration fee schedules and loopholes in the existing Mass Arbitration Supplementary Rules to extract settlements from businesses based almost entirely on the threat of aggregated AAA fees rather than the underlying merits of the claims. Many Chamber, AFSA, and AAI members have experienced these abuses firsthand. We strongly urge AAA to make additional changes to guard against to abusive mass arbitrations and to ensure that AAA arbitration remains a viable forum for consumer and workplace disputes.

We again appreciate the opportunity to submit these comments and thank AAA for its willingness to solicit feedback. Thank you for considering these comments.

8) **Comments on Particular Proposed Changes to the Consumer and Employment Arbitration Rules.**

- **Applicability of the rules**

The proposed Consumer and Employment Rules each include a rewritten Rule R-1 intended to clarify when the AAA will apply those rules to a dispute. The desire to provide greater clarity is commendable, as is the effort to harmonize the wording and structure of the corresponding Consumer and Employment Rules. But the AAA should make further changes to clarify the applicability of these rules in certain frequently recurring situations.

***Consumer Rules*:** The current Consumer Rule R-1(a) states that the Consumer Rules will apply in four situations: (1) when the arbitration agreement selects the Consumer Rules; (2) when the agreement selects the superseded Supplementary Procedures for Consumer-Related Disputes; (3) when

the agreement is in a consumer contract but does not select specific AAA rules; and (4) when the agreement is in a consumer contract but selects different rules. The new proposed Rule R-1(a) streamlines this list, but in an unclear way, as it indicates that the Consumer Rules apply whenever parties "have provided for arbitration by the American Arbitration Association ('AAA') or have an arbitration agreement within a consumer agreement." The intent may be to select the Consumer Rules for any arbitration initiated under an arbitration clause in a consumer agreement (as defined by the new Rule R-1(b)), but the placement of the modifier "in a consumer agreement"—as well as the use of the conjunction "or"—in the proposed Rule R-1(a) makes the sentence ambiguous. In addition, the proposed language is ambiguous with respect to: (1) freestanding arbitration agreements that were executed in conjunction with a consumer agreement and (2) when parties wish to arbitrate a dispute arising out of a consumer transaction but have not entered into a pre-dispute arbitration agreement.

To avoid this confusion, **the AAA should revise the first sentence of Rule R-1(a) to read:**

> **The parties shall be deemed to have made the Consumer Arbitration Rules ('Rules') a part of their arbitration agreement or submission agreement when they have provided for arbitration by the American Arbitration Association ('AAA') and either: (1) the arbitration agreement is in or was entered into in connection with a consumer agreement (as defined below); (2) the arbitration or submission agreement states that the Consumer Arbitration Rules (or the superseded Supplementary Procedures for Consumer-Related Disputes) shall apply; or (3) the submission agreement is for a dispute arising out of or relating to a consumer agreement.**

This revision will allow parties to be certain that the Consumer Rules will apply when they name those rules in their arbitration or submission agreement. And this revision confirms that consumer disputes, whether arising out of an arbitration clause in a consumer contract or a freestanding arbitration or submission agreement, will be administered under the Consumer Rules and fee schedule.

Our proposed revision also remedies another defect with the proposed Rule R-1(a), which (in an apparent attempt at simplification) deleted the current language authorizing parties to select application of the Consumer Rules in their arbitration agreement. The proposed Employment Rules, however, retained the language allowing parties to select application of those Rules in their arbitration agreement, and the same should be true of the Consumer Rules. Otherwise, the deletion of the language allowing parties to select the Consumer Rules would cast into doubt which rules and fee schedule will apply to those agreements—of which there are hundreds of millions. It instead opens the door to a dispute in every case over whether the underlying contract qualifies as a "consumer agreement" under Rule R-1(b). And those disputes will be particularly difficult to resolve under the language of proposed Rule R-1(b), which drops the examples of contracts that do and do not qualify as "consumer agreements" from the current Rule R-1(a). **Those examples from current Rule R-1(b)** provided useful guidance to parties, and **they should be retained in the new Rule R-1(b)**.[1]

In addition, by clarifying that parties may contract for the Consumer Rules, the AAA will ensure that disputes involving products or services that might not always be strictly "for personal or household

use" are certain to be administered under the Consumer Rules and fee schedule by agreement of the parties. Consider, for example, an individual's cell phone contract, credit card agreement, or subscription to productivity software. Individuals frequently use these products or services for both personal and business purposes, yet under the proposed Rule-1(a) and R-1(b), those individuals arguably would not be able to invoke the Consumer Rules and fee schedule even if the parties agree to those rules and fee schedule. It would be difficult, if not impossible, to apply the Consumer Rules to aspects of the dispute involving consumer purchases or uses while applying the Commercial Rules to aspects pertaining to business purchases or uses.

Moreover, sometimes small businesses—typically sole proprietorships—will purchase these products and services, and it may be appropriate to treat them as consumers when a dispute arises. Indeed, the law in some states analogizes small businesses to consumers, concluding that they have resources and sophistication similar to those of consumer litigants.[2] Yet small businesses are arguably precluded from availing themselves of the Consumer Rules and fee schedule under the proposed Rules R-1(a) and (b) even when the parties agree and have contracted for that result. In fact, contracts with small-business customers—or form contracts that are used interchangeably with both consumers and small-business customers—often call for arbitration under the Consumer Rules to treat those customers the same as other customers who would be qualify as consumers subject to the Consumer Rules.

Nor is there any reason not to allow parties to contract for the Consumer Rules. We are not aware of any instances in which large business-to-business contracts have inappropriately selected the Consumer Rules rather than the Commercial Rules. But even if that were to happen, proposed Rule R-1(d) gives the AAA or the arbitrator the authority to decide that the Consumer Rules should not apply to the arbitration.

***Employment Rules*:** The first sentence of proposed Employment Rule R-1(a) contains an ambiguity. It provides: "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter 'AAA') *or* under its *Employment/Workplace Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying

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[1] *The proposed Rule R-1(b) also includes a typographical error. It ends with an asterisk footnote, but there are two asterisk footnotes, which should be combined.*

[2] *See, e.g., Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Super. Ct., 34 Cal. Rptr. 3d 659, 675 (Ct. App. 2005) ("We believe that the franchise factual context is sufficiently similar to mandatory employee/employer arbitration, or consumer arbitration, to allow" the unconscionability and public policy "principles" for employment and consumer cases "to be applied to this case.").*

particular rules" (first italics added). **The first "or" in the sentence should be deleted** to avoid confusion about whether the Employment Rules apply to disputes unrelated to employment or workplace issues.

In addition, **the last two sentences of proposed Rule R-1(a) should be deleted as duplicative of proposed Rule R-1(d)**, which contains the same verbiage.[3]

Proposed Rule R-1(b) goes on to explain that the Employment Rules and associated fee schedule will be applied to disputes "between an independent contractor (working or performing as an individual and not incorporated) and a business or organization when the dispute involves work or work-related claims under independent contractor agreements, including any statutory claims." One of the asterisk footnotes to proposed Consumer Rule R-1(b) includes the same statement that the Employment Rules apply to these disputes.

In both places, the rule should be revised to specify that the Employment Rules apply to "disputes between an independent contractor (working or performing as an individual *and not as a separate business)* and a business or organization when the dispute involves work or work-related claims under independent contractor agreements, including any statutory claims. An independent contractor is working as a separate business when the contractor is incorporated, is an unincorporated entity, or provides services under a d/b/a or business name distinct from the individual's name."

Without this change, the proposed Rule R-1(b) would unsettle the many contracts selecting arbitration under the Commercial Rules for service contracts with unincorporated businesses—as many contractors are organized as limited liability companies, general or limited partnerships, or other unincorporated structures. These disputes are often best resolved under the Commercial Rules and fee schedule, and parties should be free to contract for that result.

Moreover, **Employment Rule R-1(b) should add that "[a]ny decision by the AAA or an arbitrator to apply these Employment/Workplace Rules and fee schedule to a dispute involving an independent contractor shall not be relevant to any determination whether the independent contractor is an employee for purposes of any law."** Without this clarification, parties may become embroiled in unnecessary (and inappropriate) disputes regarding the non-existent legal implications of application of the Employment Rules to certain independent contractors.

Finally, we note that the proposed Employment Rule R-1(d) regarding how to resolve conflicts between arbitration agreements and the AAA rules—specifying that the agreement generally governs over the rules—is a positive, much needed change. The current Rule R-1 provides that if there is "an adverse material inconsistency" between the rules and the

[3] Specifically, Rule R-1(a) states: "The parties, by written agreement, may vary the procedures set forth in these Rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator." Rule R-1(d) similarly states: "The parties may agree to modify these Rules but they must agree in writing. If they want to make changes after the arbitrator is appointed, any changes may be made only with the approval of the arbitrator."

arbitration agreement, "the arbitrator shall apply these rules" rather than the agreement. The current approach has led to considerable uncertainty, as parties frequently debated (and arbitrators reached

contrary views concerning) whether particular inconsistencies are "adverse" and "material." The current approach also deviates from the principles under the Federal Arbitration Act that "arbitrators wield only the authority they are given" by the "'parties' agreement,'" and that parties "may generally shape such agreements to their liking[.]"[4] The proposed Rule R-1(d) restores the primacy of the parties' arbitration agreement (to the extent that the agreement is not unconscionable or otherwise unenforceable). And the proposed language also harmonizes Employment Rule R-1(d) with the similar provision in the Consumer Rules, which have long taken this approach to inconsistencies between arbitration agreements and the AAA rules.[5]

X. Case-initiation procedures

- ***Additional filing requirements are needed to prevent fraudulent claims.***

The reorganization and clarification of the rules governing how to commence cases and what must be submitted with the demand for arbitration are extremely important and beneficial. They make the process easier to understand and more predictable to navigate. But we recommend further changes to address commonly recurring issues and prevent unfairness to the parties.

***Claimant's identifying information*:** In addition to the information required to be included with any arbitration filing under both proposed Consumer and Employment Rule R- 4(a)(iv), **claimants also should be required to provide their customer or account numbers or employee/contractor identification numbers, if any.** This information is often needed by the business to identify the claimant in its records and confirm the existence of an arbitration agreement; the claimant's contact information alone often is not sufficient (although the new requirement that claimants provide their email addresses with their demands for arbitration is helpful). And claimants initiating arbitrations often will attach arbitration clauses printed from a company's publicly available website, which do not show that the claimant is actually a party to an arbitration agreement with the business. Indeed, as the AAA is well aware, there are often discrepancies between the claimant's contact information provided with the demand and the information for that individual in the business's records. Those discrepancies—especially in the context of a mass arbitration—raise significant concerns that the claims have not truly been

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[4] *Lamps Plus, Inc. v. Varela, 587 U.S. 176, 184 (2019) (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010)).*

[5] *Specifically, current Consumer Rule R-1(c) contains materially identical language to the language in proposed Employment Rule R-1(d). That language is also continued in proposed Consumer Rule R-1(d).*

authorized by the claimants (or even that the claimants are not really customers of or workers associated with the business).

***Claimant's signature and certification*:** The filing process should also **require the claimant to sign the demand for arbitration personally, either by hand or electronically, making the following certifications:**

> **XII. The claimant has entered into the arbitration agreement that he or she has invoked with the respondent; and**
>
> **XIII. if the claimant is represented by counsel, that he or she has authorized counsel to file the arbitration and consents to respondent's disclosure to the AAA, the arbitrator, and claimant's counsel of information about the claimant, the dispute, and the claimant's confidential customer or employment records, as needed to adjudicate the arbitration.**

These signed certifications by claimants (who currently are not required to sign demands for arbitration at all) will help avoid improper filings in the names of individuals who have not (or do not understand that they have) authorized a lawyer to commence a legal proceeding before the AAA. This confusion is widespread in the mass arbitration context. Many mass arbitration claimants are recruited online by lawyers or other lead generators using online or social-media ads that focus on the potential payments that might be available to individuals who click to sign up rather than the reality that the individual would be signing up to be a party to an individual arbitration proceeding.[6] An average reader of these solicitations might consider them to be invitations to participate in mere investigations of a business practice or for the submission of a claim as an absent class member in a class action.

Moreover, requiring confirmation that claimants consent to the disclosure of their account or employment records when necessary will help greatly reduce the incidence of disputes over access to claimant information. Especially in the mass arbitration context, businesses and claimants' counsel frequently clash over the counsel's demand for private information—a serious concern because businesses are often obligated to keep most personal information confidential from third parties unless the claimant has consented to the disclosure.[7]

***Signed certification by claimant's counsel*:** As part of the filing process, **claimant's counsel also should be required to sign a certification that, to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the**

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[6] *See, e.g., U.S. Chamber of Commerce ILR, Mass Arbitration Shakedown: Coercing Unjustified Settlements 21 (Feb. 2023), at https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf (displaying sample social-media solicitations for mass arbitration filings) ("Mass Arbitration Shakedown").*

[7] *See, e.g., 15 U.S.C. §§ 6801-09 (barring financial institutions from disclosing customer information to third parties without the customer's consent).*

claims are not being presented for an improper purpose (such as to harass or needlessly impose costs of arbitration), their claims are not legally frivolous, and their factual contentions have

evidentiary support or, if so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. A parallel signature requirement also should be added to counsel filing an answer or asserting a counterclaim.

This certification is modeled after Federal Rule of Civil Procedure 11(b), which (like its state-court equivalents) is intended to prohibit lawyers from filing frivolous claims. It is therefore familiar to all lawyers who might assert claims or counterclaims in AAA arbitrations. Counsel also should be required to certify that the arbitrator may impose sanctions against them if those standards are violated.[8] The proposed certification by counsel is similar to the existing requirement under Mass Arbitration Supplementary Rule MA-2 that "filings [to initiate a mass arbitration] must include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge."

This change (along with a companion change to Consumer and Employment Rule R-57 proposed below) will reduce confusion about arbitrators' authority to sanction counsel when appropriate. The ability to impose such sanctions is needed to deter lawyers from filing demands on behalf of non-existent claimants or on behalf of claimants who have not authorized an arbitration to be filed on their behalf. For example, the Chamber's ILR has identified numerous reports of demands for arbitration being filed by counsel in the names of individuals who, according to the respondent, are fictitious, deceased, not customers who purchased the product or service at issue, or who were unaware that arbitrations had been filed in their names.[9] Lawyers trying to use a mass arbitration to extract a settlement from the targeted business sometimes resort to the filing of ever-larger numbers of unvetted demands for arbitrations simply to drive up AAA fees that the business must pay. In these situations, it may be inappropriate to sanction the claimant for the frivolous filing. Yet under the proposed rules, the lawyers who engage in these tactics will seek to circumvent sanctions by arguing that they are not parties to the arbitration agreement and neither the agreement nor the AAA rules authorize

[8] Indeed, these steps are mandated by the rules of professional conduct and should also apply in the arbitration context. Model R. of Prof. Conduct 3.1 cmt. 2 ("The filing of an action . . . or similar action taken for a client" requires lawyers to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions.").

[9] *Mass Arbitration Shakedown*, *supra* n.6, at 37 (noting reports from defense counsel that "the number of obviously groundless claims in mass arbitrations often exceeds 30 percent of claims—and on a number of occasions has exceeded 90 percent"); *see also* Diana Pogosyan, Note, *Issues Arising Out of Mass Arbitrations & Solutions to Combat Them*, 2024 UTAH L. REV. 1173, 1186 (2024) (detailing rising abuse of mass arbitration filings).

sanctions on counsel.[10] In court, there is no question that these lawyers could—and almost certainly would—be sanctioned.[11] AAA arbitrators should have the same authority.

Requiring additional identifying information and signed certifications at the demand-for-arbitration stage should not present a problem for real claimants and their counsel. But in the mass arbitration context, filers of abusive mass arbitrations often cannot provide this basic information

because they are not vetting their clients (some of whom are not even real). And filers strive to avoid providing any certification at all as to the legitimacy of filings because they are often parroting (without investigation) information typed by unknown strangers into online claimant-recruitment forms. As a result, process arbitrators have had to order claimants' counsel to submit amended demands that include this information and require claimants' counsel to sign under a similar certification to address the problem of unverified claimants.[12] The rules should simply require this information and certifications upfront to avoid disputes and reduce the level of fraud that has long been documented.

XV. *Service requirements should conform to parties' agreements and not permit service through methods of questionable effectiveness.*

The proposed Consumer and Employment Rules both include additional clarification about how demands for arbitrations are to be served. Two aspects of the proposed revision, however, should be amended to ensure that the proper parties are notified about a new claim.

The first change relates to the fact that, in many consumer and employment or independent-contractor agreements, the parties agree on a specific method for notice of claims. Those contractual agreements regarding notice should be honored. Accordingly, rather than authorizing service of the demand for arbitration "at the last-known address" of the "party or its authorized representative," **Rule R-4(b)(iii) and Rule R-40 of both the proposed Consumer and Employment Rules should state that service should be directed to the address provided in the parties' agreement. Only if the agreement does not so provide (or cannot be done) should case-initiating documents be served in the other ways specified in the proposed rules.**

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[10] *See, e.g., Herrera v. Santangelo Law Offs., P.C., 520 P.3d 698, 705-707 (Colo. Ct. App. 2022) (concluding that arbitrators lack inherent authority to impose sanctions on counsel under Colorado law).*

[11] *See, e.g., Fed. R. Civ. P. 11(c)(1) (authorizing "an appropriate sanction on any attorney, law firm, or party").*

[12] *See, e.g., Mosley v. Wells Fargo & Co., 2023 WL 3185790, at *1 (S.D. Cal. May 1, 2023) (refusing to vacate process arbitrator award requiring mass arbitration demands to be amended to include claimant's bank account number), aff'd, 2024 WL 977674 (9th Cir. Mar. 7, 2024).*

Second, **Consumer and Employment Rule R-4(b)(iii)(a) should be amended to allow service of case-initiating documents at the last-known address for *individuals*, but for *entities*, service instead should be made this way only if there is no agent for service of process in the state where the entity is registered, incorporated, or doing business.** Service at any "last known address" for a business may lead to service by mail to ancillary business locations (such as mall kiosks or other retail locations) in an effort to conceal the filings from the business's legal department. Moreover, service of case-initiating documents by mail to the last known address of the business's "authorized representative" may lead to inappropriate attempts to serve businesses by mailing documents to attorneys who may no longer

represent the business. Service of case-initiating documents upon counsel should be allowed only with the prior agreement of the party being served.

Accordingly, **Consumer and Employment Rule R-4(b)(iii) should be amended to state as follows:**

> **Any papers, notices, or process necessary for the filing of an arbitration under this Rule may be served on a party in the manner provided for in the parties' agreement. If the agreement does not so provide, a party may be served:**
>
> **a) for an entity, by mail addressed to its registered agent of process in the state where the entity is registered, incorporated, or doing business; or if the entity does not have a registered agent, by mail addressed to the party at its last known address;**
>
> **b) for an individual, by mail addressed to the party at his or her last known address;**
>
> **c) by electronic service/email to the party, or by mail or electronic service/email to the party's authorized representative, with the prior agreement of the party being served;**
>
> **d) by personal service; or**
>
> **e) by any other service methods provided for under the applicable procedures of the courts of the state where the party to be served is located.**

3. The AAA should adopt a fair method to determine which arbitration provision controls when there is a dispute.

It is not uncommon for consumers or workers to file a demand for arbitration based on a superseded or otherwise incorrect version of an arbitration agreement. We therefore recommend revising proposed Consumer and Employment Rule R-5(d), which indicates that in the event of a dispute over which arbitration agreement governs a dispute, the *claimant's* choice of arbitration agreement will control, subject to final decision by the arbitrator.

As written, the proposed rule will predictably cause unnecessary problems if claimants attach the wrong or superseded version of an arbitration provision. This is increasingly prevalent in the mass arbitration context. In recent years, many businesses have revised their arbitration agreements to address the rise of abusive mass arbitrations, such as by adding pre-arbitration notice-of-dispute

requirements or adopting other procedures to facilitate the orderly and fair resolution of mass claims. If the *claimant's* choice of arbitration agreement always is controlling as an initial matter—even if incorrect—claimants may be able to impose improper costs and burdens on businesses that seek to enforce the correct versions of their agreements. And that is especially true in the context of a mass arbitration if the process arbitrator decides (incorrectly) that the question of which agreement governs is a merits question that must be decided by merits arbitrators.

Instead, as the default position, Rule R-5(d) should be revised to state that in the event of a dispute over which arbitration agreement governs, the *later-in-time* arbitration agreement is controlling as an initial matter. This choice of default is more logical because the most recent version of the arbitration agreement invoked by a party is more likely to be the governing one.

In addition, Rule R-5(d) should be modified to reflect that, in many instances, a AAA arbitrator cannot decide the issue. To be sure, the AAA rules generally authorize arbitrators to decide their own jurisdiction. But in many arbitration agreements, the parties choose not to delegate these questions of arbitrability to arbitrators, but instead reserve them for courts. And even if the different iterations of the arbitration agreement *both* delegate questions of arbitrability to the arbitrator, if one of the agreements selects a different arbitration administrator (say, JAMS instead of the AAA), the proponents of each agreement would seek to present the arbitrability question to differently empaneled arbitrators. Under the FAA, however, only a court may decide a dispute over who decides arbitrability.[13]

Accordingly, **Rule R-5(d) should specify that "if the respondent alleges that a different arbitration agreement is controlling, the matter will be administered in accordance with the later-in-time agreement, subject to a final determination by a process**

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[13] *See Coinbase, Inc. v. Suski, 602 U.S. 143, 149, 152 (2024) (holding that "if parties have multiple agreements that conflict as to the third-order question of who decides arbitrability," then "a court must decide which contract governs" that issue).*

arbitrator or, if there is no process arbitrator, by the merits arbitrator. If the parties have not agreed to delegate questions of arbitrability to the arbitrator (or if the proffered agreements select different administrators), the stay provisions of Rule R-2 shall apply to permit the parties to obtain an order regarding the arbitration from the court."

4. The automatic stay of arbitrations when judicial intervention is sought should be available for 90 days and last until the court rules.

We welcome the proposed change in new Consumer Rule and Employment Rule R-2 to lengthen the automatic stay to 90 days when any party seeks judicial intervention regarding the commencement of an arbitration, with extensions of the stay permitted sua sponte or upon a showing of good cause. This change is an excellent step toward reducing the burden on parties; under the current approach, parties often must litigate both the court challenge and the arbitrations once the 30-day stay expired.

And the change also reduces the burden on courts, which were required to decide emergency motions for temporary restraining orders or preliminary injunctions staying the arbitrations while the issue of arbitrability is litigated because of the short duration of the automatic stay under current rules.

The justification for the change is obvious: court actions take much longer than 30 days. And there is no reason for emergency motion practice in court in every case in which the parties dispute arbitrability.

That said, the proposed change is insufficient to address the problem for two reasons. First, although the rule conditions the stay on a party seeking judicial intervention within 30 days of commencement of administration, the respondent may not be in a position at that point to know whether to seek judicial intervention. Especially in a mass arbitration involving many thousands of claimants, the respondent may need more than 30 days to determine, among other things, whether it has arbitration agreements with all claimants and thus whether judicial intervention is needed. **The proposed Rule R-2 therefore be amended to grant the automatic stay if the parties seek judicial intervention within 90 days of commencement of administration.**

Second, the reality of litigation in state and federal courts is that questions of arbitrability almost always take longer than 90 days to be resolved. Yet these disputes rarely entail such exigent circumstances as to—in effect—insist that courts rule in expedited fashion. **We therefore recommend that the AAA amend Rule R-2 to specify that the automatic stay should continue as long as proceedings regarding arbitrability remain pending before the court, unless the court orders otherwise.** That way, in the rare case in which there truly is an emergency that justifies proceeding with the arbitrations faster, the parties can ask the court for an order directing the parties to take steps needed to commence arbitration proceedings— greatly reducing the need for emergency motions (and thus the burdens on parties and courts).

Accordingly, **Consumer Rule and Employment Rule R-2 should be revised to state:**

> **If within 90 calendar days after the AAA's commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration during that court proceeding, unless the court orders otherwise.**

5. The proposal to add authority to consolidate multiple arbitrations filed by the same claimant is a valuable tool to address mis-filed or abusive duplicate arbitrations.

Proposed Consumer Rule and Employment Rule R-4(e) authorize the AAA to consolidate multiple arbitrations filed by the *same party* arising out of the same contract, subject to final determination by the arbitrator. This change will promote the efficiency of arbitration proceedings. With the switch to online case initiation, technical issues may lead some claimants inadvertently to file their case multiple times. Or some claimants may deliberately engage in claim splitting or duplicative filings to

inflict needless arbitration costs on the respondent business. In either scenario, the proposed rule makes sense, confirming that the AAA has the discretion to consolidate multiple arbitrations filed by the same claimant into a single proceeding.

6. The proposed changes to Consumer Rule R-14 and Employment Rule R-12 could be misinterpreted to impose an inappropriately short deadline to raise objections to the locale of the arbitration or arbitration hearings.

Proposed Consumer Rule R-14 and Employment Rule R-12 have rewritten the current rules regarding the fixing of the locale of the arbitration to be more uniform. This harmonization and better explanation of determining the locale is greatly appreciated.

There appears to be a typographical error, however, in Consumer Rule R-14. It is missing the language in Employment Rule R-12(b) regarding how to determine the locale when one is specified in the arbitration agreement—namely, that the parties' agreement will govern, unless the parties agree otherwise or the arbitrator decides that a different locale is required. There is no reason to omit that language from Consumer Rule R-14, because that procedure has historically been applied in consumer arbitrations without difficulty. **Consumer Rule R-14 therefore should be amended to add a provision mirroring Employment Rule R-12(b).**

In addition, one substantive change should be made to these proposed rules. Specifically, Consumer Rule 14(c) and Employment Rule R-12(d) each state that "[a]ny disputes

regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days after the AAA sends notice of the filing of the Demand or by the date established by the AAA." The introduction of a 14-day deadline to raise objections regarding the locale is new, and could threaten to upend the orderly administration of arbitrations.

The inclusion of a presumptive deadline for locale challenges creates a risk that arbitrators might find that a party has waived an objection to the locale by not raising it during the 14-day period. It is likely that no such hard-and-fast deadline for raising issues regarding the locale of an arbitration or any hearings was intended. But the proposed rule may be read that way. And a 14-day deadline is too short for issues regarding locale to be raised, especially in the context of a mass arbitration. Parties may have initial threshold disputes that make it impractical to figure out what the locale should be before the answer is filed—including, for example, disputes over where a claimant lives (an issue that occurs with some frequency in mass arbitrations). Moreover, at this early stage, parties may be in the process of engaging counsel and may be unaware of the short time in which to object to the locale. And in the mass arbitration context, the initial answers to the demands for arbitration are not even due until 45 days after the filing requirements for each demand have been met (Rule MA-4(a))—yet under the proposed rule, any objections to locale must be raised far earlier.

To be sure, we appreciate that the AAA must be able to choose an initial locale as an administrative matter to appoint an appropriate arbitrator. Requiring that objections to locale be included in the answer or by some other deadline the AAA may set is appropriate. But the rule should be

revised to clarify that subsequent objections to the locale may be raised but will be decided by the arbitrator. Thus, **Consumer Rule R-14 and Employment Rule R-12 should state that "[a]ny disputes regarding the locale that are to be decided by the AAA should be included in the answer or submitted to the AAA and all other parties before the AAA begins arbitrator selection or by the date established by the AAA. Any later objections to locale must be presented to the process or merits arbitrator."**

C. The Consumer Clause Registry

1. *Determining whether an arbitration clause may be included on the Consumer Clause Registry should be a one-time determination of compliance with the Consumer Due Process Protocol.*

Proposed Consumer Rule R-12 reorganizes and revises the current rule requiring arbitration clauses in consumer agreements to be submitted for review for compliance with the AAA's Consumer Due Process Protocol and published on the AAA's Consumer Clause Registry before the AAA will administer any arbitrations under the clause. The AAA should make two changes to the proposed rule to promote fairness to the parties and predictability of outcomes.

***Compliance with unwritten "due process standards" in Consumer Rules*:** Proposed Rule R-12(b) specifies that the required review will encompass not only "material compliance with due process standards" in the Protocol, but also with those in "the *Consumer Arbitration Rules*[.]" The implication is that some aspects of the Consumer Rules contain unenumerated due process standards—separate and apart from the comprehensive due process standards articulated in the Consumer Due Process Protocol—that arbitration clauses cannot vary. This nebulous standard provides no guidance to parties drafting arbitration agreements, who might wish to depart from the default Consumer Rules in certain respects. This approach also conflicts with proposed Rule R-1(e), which confirms that parties can tailor arbitration procedures and rules in their arbitration agreements for the types of disputes that can arise or for the needs of particular cases, subject to the limits of the Consumer Due Process Protocol.

This approach also is entirely unnecessary. Arbitration clauses already must comply with the Consumer Due Process Protocol, which protects fairness to consumers. And parties already have the power to challenge the enforceability of an unfair arbitration clause under state unconscionability law, either by raising the challenge to the arbitrator under Rule R-7 or, if the clause does not delegate questions of arbitrability to the arbitrator, raising that challenge in court.[14] Those arbitrability challenges are resolved in a predictable fashion, as a large body of precedent determines or at least guides the outcome. There is no need to inject additional uncertainty by suggesting that a new extra-legal source of challenges to arbitration clauses must be considered—namely, compliance with unwritten "due process standards contained in . . . the *Consumer Arbitration Rules*," as proposed Rule R-12(b) would require. Indeed, it would be unfair to the parties to arbitration agreements if, after a dispute has arisen, a party could evade arbitration by arguing that the arbitration agreement impermissibly departs from some unidentified inalterable requirement of the Consumer Rules, even though the agreement otherwise is fully enforceable under applicable law. **Accordingly, references to "due process standards of these Rules" in Consumer Rule R-12(b) should be deleted.**

***Collateral attacks on Consumer Due Process Protocol compliance*:** Proposed Rule R-12(b) also refers to proposed Rule R-1(c), which states that even if the AAA accepts a case for administration, any party who "disagrees" about "whether the agreement meets these Rules and the *Consumer Due Process Protocol* . . . can bring the issue to an arbitrator for a final decision." In other words, issues regarding compliance with the Consumer Due Process Protocol and unwritten due process principles asserted to be implicit in the Consumer Rules now may be litigated in every case.

This potential for collateral challenges to the AAA's decision to approve an arbitration clause and include it on the Consumer Clause Registry will greatly unsettle the enforceability of

[14] *See*, *e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019) ("The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions[.]"); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question[.]").

arbitration agreements. The AAA has many arbitrators on its roster that it appoints to consumer arbitrations, and those arbitrators may have differing views about the fairness of consumer arbitration agreements. Thus, parties will lack the needed confidence that a AAA-approved arbitration agreement will actually be enforced by AAA arbitrators.

In fact, claimants already have begun to mount these types of collateral attacks under current Consumer Rule R-1(d), which does not expressly authorize collateral challenges to the AAA's determination that an arbitration clause complies with the Consumer Due Process Protocol. The experience of Chamber, AFSA, and AAI members with these challenges makes clear that the rules should prevent those attacks—not allow such challenges in every case.

To begin with, these challenges are being raised today even if judicial decisions confirm that the arbitration agreement is enforceable as a matter of law. Nonetheless, claimants' counsel often urge arbitrators to depart from legal precedents and instead to indulge extra-legal arguments about perceived "fairness." But that mode of analysis is effectively rudderless—and its outcome is entirely unpredictable. The inevitable result is that almost any arbitration clause, no matter how pro-consumer, may eventually be deemed out of compliance with the Protocol or unwritten fairness principles argued to be implicit in the rules by fiat of some future arbitrator applying his or her own brand of justice, regardless of the governing law.

This result would be palpably unfair to contracting parties, who count on the enforceability of arbitration agreements. The AAA should not codify a procedure that creates an enormous—and unpredictable—risk that arbitration agreements that are enforceable under applicable law will be invalidated. Indeed, many companies that use form contracts incur enormous expenses to print and distribute millions of consumer contracts containing arbitration clauses. These companies must be able to rely on the AAA's upfront determination that it will administer disputes brought under a particular arbitration clause. If the AAA decides in that initial review that the arbitration clause does not comply with the Consumer Due Process Protocol, the company has advance notice, and so can change its clause

before including it in contracts with customers either to comply with the Protocol or to pick another administrator.
But if the AAA's initial approval of the arbitration clause can be overturned in any future case, it is too late for the company to rewrite the clause to make it enforceable, and the predictability and other benefits of arbitration will be lost.

Nor are these collateral challenges to initial AAA approval of arbitration clauses necessary. As noted above, in any future case, consumers are free to argue that the arbitration clause is unconscionable or otherwise unenforceable under applicable law. Because those arbitrability challenges can be made in any case, there is no need for an additional collateral challenge to the AAA's determination that an arbitration clause complies with the Consumer Due Process Protocol.

Accordingly, the AAA **should revise proposed Consumer Rules R-1(c) and R-12** to avoid these issues:

- First, **the provisions authorizing the AAA to refuse to administer arbitrations under arbitration clauses that do not comport with the Consumer Rules or satisfy "due process standards" implicit in those rules should be deleted**, as all that should be required is compliance with the Consumer Due Process Protocol.

- Second, **the final two sentences of proposed Rule R-1(c), which authorize collateral challenges to the AAA's administrative determinations in every case, should be deleted**.

- Third, **the following sentence should be added to the end of proposed Rule R-12(d): "Once the AAA has accepted a case for administration and approved an arbitration agreement for inclusion on the Consumer Clause Registry, those determinations may not be reversed by an arbitrator. But if a party believes that an arbitration agreement is unenforceable under applicable law, they may raise that issue with the arbitrator under Rule R-7 or (if the parties have not agreed to arbitrate such issues) with a court."**

2. The changes to the annual registry fee create an unjustifiable trap for the unwary.

Proposed Consumer Rule R-12(e) states that if a party does not pay the annual Registry fee, "the AAA will decline to administer consumer arbitrations arising from that arbitration agreement," and that "[c]harging an expedited review fee as an alternative is not permissible." **This language should be revised to permit administration upon payment of the annual Registry fees that were not previously paid, plus a reasonable penalty (such as an additional year's Registry fee). Alternatively, the AAA could eliminate the annual Registry fee and simply increase the initial fee when a business's arbitration agreement is first submitted for review**.

Refusal to administer arbitrations under a previously approved arbitration agreement merely because the business fell behind on the annual Registry fee creates a trap for the unwary. Administrative errors such as this are inevitable, especially because turnover in personnel in legal departments may mean that the invoice for the annual Registry fee is sent to an unmonitored email inbox. In addition, the consequences for nonpayment under the proposed rule—the end of a company's consumer arbitration program—are unduly harsh. Indeed, that penalty is far out of proportion to the failure to pay the annual fee, because that fee is not for any particular case and thus nonpayment would not disrupt any consumer arbitration. And consumers, in particular, suffer from this approach; a consumer rebuffed from trying to initiate arbitration that the AAA refuses to administer for this reason would have little recourse but to submit their claim to the overburdened, expensive, and harder to navigate court system. Many consumer claims that would be feasible to arbitrate would be priced out of court entirely, leaving these consumers with no redress.

Likely for this and similar reasons, other arbitration providers, such as JAMS and NAM, do not impose such a harsh penalty.

D. The pre-administration notice and review requirement for employment arbitrations.

Unlike the proposed Consumer Rules, which expand the pre-arbitration registration requirement and allow it to be revisited in every case, the proposed Employment Rules eliminate current Rule R-2, which mandated that employers intending to use AAA to administer disputes under an "employment ADR plan" "notify" AAA at least "30 days prior to the planned effective date of the program" and "provide the [AAA] with a copy of the employment dispute resolution plan."

This is a good change that should be retained. Few employers understood whether their employment or independent-contractor arbitration agreements were subject to the requirements in current Rule R-2. The rule did not explain what the AAA would do once notified, leaving the standard for whether and why the AAA would accept or reject particular arbitration agreements unclear. And existing law already affords parties with the ability to challenge the enforceability of unconscionable arbitration agreements. Because the pre-administration notice and review process was superfluous and unsettled the enforceability of arbitration agreements, it is appropriate to eliminate it.

E. Mediation

Proposed Consumer Rule and Employment Rule R-11 provides that in every arbitration, and at any stage in the case, "the AAA may refer the parties to mediation," separate and apart from any "request" by the "parties" for "mediation." But the AAA should not empower itself to force the parties to participate in mediation. Given the relatively modest stakes of most one-off consumer or workplace arbitrations, the cost of formal mediation simply is not justified. And many agreements already include pre-arbitration dispute-resolution procedures designed to facilitate the voluntary settlement of cases. If parties have agreed to and participated in these contractual dispute-resolution processes, a requirement by the AAA that they engage in mediation—perhaps for a second time—would be wasteful.

Even worse, the potential for AAA-required mediation allows claimants to extract unfair settlement leverage over businesses. The AAA's proposed Rule R-11 calls for any such compelled mediation to be administered by AAA under the AAA Consumer (or Employment) Mediation Procedures—and under those procedures, the company generally must pay the cost of mediation. That means that claimants can request mediation in every case, which can be ordered over the business's objection, simply to force the business to pay the additional expense. This potential for abuse would be even greater in mass arbitrations if mass arbitration filers could request individual mediations in every case.

For these reasons, **this aspect of proposed Consumer and Employment Rule R-11 authorizing the AAA to refer the parties to mediation even if they do not all agree should be abandoned entirely**. But if the AAA insists on including such a rule, the rule should be limited to global mediations in the context of mass arbitrations.

That is because, in mass arbitrations—as in mass torts cases administered by courts under multi-district litigation procedures—the ability to require global mediations regardless of a party's wishes makes more sense. These types of disputes are almost always resolved through settlements achieved pursuant to one or more global mediations. Nonetheless, lawyers who file mass arbitrations sometimes refuse to mediate in an effort to accelerate the targeted business's obligation to pay arbitration fees—and thereby to impose additional unfair settlement leverage on the business. Accordingly, **proposed Rule R-11 should be revised to specify that global mediation may be ordered over a party's objections by either the AAA or an arbitrator only if (1) the proceeding is governed by the Mass Arbitration Supplementary Rules and**
(2) any party paying in whole or in part for the mediation agrees.

The proposed Rule R-11 also should be revised in two other respects. First, **the rule should clarify that the parties may agree to mediation that is not administered by the AAA**. Parties may prefer to use a different mediator who is affiliated with another administrator or an unaffiliated mediator expert in resolving the particular type of claim. The AAA should not prohibit parties from using non-AAA mediators; it is inappropriate to tie the AAA's arbitration services to its mediation services in this manner, and arguably gives improper incentives to the AAA to order AAA mediation over a party's objections.

Second, **proposed Rule R-11 should specify that unless the parties agree otherwise, arbitration proceedings must be stayed during the mediation.** The proposed rule adopts the opposite presumption. But requiring concurrent mediation and arbitration produces unnecessary expense, by both the parties and the arbitrator. And this waste is especially pronounced in mass arbitrations, where claimants may seek to expedite the arbitration proceedings solely to increase the business's AAA fees as a tactic to extract a blackmail settlement during the mediation.

F. Dispositive motions

The treatment of dispositive motions is a critical one for Chamber, AFSA, and AAI members given that many issues can be bifurcated and decided on an expedited basis—often as a matter of law—before the parties engage in costly discovery or prepare for and participate in a hearing. The current Consumer

Rule R-33 and Employment Rule R-27 address this issue appropriately by giving the arbitrator the *discretion* to allow dispositive motions if there is "substantial cause" for believing that the motion is likely to succeed and dispose of or narrow the issues in the case. Indeed, in the experience of Chamber, AFSA, and AAI members, a significant percentage of consumer arbitrations in particular are swiftly resolved as a matter of law on the basis of a dispositive motion.

Although proposed Consumer Rule R-31 and Employment Rule R-32 keep the current language in subpart (b), both add two provisions that each place a heavy thumb on the scale against allowing a party to file a dispositive motion. First, subpart (a) states that the arbitrator "has the sole discretion to allow or deny the filing of a written motion and the arbitrator's decision is final." That statement is hard to square with the possibility of arbitral appeals under proposed Consumer Rule R-58. It also is a barely disguised admonition to arbitrators that they are free to dispense with the "substantial cause" standard of subpart (b) and refuse to allow the filing of a dispositive motion. And that is especially true when subpart (a) is taken in combination with subpart (c), which states that "[c]onsistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion." That statement effectively discourages arbitrators from allowing dispositive motions in consumer and workplace arbitrations.

In fact, by directing arbitrators to consider the expense of briefing dispositive motions, proposed subpart (c) requires them to look into the wrong end of the telescope. When there is substantial cause to believe the dispositive motion is likely to succeed and dispose of or narrow the issues, the motion will, by definition, *reduce* the time and cost of an arbitration. By contrast, disallowing such a dispositive motion would never reduce the parties' costs, because the parties will in every case be required to include in their pre-hearing briefs the arguments that would have been contained in the dispositive motion and then argue those issues at the hearing.
Eliminating dispositive motions does not save any expense. Instead, it makes the dispute more costly to resolve because the parties must develop facts and prepare for and participate in a hearing on all issues, even those that would have been rendered irrelevant by an early ruling on a dispositive motion. Yet the proposed subpart (c) encourages arbitrators to ignore this reality and view the costs of briefing a proposed dispositive motion in isolation.

Indeed, the proposed change to discourage dispositive motions is internally inconsistent with the proposed change to expand the use of desk arbitrations in consumer cases under proposed Consumer Rule R-36.[15] Dispositive motions allow cases to be resolved efficiently on the papers—but without depriving any party of the ability to show that factual disputes warrant a hearing. As the AAA well knows, and as the experience of Chamber, AFSA, and AAI members confirms, a substantial portion of both consumer and employment arbitrations are resolved outright, or at least greatly streamlined, by orders granting dispositive motions. The proposed changes, however, would needlessly increase the time and cost of arbitrations.

Accordingly, both subparts (a) and (c) should be deleted. There is no reason to depart from the current rules governing the availability of dispositive motions.

At a minimum, however, **if subpart (c) is retained, it should be revised to direct the arbitrator also to consider the "time and cost for the parties, witnesses, and the arbitrator associated with proceeding with information exchange, hearing preparation, and**

[15] As discussed below, we recommend against the expanded use of desk arbitrations.

conducting the hearing that encompasses the issues that otherwise would have been potentially resolved, or rendered irrelevant, by the dispositive motion."

In addition, to promote the goal of achieving an efficient and economical resolution of the dispute, **the proposed rule also should clarify that information exchange should be stayed during the pendency of a dispositive motion, unless the parties agree otherwise or good cause is shown for denying a stay.**

G. Offers of entry of an award on specified terms

In amending the Consumer and Employment rules, the AAA should adopt a procedure commonly used in court litigation to facilitate early settlement of disputes—the offer of judgment procedure available in federal and many state courts.[16] **A new rule should be added to permit any party to serve an offer of judgment, similar to Federal Rule of Civil Procedure 68.**

Under this approach, no later than two weeks before the hearing, either party may serve the other with an offer of entry of an award on specified terms. If an offer is accepted, the arbitrator shall enter a consent award in accordance with those terms pursuant to proposed Rule R-47. If an offer is not accepted within 14 days, it is considered withdrawn, and evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. If the award that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made, including any AAA or arbitrator fees paid after the date of the offer. This change would greatly promote settlement of consumer and workplace cases.

H. Exchange of information

The proposed changes to the rules governing information exchange in consumer and workplace arbitrations create confusion about what information must be exchanged and the extent to which additional discovery may be required without arbitrator approval.

***Anticipated exhibits and witness lists*:** We advise clarifying that in every case, the arbitrators shall direct the parties to exchange documents in their possession or custody on which they intend to rely at the hearing. That is the approach taken in current Consumer Rule R-22(b). In addition, we also recommend requiring parties in every case to disclose in advance the witnesses, if any, they plan to have testify and the topics of their anticipated testimony. Consumers and employees should not be left guessing what documents or witnesses a company may use to make out its claims and defenses, and vice versa. Thus, **proposed Consumer Rule R-20(b) and Employment Rule R-21(b) should be revised to state that "[u]nless the parties agree otherwise or for good cause**

shown, by such date that the arbitrator sets that is sufficiently in advance of the hearing to permit a fundamentally fair

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[16] *See, e.g., Fed. R. Civ. P. 68.*

process, the arbitrator shall require the parties to do the following: (i) exchange documents in their possession or custody on which they intend to rely at the hearing; (ii) exchange lists of witnesses, if any, they intend to have testify at the hearing, along with each witness's contact information and the proposed topics of his or her testimony; and
(iii) update their exchanges of documents on which they intend to rely and list of witnesses they intend to have testify, as those documents or witnesses become known to them."

***Requests for production of documents*:** The proposed subparts (b)(iii)-(iv) appear to contemplate in every case that requests for production of documents—including the requests for electronically stored information that make litigation in court so expensive—may routinely be granted in every arbitration. That creates the misimpression that such wide-ranging discovery tools are appropriate in every consumer and employment case. Yet as the Supreme Court has observed, "discovery allowed in arbitration . . . might not be as extensive as in the federal courts, [because] by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[17] Indeed, "[p]arties generally favor arbitration precisely because of the" lower cost of resolving a dispute without court rules and full-blown judicially supervised discovery, which "may be of particular importance in employment litigation, which often involves smaller sums of money[.]"[18] The Court also has stated that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation" in court.[19]

For these reasons, **subpart (b)(iii) should be revised to clarify that "the arbitrator may, on application of a party and if needed to ensure a fundamentally fair process while ensuring that the arbitration process remains fast and economical, require another party, in response to a reasonable and narrowly tailored document request, to make available documents in the responding party's possession or custody, not otherwise available to the party seeking the documents, that are relevant and material to the outcome of disputed issues."**

***Interrogatories and depositions*:** Proposed Consumer Rule R-20 and Employment Rule R-21 do not address the availability of interrogatories or depositions. By contrast, current Employment Rule R-9 gives the arbitrator the authority to order those forms of discovery when truly necessary. Because targeted depositions and interrogatories may sometimes be appropriate in workplace arbitrations, **proposed Employment Rule R-21(b) should be revised to add a new subpart that authorizes the arbitrator to permit, "upon application of a party and if needed to ensure a fundamentally fair process while ensuring that the arbitration**

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[17] *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (internal quotation marks omitted).*

[18] *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009).*

[19] *Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).*

process remains fast and economical, other forms of discovery, including narrowly targeted depositions or interrogatories."

***Sua sponte discovery*:** Proposed Consumer Rule R-20 and Employment Rule R-21 indicate that the arbitrator may order discovery "on the arbitrator's own initiative." Similarly, proposed Consumer Rule R-32(d) and proposed Employment Rule R-33(d) would authorize the arbitrator to "subpoena witnesses or documents . . . on the arbitrator's own initiative." **The adoption of arbitrator-led, sua sponte discovery should be reconsidered.**

The norm for American arbitrations, particularly for consumer and workplace disputes, is for party-led discovery—with limits to avoid the type of full-blown discovery that takes place in courts. This approach ensures that the parties enjoy the flexibility to keep the cost of dispute resolution lower by choosing to forgo additional discovery. This flexibility should be preserved. There is no reason to shift to a more European inquisitorial system, under which the arbitrator independently conducts discovery by propounding his or her own discovery requests and subpoenaing witnesses the parties otherwise would not have called.

I. Procedure for hearings

Four aspects of the proposed changes to procedures for hearings warrant reconsideration. First, non-parties should not be permitted to attend arbitration hearings, and certainly not without advance notice and a showing of a right to attend. Second, documents- only desk arbitrations over a party's objections should not be required. Third, unsworn written testimony should not be allowed to be submitted as evidence. Fourth, the AAA should restore deleted language confirming that arbitrators should apply in employment arbitrations the same burdens of proof and production that would apply in court.

1. Arbitrators should not be permitted to allow third parties to attend arbitration hearings without advance notice.

The confidential nature of arbitration has a long history.[20] Confidentiality is particularly beneficial in workplace arbitrations, which can involve sensitive issues, such as allegations of

[20] *See, e.g., Del. Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 518 (3d Cir. 2013) ("Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings."); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir.

1985) (arbitration is "a private proceeding which is generally closed to the public"); *Hutchings v. U.S. Indus., Inc.*, 428 F.2d 303, 312 (5th Cir. 1970) ("T]he arbitration process is a private one[.]"); Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 Tex. Int'l L.J. 121, 122 (1995) (describing "institutional arbitration rules" requiring that arbitrations "shall be held in private" and "centuries" of legal recognition in the laws of common law jurisdictions that "arbitrations take place in private").

misconduct that the parties generally would prefer to keep private. Parties to consumer arbitrations also benefit from confidentiality, as the privacy of the proceedings frees the parties in consumer cases as well as in workplace cases to take a less hostile, more conciliatory approach toward one another than parties might otherwise feel constrained to take in public view. Worker and consumer claimants might feel pressure to take a more adversarial approach; and businesses would be concerned that any attempt at conciliation or decision not to raise legal or factual defenses would be invoked against the business in future proceedings in arbitration or in court.

Nonetheless, proposed Consumer Rule R-23 and Employment Rule R-24 both state that "[a]ny person having a direct interest in the arbitration is entitled to attend hearings." What might constitute a "direct interest" entitling a third party to attend a hearing is left undefined and unexplained. Under this vague standard, members of the press, bloggers and other curious individuals—including an entire constellation of individuals claiming some connection to the parties or the subject matter—might insist upon a right to attend hearings. And the parties would be powerless to prevent these interlopers from attending. That would undermine the parties' expectation of privacy in arbitration.

Even worse, under these proposed rules, the parties are not even guaranteed advance notice and an opportunity to object if a third party seeks to attend a hearing. This approach to arbitration hearings risks very substantial unfairness to the parties.

The provision in these proposed rules allowing anyone with a "direct interest" to attend hearings should be deleted.

Alternatively, if the proposed language is kept, it should be revised to require third parties seeking to attend the hearing either to obtain consent from all parties or demonstrate a "substantial direct financial interest in the arbitration and a sufficient need to attend that overcomes the presumption of privacy of arbitration proceedings." In addition, third parties seeking to attend hearings without consent from all parties should be required to request leave in writing in advance, and all parties should be given an opportunity to object.

2. Telephonic or virtual hearings promote due process and help to curb widespread abuse in mass arbitrations.

Under the current Consumer Rules, cases involving claims for $25,000 or less default to a document-only desk arbitration, but a hearing of some sort is granted if "a party asks for a hearing or the arbitrator decides that a hearing is necessary." Rule D-1(b). By contrast, under proposed Consumer Rule R-1(f), "[w]here no disclosed claims or counterclaims exceed $50,000, the dispute shall be resolved by the submission of documents only/desk arbitration as provided in Rule D-1(b) of the Procedures for

the Resolution of Disputes through Document Submission." That referenced Rule D-1(b), as well as proposed Rule R-36, clarify that the arbitrator may order

a "virtual or telephonic hearing" if one is "necessary," or an "in-person hearing" is needed "for a fundamentally fair process."

We agree with increasing the amount-in-controversy threshold below which cases default to desk arbitrations from $25,000 to $50,000. Desk arbitrations often can efficiently resolve these types of disputes. But parties should remain entitled to at least a telephonic or virtual hearing, without the risk that arbitrators will decide that the party has not sufficiently proven that a hearing is "necessary."

Indeed, the AAA Consumer Due Process Protocol Principle 12(1) explains that as part of the right to "a fundamentally-fair arbitration hearing," parties must be afforded "an opportunity to be heard[.]" To be sure, the Protocol goes on to explain that this right "may be met by hearings conducted by electronic or telephonic means or by a submission of documents." But in this age of pervasively available telephonic or virtual hearing options, cases should be resolved without a hearing over a party's objection only if a dispositive motion can resolve the case.
Otherwise, where factual disputes must be resolved, any party who requests a hearing should be granted at least a telephonic or virtual hearing so that the party can ask questions of witnesses and to allow the arbitrator to assess credibility.

Making telephonic or virtual hearings available when requested by a party also ensures that all parties will have an opportunity to speak with and have their arguments acknowledged by the arbitrator. Because arbitrators do not speak with the parties in a desk arbitration, arbitrators have no opportunity to demonstrate their attentiveness and careful consideration of each party's positions.

Finally, allowing parties to request telephonic or virtual hearings will also deter abusive mass arbitrations in which the lawyer filing the arbitrations has no real relationship with the purported claimants—who may not even exist or have any idea that arbitrations have been filed in their names. These lawyers typically request desk arbitrations, which allows them to obscure the claimants' fictitiousness or lack of awareness of the proceedings. Accordingly, **Rules R-1(f), R-36, and D-1(b) should all be revised to clarify that a desk arbitration will be converted to a telephonic or virtual hearing upon the request of any party.**

3. Unsworn written testimony should not be permitted.

Proposed Consumer Rule R-33(a) and Employment Rule R-34(a) authorize the arbitrator to "receive and consider the evidence of witnesses by written statements rather than in-person testimony." That is a change from current Consumer Rule R-35(a), which permits written testimony only "by declaration or affidavit." (The current Employment Rules do not have a counterpart to current Consumer Rule R-35(a), but current Employment Rule R-8(xv) provides that during the initial arbitration management conference, the arbitrator shall consider "the extent to which testimony may be admitted at the hearing . . . by affidavit[.]").

The AAA should not allow unsworn written testimony to be presented as evidence. This change would invite fraud, as a lying witness could later avoid punishment by pointing out that he or she was not under oath. And the change is unnecessary, as it is easy for parties to provide sworn affidavits or declarations signed under penalty of perjury.

4. Arbitrators should apply the same burdens of proof and production as courts in employment cases.

In the current Employment Rules, the third sentence of Rule R-28 provides that "[t]he parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court." The counterpart to that rule in the proposed Employment Rules, Rule R-31, deletes that sentence. This omission may lead to confusion about whether the discretion conferred on arbitrators to "vary" hearing procedure includes the power to reallocate the burdens of proof and production imposed by substantive law. That outcome could unfairly bias the proceedings against either the claimant or the respondent and systematically distort the results in employment arbitrations. This change should be reconsidered, and **the third sentence of Rule R-28 should be restored**.

J. Sanctions

As discussed above, **the proposed rule regarding sanctions (Rule R-57 in both the Consumer and Employment rules) should be revised to authorize arbitrators to impose sanctions on counsel who fail to comply with the required certifications**. Particularly in mass arbitrations, where claimants may be fictitious or unaware of the frivolous claims filed in their names, both merits and process arbitrators should be empowered to impose sanctions on counsel, because counsel (rather than the claimants) are the ones responsible for the breach of ethical obligations.

K. Publication of arbitration awards

Proposed Consumer Rule and Employment Rule R-42(c) provides that "[t]he AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published." The potential that the AAA may indiscriminately publish awards is inconsistent with the confidential nature of arbitration. And even if an applicable law required the disclosure of the *result* of an arbitration, publication of the full award—including the arbitrator's detailed discussion of the allegations, evidence, and findings—would be unnecessary. But if the proposed rule were to be kept, three aspects should be changed.

First, the proposed rule improperly permits the AAA to publish an award even if the parties have agreed to keep the arbitration proceedings and the arbitrator's award confidential. Parties sometimes choose to agree to arbitration because arbitration proceedings are private. The proposed rule would frustrate those parties' intentions.

Second, even if the parties have not expressly agreed to keep the award confidential, the proposed rule fails to provide the parties with advance notice and the ability to object to publication of

the award. Because of the expectation of privacy in arbitration, and the potential that particular arbitrations may involve sensitive subjects or materials, all parties should have the right to show that there is good cause not to publish an award, either in whole or in part.

Third, even if an award were to be published, the proposed rule improperly assumes that the only redactions from the published version should be the names of the parties and witnesses. Arbitration awards may discuss trade secrets or other confidential matters, or information that a party finds embarrassing.

Accordingly, **if kept, Consumer Rule and Employment Rule R-42(c) should be revised to provide:**

> **The AAA may choose to publish an award rendered under these Rules if the parties have not agreed to keep the arbitration proceedings confidential. If the AAA intends to publish an award, the parties will be given 30 days advance notice and an opportunity to object. An award will not be published if any party shows good cause. If an award is published, the names of the parties and witnesses and any sensitive information identified by the parties will be redacted.**

L. Arbitral appeals

Proposed Consumer Rule R-58 expressly authorizes an optional appellate arbitration process, so long as the appeal complies with the Consumer Due Process Protocol and the associated AAA and arbitrator fees are allocated in the same manner as regular arbitrations under the Consumer fee schedule.

The adoption of an express rule governing optional appeals in consumer arbitrations is helpful. But the AAA should make three changes to this proposed rule.

***Appeal of non-final awards*:** First, **the rule should specify that only final arbitration awards, not interim awards or process arbitrator orders, are subject to appeal**. Otherwise, claimants seeking settlement leverage might appeal every conceivable interlocutory ruling to delay the proceedings and inflict costs on the respondent.

***Consumer fee schedule*:** Second, **the Consumer fee schedule should not apply to arbitral appeals**. That fee schedule would require the business to subsidize the lion's share of the costs of arbitral appeals, which are far more expensive than the typical consumer arbitration because they often involve a panel of three arbitrators rather than one. **Instead, the cost allocation of Rule A-12 of the AAA's Optional Appellate Rules should apply, unless a different allocation is required by applicable law.** Under Rule A-12, the appellant generally advances the fees, subject to reallocation by the arbitral panel in the final award. This allocation ensures fairness to both parties because, by requiring appellants to pay the costs unless they prevail (or justice otherwise requires), it discourages the pursuit of groundless appeals.

If the Consumer fee schedule instead were applied to arbitral appeals, claimants will have an incentive to threaten to appeal in every case, no matter how baseless, simply to drive up a business's costs and enable the claimant to extract a higher cost-of-defense settlements for claims that the arbitrator already has determined to be valueless. This risk is particularly acute in the mass arbitration context, where filers already take every opportunity to maximize the threatened AAA fees on a business.

Moreover, many existing agreements with appellate options were written in reliance upon the Optional Appellate Rules and their approach to fee allocation, which does not assume that the business pays the vast majority of expenses for appeals, regardless of who wins. By switching to a much more one-sided allocation, the AAA would frustrate the parties' intentions in drafting those agreements.

Alternatively, **even if the AAA were to require the Consumer fee schedule apply to arbitral appeals, that fee schedule should apply only if the value of the relief sought (whether monetary or non-monetary) is $75,000 or less**. In other cases, the amount at stake is sufficient to justify application of the fee allocation of Rule A-12 of the Optional Appellate Rules.

***Safe harbor for appellate procedures*:** Third, **the rule should add a safe harbor clarifying that an agreement authorizing an appeal under the AAA's Optional Appellate Arbitration Rules does not also have to comply with the AAA's Consumer Due Process Protocol.** Otherwise, because the Protocol was not written with appeals in mind, application of the Protocol to appellate procedures will lead to considerable uncertainty. For example, does the Protocol's right to bring claims in small claims court mean that appeals must also be removable to small claims court? At what point does the schedule for briefing, argument, and decision—or even the availability of an appeal—cause "undue delay" within the meaning of the Protocol? To avoid these issues, the AAA should prescribe a safe harbor and identify its appellate arbitration rules as acceptable.

II. Additional Reforms Are Urgently Needed to Curb the Rapidly Growing Number of Abusive Mass Arbitrations.

Although amendments to the Consumer and Employment Rules can improve the efficacy and fairness of arbitration proceedings, these changes at the margins fail to confront the elephant in the room—abusive mass arbitrations. These campaigns are being pursued at an accelerating rate. Law firms filing these mass arbitrations do not seek to obtain merits rulings on the asserted claims, but instead exploit loopholes in the AAA's rules and fee schedules to inflict enormous upfront arbitration fees on companies. These fees leave companies no choice but to pay excessive settlements, regardless of the merits (or lack of merits) of the underlying claims. The AAA should make immediate changes to the Mass Arbitration Supplementary Rules and fee schedules to halt this subversion of AAA proceedings.

A. Abusive mass arbitrations are proliferating, and threaten to undermine continued viability of consumer and employee/worker arbitration.

There is nothing inherently wrong with consumers or workers taking advantage of economies of scale by using shared counsel to pursue individual arbitrations of similar claims. Many such claims are individualized and could never have been certified as class actions in court. Without arbitration, these

claims would have been priced out of the justice system. And even if a class action could have been possible, individual arbitrations are often superior; they can be resolved in a fraction of the time and for a fraction of the cost, and the outcomes are generally fairer to the parties. Indeed, studies show that consumers and workers who bring claims in arbitration prevail more often and recover as much or more than consumers or workers who litigate in court.[21] By contrast, class members rarely benefit from class actions.[22]

But the mass arbitration device, in its current form, is susceptible to abuse because of vulnerabilities in the AAA's rules and fee schedules. Lawyers pursuing this strategy recruit as many claimants as possible—regularly tens of thousands or even over a hundred thousand. The recruited pool contains many more claimants than the lawyers could possibly vet, much less for whom the lawyers could actually arbitrate claims. But the point is not to arbitrate the claims.
Instead, the point is to threaten to file arbitrations because it would inflict massive AAA fees on the target. The aggregated fees leave the business little choice but to yield to a settlement, because it is simply impossible under the AAA's current approach to mass arbitrations for businesses to mount a defense. Indeed, in a decision issued earlier today, the Ninth Circuit criticized a law firm that frequently pursues mass arbitrations before the AAA for trying to inflate a business's arbitration fees in a JAMS mass arbitration from $1,750 to $12,775,000.[23] The Ninth Circuit stated that the law firm had used a "mass-arbitration tactic" that "appear[ed] to be geared more toward racking up procedural costs to the point of forcing [the business] to capitulate to a settlement than proving the allegations [underlying the claims] to seek appropriate redress on the merits."[24]

In 2023, the Chamber's ILR published a report documenting the sharp rise in the filing of abusive mass arbitrations, noting (for example) that public reporting showed that, during a short

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[21] *See Mass Arbitration Shakedown, supra, n.6, at 10-11 (identifying and discussing studies comparing consumer and employment litigation and arbitration outcomes).*

[22] *See id. at 12-14 (discussing studies of the limited benefits of class actions to class members).*

[23] *Jones v. Starz Entmt., LLC, No. 24-1645, slip op. at 6 (9th Cir. Feb. 28, 2025).*

[24] *Id. at 14.*

time period, a single law firm had filed enormous mass arbitrations against Doordash, Postmates, CenturyLink, FanDuel, Draftkings, Intuit, Amazon, Chegg, Samsung, Buffalo Wild Wings, Chipotle, Dollar Tree, and Peloton.[25] Those publicly reported mass arbitrations were, of course, merely the tip of the iceberg. Most mass arbitration filings go unreported. And far more mass arbitrations are threatened and produce settlements before arbitrations are filed.

The AAA's January 2024 introduction of the Mass Arbitration Supplementary Rules and new consumer and employment mass arbitration fee schedules reflected a welcome recognition of the need to address this new dangerous abuse of the arbitration system.[26] The reforms adopted in those rules and fee schedules were much needed. But they are not enough.

Since those January 2024 changes went into effect, the pace of threatened and actual filings of abusive mass arbitrations has dramatically quickened. Many more Chamber, AFSA, and AAI members have been targeted by improper mass arbitration campaigns. And the velocity of new threats and size of law firms' claimant portfolios continue to increase. The end result is that mass arbitrations are evolving into a heavy tax on companies that continue to select the AAA in arbitration agreements with customers and workers.

The AAA should take action now to stop abusive mass arbitrations and to ensure that its forum remains a fair and cost-effective way to resolve all types of consumer and workplace disputes—including mass disputes.

B. Additional case-initiation requirements are needed to address ongoing mass arbitration abuses.

The first area in which reform of mass arbitration procedures is sorely needed is at the filing stage.

***Need for claimant identifying information and signed certifications by claimants and their counsel*:** In the experience of Chamber, AFSA, and AAI members, the number of mass arbitration claims filed in the names of individuals who turn out not to be purchasers of the disputed product or service (or workers subject to the challenged employment practice) is often shockingly high—typically 30 percent of filings, and sometimes exceeding 90 percent.[27] Frequently, mass arbitration claimants are fictious or have no arbitration agreement at all with the respondent. Yet without adequate identifying information, determining which claimants do not exist, or are asserting non-arbitrable or frivolous claims (because they are not the customers or workers at issue) is often a laborious manual process. And it is a task that—

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[25] *See id. at 19-21.*

[26] *See Adam Shoneck, Mass Arbitration—How Did We Get Here & Where Are We Now? (June 6, 2024), at https://www.adr.org/blog/mass-arbitration-how-did-we-get-here-and-where-are-we- now (describing 2024 changes to rules and fee schedules for mass arbitrations).*

[27] *See, e.g., Mass Arbitration Shakedown, supra n.6, at 37.*

unless an enormous amount of manpower is expended—would take the business longer than the 30 days a respondent has under the Mass Arbitration Supplementary Rules to file a court action to halt non-arbitrable arbitrations or the 45 days a respondent has to file an answer.[28]

This problem is getting worse, not better. Claimants' counsel often recruit claimants online by posting websites or social-media ads using webforms for prospective claimants to complete.[29] These forms have always attracted fraudsters who fill out fake information in the hope that that the claim would avoid scrutiny but pay out in the almost inevitable settlement. But the rise of generative AI and related technologies is making it possible to submit ever-larger numbers of fake claims and to customize the information to make the fraud harder to spot.

The recent spike in fraudulent claims submitted in class settlements via online web portals—which operate similarly to the forms used to recruit mass arbitration claimants— illustrates the problem. Experience shows that even small class settlements often receive hundreds of thousands or millions of increasingly clever fake claims, such as ones with individualized claimant identifying and contact information or even computer-generated proofs of purchase.[30] In class settlements, neutral claims administrators scrutinize the filings to weed out improper claims. But in mass arbitrations, business respondents often report that claimants' counsel are doing little or nothing to investigate their recruited "claimants" before filing arbitrations.[31]

Claimants' counsel have an ethical duty to vet their mass arbitration claimants *before* filing demands for arbitrations in the claimants' names.[32] Claimants' counsel should not be permitted to outsource that duty to business respondents as a tactic for imposing substantial investigation costs and AAA fees on the business. But the current rules allow that result because insufficient identifying information is required at the case-initiation stage, and neither claimants

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[28] *See MA Rules R-1(e) & R-4(a).*

[29] *See Mass Arbitration Shakedown, supra n.6, at 34.*

[30] *See, e.g., Dkt. 54 ¶¶ 20-23, Hezi v. Celsius Holdings, Inc., No. 1:21-cv-9892 (S.D.N.Y. Nov. 22, 2022) (declaration of claims administrator describing 658,719 fake claims submitted via class settlement website); Dkt. 155 at 1-2, Hesse v. Godiva Chocolatier, Inc., No. 1:19-cv-972 (S.D.N.Y. Dec. 16, 2022) (noting determination by claims administrator that claims had been faked by a "bot" hosted in a "foreign country").*

[31] *See, e.g., Mass Arbitration Shakedown, supra n.6 at 37.*

[32] *See, e.g., Model R. of Prof. Conduct 3.1, cmt. 2 (stating that before "[t]he filing of an action . . . or similar action taken for a client," the lawyer must "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions"); Steven C. Bennett, Who Is Responsible for Ethical Behavior by Counsel in Arbitration, 63 Disp. Resol. J. 38, 40 (2008) ("The prevailing view" is that "state codes of lawyer conduct, generally modeled on the American Bar Association's Model Code of Professional Conduct, . . . apply to lawyers who serve as advocates in arbitration.").*

nor claimants' counsel are required to sign certifications that subject them to the same standards barring the filing of frivolous claims that would apply in court. **As discussed above, we urge the AAA to adopt stricter filing requirements above for all consumer and workplace arbitrations. Those requirements are especially needed to curb abusive mass arbitrations.**

***Process arbitrator authority to impose sanctions on counsel*:** Relatedly, **Mass Arbitration Supplementary Rule MA-6 should be amended to clarify that when process arbitrators decide disputes over compliance with AAA or contractual filing requirements or related issues regarding proper case initiation, if the arbitrator finds that claimants' counsel has filed patently improper claims, the**

arbitrator has authority to require claimants' counsel to show cause why they should not be sanctioned. The process arbitrator also **should have the authority to impose sanctions if appropriate:** these improper cases will never reach a merits arbitrator, and this abusive conduct will escape sanctions entirely unless the process arbitrator is authorized to take action.

***Satisfaction of pre-arbitration dispute-resolution processes*:** Another commonly disputed issue before process arbitrators is the failure of claimants to comply with contractual obligations to engage in informal dispute resolution before commencing arbitration.[33] For example, arbitration agreements often require the parties to provide written notice 30 days or more before filing arbitration so that the parties have a meaningful opportunity to discuss settlement before AAA fees are incurred. The AAA therefore should **require mass arbitration claimants to attach either their pre-arbitration notices to their demands for arbitration if compliance with such a procedure is required by the arbitration agreement or an explanation why they believe that no such requirement applies (or is legally enforceable)**. In many cases, that attachment would prove whether a claimant has complied with the contractual precondition to arbitration, streamlining the issues for process arbitrators or courts that are later asked to enforce the pre-arbitration requirement—or perhaps avoiding the dispute entirely.

***Disclosure of third-party litigation funding agreements*:** Many larger mass arbitration campaigns are now financed by third-party litigation funders, which loan money to claimants' counsel to pay the expenses incurred to recruit as many claimants as possible in exchange for a share of the proceeds. The presence of these third-party funders, however, may distort both litigation and settlement behavior by claimants' counsel. Counsel may feel beholden to the funder to take ethically dubious steps to maximize the funders' payout, such as advancing non-meritorious or even frivolous claims to extract a settlement based on the business's AAA

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[33] *See Mass Arbitration Supplementary Rule MA-6(c)(ii) (authorizing process arbitrators to hear "[d]isputes over any applicable conditions precedent" to arbitration).*

fees and cost of defense.[34] For this reason, some courts (either by operation of statute, court rule, or standing order) require disclosure of such arrangements.[35] The AAA should do likewise and **require mass arbitration filers to disclose, when the arbitration is initiated, copies of any contractual agreements giving anyone other than the claimant or claimants' counsel the right to receive compensation that is contingent on the proceeds of the arbitration.**

C. AAA and arbitrator fees should not be assessed on a per-case basis in mass arbitrations.

The fee schedule for mass arbitrations should be also be reexamined and revised. The January 2024 switch from per-case filing fees to a single initiation fee, no matter how many cases are filed, was a salutary change. But this realignment should extend to the rest of the fee schedule. **All per-case fees and deposits should be eliminated and replaced with fees that fairly compensate the AAA and arbitrators for the cost of services provided without giving claimants' counsel the ability to weaponize the AAA's fee schedule to extract blackmail settlements from respondents.**

For example, consider a mass arbitration that continues past the process-arbitrator stage in which claimants insist on proceeding with all cases at once. At that point, under the fee schedules for both consumer and employment mass arbitrations, the AAA would charge the business nonrefundable Per Case Fees and Arbitrator Appointment Fees for every case—even if only a small fraction of those cases would ever be arbitrated.[36] Similarly, separate initial

[34] *See, e.g., U.S. Chamber of Commerce ILR, What You Need to Know About Third Party Litigation Funding (June 7, 2024), at https://instituteforlegalreform.com/what-you-need-to-know-about- third-party-litigation-funding/.*

[35] *See, e.g., Ind. Code § 24-12-11-5; La. Rev. Stat. § 9:3580.13(B); Mont. Code § 31-4-108; W.V. Code § 46A-6N-6; Wis. Code § 804.01(2)(bg); see also D. Ariz. L.R. 7.1.1; C.D. Cal. L.R. 7.1-1; Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement ¶ 17 (N.D. Cal. Nov. 30, 2023); Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); M.D. Fla. L.R. 3.03(a); N.D. Ga. L.R. 3.3(A)(2); S.D. Ga. L.R. 7.1.1; N.D. Iowa L.R. 7.1; S.D. Iowa L. R. 7.1; D. Md. L.R. 103.3(b); E.D. Mich. L.R. 83.4(b)(2); Nev. L. R. 7.1-1(a); D.N.J. Civ. L.R. 7.1.1; E.D.N.C. L. Civ. R. 7.3(b)(2); M.D. Tenn. L.R. 7.02; N.D. Tex. L.R. 3.1(c); W.D. Tex. L.R. CV-33(b)(3).*

[36] *See AAA, Consumer Mass Arbitration and Mediation Fee Schedule (2024), https://www.adr.org/sites/default/files/document_repository/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf; AAA, Employment/Workplace Mass Arbitration and Mediation Fee Schedule (2024), https://adr.org/sites/default/files/Employment-Workplace_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.*

arbitrator deposits can be charged for every case, even if all of the cases are assigned to a small roster of arbitrators who each will decide numerous cases individually.[37]

These charges, which must be paid upfront and in full before the company can defend itself on the merits in any case, can reach staggering amounts. As the number of claimants increase, the amount can be so high that the company cannot reasonably afford to mount a defense. To illustrate these concerns, consider the amount of Per Case Fees, Arbitrator Appointment Fees, and initial arbitrator compensation deposits a business must pay for a mass arbitration of 10,000 claimants, 50,000 claimants, or 100,000 claimants—representing commonly compiled numbers of individual arbitrations that lawyers frequently threaten to file:

Number of Claimants	Per Case Fees	Arbitrator Appointment Fees[38]	Initial Arbitrator Deposits[39]	Total
10,000 consumers	$1,375,000	$4,500,000	$30,000,000	$35,875,000
10,000 workers	$1,375,000	$11,000,000	$30,000,000	$42,375,000

50,000 consumers	$5,375,000	$22,500,000	$150,000,000	$177,875,000
50,000 workers	$5,375,000	$55,000,000	$150,000,000	$210,375,000
100,000 consumers	$10,375,000	$45,000,000	$300,000,000	$355,375,000
1000,000 workers	$10,375,000	$110,000,000	$300,000,00	$420,375,000

These amounts—tens or hundreds of millions of dollars—cannot feasibly be paid upfront. And they are not the only fees that must be paid: businesses also must pay Final Fees on a per-case basis as hearings are scheduled, and arbitrators may request additional deposits for each case to which they are assigned as they do work.[40] But it is the potential of being charged the Per Case Fees, the Arbitrator Appointment Fees, and initial deposits for the arbitrator's compensation on a per-case basis, before merits arbitrators can hear defenses in any case, that gives mass arbitration filers tremendous leverage to extract a settlement.

The AAA therefore should revise its fee schedules to eliminate per-case fees and deposits in mass arbitrations. Those per-case amounts are the driver of abusive mass

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[37] *See supra n.36.*

[38] *For consumer cases, this calculation assumes the AAA will directly appoint arbitrators. If the agreement calls for rank-and-strike appointments, the fees would be even higher.*

[39] *This calculation assumes an initial arbitrator deposit of $3,000 per case.*

[40] *See supra n.36.*

arbitrations. And per-case fees quickly reach astronomical sums that bear no relation to the amount of fair compensation for the work the AAA does in administering the cases, almost none of which will actually be arbitrated. Instead, **in mass arbitrations, the AAA should charge for administrative services on an hourly basis and collect deposits on a per-arbitrator basis, no matter how many cases are assigned to an arbitrator, rather than on a per-case basis.**

D. Process arbitrators should enforce agreements to stage or batch cases to facilitate the efficient resolution of mass arbitrations.

Many companies have tailored their arbitration agreements to the needs of mass arbitration by preserving the right to individual arbitration but ensuring that those individual arbitrations proceed in an orderly fashion. Typically, these agreements require the parties to select bellwether or test cases to be arbitrated first, so that the outcome can inform a global mediation. Although the results on the bellwether cases would not be binding on any of the claimants in the other cases, the outcomes of those cases would provide useful information for all parties regarding the relative strength of the parties'

claims and defenses. If any cases remain after the mediation, these agreements often specify that the individual arbitrations will proceed in an orderly staged fashion.

This is the process that courts use to handle mass numbers of individual cases, such as mass torts, whether in the multidistrict litigation process in federal court or similar procedures at the state level.[41] Courts do not simply proceed to simultaneous individual trials in each and every case. There is no reason for the AAA to lack the ability to impose coordination on mass individual proceedings by requiring orderly staging of cases when courts do exactly that in virtually identical circumstances.

With these tools, the AAA is well situated to administer mass arbitrations, even if all claimants want individual hearings. The AAA has a deep roster of neutrals who can preside over individual hearings. But those cases will necessarily need to be sequenced, and an intelligent staging process can facilitate the voluntary settlement of the vast majority of other cases. Mass arbitrations of claims in this way can be resolved fairly and efficiently.

Many claimants' counsel agree and cooperate with using these approaches to resolve mass arbitrations. But some claimants' counsel refuse to participate in the selection of bellwether cases or the orderly staging of arbitrations. Instead, they insist that every case must be individually tried *at the same time*. In practice, arbitrating every case in a significant mass arbitration simultaneously is never done. There simply are not enough arbitrators to try thousands or tens of thousands of cases at the same time. And it is an unfair abuse of AAA, arbitrator, and party resources to allow unscrupulous claimants' counsel to insist on this approach in an attempt to inflict additional AAA fees on companies in order to extract blackmail settlements. Indeed, this practice harms the parties in other unrelated disputes by improperly diverting AAA resources.

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[41] *Mass Arbitration Shakedown, supra n.6, at 48-50.*

Accordingly, the Mass Arbitration Supplementary Rules should be amended to provide that arbitrators will enforce bellwether or batching clauses in arbitration clauses unless invalidated by a court order or, if there is a delegation clause, the arbitrator has ruled that the clause is unlawful under the law of a particular state (in which case the bellwether or batching shall be applied to claimants from other states).

E. The Mass Arbitration Supplementary Rules should also apply when mass arbitrations are threatened.

As currently written, Rule MA-1(b), the Mass Arbitration Supplementary Rules apply when 25 or more similar demands for arbitration are *filed* by the same or coordinated counsel. This requirement should be revised so that the rules also apply when 25 or more such demands are *threatened in writing* to be filed.

Under some arbitration agreements, if numerous claimants represented by the same or coordinated counsel notify the business of an intent to arbitrate similar claims, all of the claims must be either batched together in a single or a small number of arbitrations or only a small number of individual test cases may be filed in arbitration at a time. When parties follow these procedures and fewer than 25 cases are filed at once, the AAA is currently declining to apply the Mass Arbitration Supplementary Rules. But that outcome prevents the parties from taking advantage of the process-arbitrator procedure available under those rules—a role that can help facilitate the efficient resolution of disputes over threshold administrative issues.

The AAA therefore should amend Rule MA-1(b)(i) to provide that Mass Arbitrations are defined as "twenty-five or more similar Demands for Arbitration (Demand(s)) filed or threatened in writing to be filed against or on behalf of the same party or related parties."

* * *

We again thank the AAA for the opportunity to submit public comment on behalf of our members regarding the proposed rule changes.

Celia Winslow
AMERICAN FINANCIAL SERVICES ASSOCIATION
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Sincerely yours,

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Advocacy Group Comment #17

Attorney(s): **Umair Javed; Avonne Bell**
Advocacy Group: **Cellular Telecommunications Industry Association (CTIA)**
City: **Washington, DC**
Date Received: **2/28/25**

February 28, 2025

BY EMAIL

American Arbitration Association ConsumerRules@adr.org
EmploymentRules@adr.org

Re: Comments on Draft Amendments to Consumer and Employment Arbitration Rules

To Whom It May Concern:

On behalf of CTIA—the Wireless Association® ("CTIA"), we write in response to the AAA's invitation for public comment on the proposed amendments to the AAA Consumer Arbitration Rules and the AAA Employment Rules and Mediation Procedures. We thank AAA for the opportunity to provide these comments.

CTIA represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. Our members include wireless carriers, device manufacturers, and suppliers, as well as apps and content companies.

Many CTIA members have long entered into arbitration agreements with their customers and workers, selecting the AAA as the administrator. Our members who are wireless carriers in particular have entered into hundreds of millions of consumer arbitration agreements. Both CTIA

members and their customers and workers benefit from AAA arbitration because it allows the parties to resolve disputes fairly, and quicker, faster, and more economically than they could in court.

We write today to emphasize the urgent need for reform of AAA rules and procedures in connection with mass arbitrations—an issue of great importance to CTIA members.

We welcomed the AAA's introduction of the Mass Arbitration Supplementary Rules in January 2024 as a means to curb some of the worst abuses of mass arbitration. These changes were an important first step, but after hearing from our members, we stress that more far-reaching reform to address these abuses is imperative. Unfortunately, due to widespread abuses, mass arbitration has all too often become a weapon to force businesses to pay enormous settlements without regard to the merits of the underlying claims.

The counsel who engage in this practice typically have no interest in arbitrating the claims. Indeed, they make no secret of that fact when threatening to file mass arbitrations against CTIA members and other businesses. Instead, they are capitalizing on loopholes in AAA's existing rules and fee schedules that let them threaten companies with inflict massive AAA fees that must be paid upfront before the business can defend any claim on the merits.

When faced with the prospect of having to pay many millions of dollars of AAA fees, companies must confront a painful decision. They either must settle the dispute immediately, even when they have not engaged in any wrongdoing, or spend enormous sums to have even a chance to raise their defenses on the merits. Adding insult to injury, lawyers threatening these mass arbitrations routinely inflate their claimant pool—and thus the threatened AAA fees—by recruiting claimants online, without adequately vetting them to weed out purported claimants who are fictitious, not customers of the business, or never purchased the disputed product or service. The AAA should take immediate action to stop these abuses, which are being facilitated by the AAA's current mass arbitration rules and fee schedules. Indeed, the number of threatened mass-arbitration campaigns has continued to grow—in large measure because the AAA's process is so easy for plaintiffs' lawyers to weaponize.

Arbitration should be fair, efficient, and equitable for both sides of any dispute. But abusive mass arbitrations now threaten to undermine the legitimacy of the AAA's arbitration process. CTIA therefore respectfully urges the AAA to make additional reforms to curb abusive practices and ensure the long-term viability of arbitration, including the changes recommended in the comments submitted by the U.S. Chamber of Commerce, the American Financial Services Association, and the Automotive Alliance for Innovation.

* * *

We again thank AAA for the opportunity to submit this public comment on behalf of our members regarding the proposed rule changes.

Sincerely,

Umair Javed
SVP & General Counsel

Avonne Bell
Director, Connected Life

Feedback From AAA Panelists

AAA Panelist Comment #1

Panelist: **Anonymous**
Date Received: **1/31/25**

Changes are welcome. 31 c is extremely important: "Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion."

AAA Panelist Comment #2

Panelist: **Stanley Santire**
Law Firm: **Santire Law Firm PLLC**
City: **Houston, TX**
Date Received**: 2/6/25**

Concerning Rule 2, from my experience with Texas Courts I suggest that a 90 day suspension is too long. From my experience, the ability to get such resolution from a Court is, at the most, less than 60 days. I believe that a prime goal in consumer matters, in addition to reduction of cost, is timely resolution.

Stanley

AAA Panelist Comment #3

Panelist: **Anonymous**
Date Received: **2/6/25**

Hi:

I see that the threshold for documents only arbitrations has increased from $25,000 to $50,000. Will arbitrator compensation for these fixed rate arbitrations be increased? Maybe it was addressed, and I just missed it?

Thanks!

AAA Panelist Comment #4

Panelist: **Allan Marain**
Law Firm: **Law Offices of Allan Marain**
City: **New Brunswick, NJ**
Date Received: **2/6/25**

Dear AAA:

Pursuant to invitation to comment upon proposed rules, I offer the following:

R.-1(f): Please consider incorporating a provision to the effect of "Unless all parties agree otherwise..."

R-4(a)(ii) (Second Paragraph) might begin, "If the court order directs, or the arbitration agreement between the parties specifies, that a specific party is responsible for the filing fee,

R-7 should make clear that its provisions are subject to existing law.

R-9(c): The last sentence fails to address the case where all parties agree that the dispute is within the jurisdiction of small claims court, but disagree on whether the case should be heard there.

R-11: Should this Rule also specify what information (if any) developed in a failed mediation shall be made available to the arbitrator?

R-12(e) I do not understand the rationale of the last sentence precluding expedited review.

R-15: Please consider consolidating paragraphs (b) and (c).

R-17: Is it the intention of AAA to preclude party-appointed arbitrators? If not, provision (a)(1) needs supplementation.

R-21(d): Yes! I'm happy to see this proposal.

R-24(b) should reiterate "unless such choice is prohibited by applicable law".

R-24(c): I'm glad to see this addition!

R-25: How is "duly qualified person" to be defined? What if no "duly qualified person" is available?

R-26(d) allows the arbitrator to apportion cost; R-26(a) does not. This is an inconsistency that might be clarified.

R-31(b) deserves further analysis. A dispositive motion that not likely to succeed can even, in its denial, narrow the issues.

R-32(d): Please consider changing the word "consider" to "honor" or "abide by".

Is it the intention of R.33(b) to abrogate Direct Exchange of information? Should Direct Exchange be addressed, here or elsewhere?

Does R-36 preclude an in-person hearing even when all parties seek same even on claims not exceeding $50,000.00? And what if no disclosed claim or counterclaim exceeds $50,000.00, but the counterclaim caused the total amount in dispute to exceed that figure?

R-41(a) fails to provide for a party's unexplained absence, or a party's refusal to participate.

R-55: Please consider whether this Rule should specify which party is, at least, initially, responsible for payments.

D-4(a) contains a sentence fragment.

General: I acknowledge and appreciate the hard work AAA has devoted to this project. It is easy for me to sit here to second-guess their product, but creating that product in the first place required huge time and study.

Very respectfully,

Allan Marain
732-828-2020
Allan@MarainLaw.com
Member, Association of Criminal Defense Lawyers of New Jersey

AAA Panelist Comment #5

Panelist: **Anonymous**
Date Received: **2/6/25**

Recently I've been an arbitrator on two cases where the case manager billed most, but not all, of the arbitrator compensation. As the arbitrator I was unaware of this despite asking if all fees were paid several times. It was a mistake on the part of the case manager in both cases. One case took 18 months

and multiple inquiries to finally submit the arbitrator compensation. The other refuses to respond to AAA inquiries. I'd like to see Rule 56 (f) apply to the latter case going forward. The party in this case is involved in multiple AAA cases. There has to be a way to get his attention and sanction this behavior.

Thank you for your consideration.

AAA Panelist Comment #6

Panelist: **Renee Gerstman**
Law Firm: **Gerstman Law**
City: **Scottsdale, AZ**
Date Received: **2/6/25**

R-5(d) – Consider whether this provision conflicts with Coinbase, Inc. v. Suski, 602 U.S. 143 (2024) which holds that were there are two contracts between parties with differing arbitration provisions **the court** must decide which arbitration provision is applicable to the dispute.

R-32(a) – I question use of the word "default" as it is not defined and seems to relate to a concept in rules of civil procedure that is not applicable here as there is no obligation to file an answer.

R-34(a) – Why does the arbitrator have to make that request to AAA rather than directly to the parties?

R-34(b) – Why is the AAA notifying the parties if direct exchange has been agreed to?

R-29- Similar to Rule 32(a). If you are going to use the term "default" it should be defined. Why not just say "the failure of a party to participate in the arbitration process."

R-37(a) – I think this will lead to unsuccessful parties claiming that the arbitrator did not ask whether they have further proofs or witnesses to offer as a basis to vacate an award. Most arbitrations are not transcribed so there will be no way to confirm or deny whether this rule was complied with in every single case.

R-51(a)- This statement is very broad and may conflict with various State's laws and decisions about what constitutes a waiver of the right to arbitrate.

R-39- Do you need to add prior to closing of the hearing or issuance of a final award?

R-41(a) – Is this a policy change that in consumer cases all communication must go through the AAA or involve the AAA? I agree that where there are unrepresented parties the better practice is to have the AAA involved in all communications but what about cases where this is counsel involved for both parties?

Thank you for allowing the opportunity to comment. If you have any questions about my comments or wish to discuss them more fully, please let me know.

Renee Gerstman

AAA Panelist Comment #7

Panelist: **Anonymous**
Date Received: **2/8/25**

Hello. I commend you for your excellent work in revising the Consumer Rules and am respectfully providing my comments, which I submit will further clarify various provisions and prevent abuses. Thank you for this opportunity, and I hope these comments are helpful.

Under Rule R-1(a), I propose a revision to the second sentence to explicitly define the scope of the rule in relation to consumer agreements: "If no rules are specified in a consumer agreement…." This will provide a clear understanding of the rule's applicability.

In Rule R-1(e), there is a typo. It should read, "but they must do so…."

Under R-4(a) or at the appropriate place, I recommend that you re-add the requirement that a claimant specify the amount in dispute. This amount provides the respondent with a clear understanding of the claimant's expectations, which could facilitate an early resolution.

Also, under R-4(a) or the appropriate place, I recommend an affirmation requirement like the Mass Arbitration Rules that the filing is true and correct to the claimant's knowledge. This requirement can help ensure the integrity of the arbitration process.

Under Rule R-5(a), I recommend adding the following language for clarity: "…being requested by the AAA or the arbitrator…."

Under Rule R-5(e), I also recommend adding the following language for clarity: "…clear to the arbitrator and the opposing party."

Under Rule R-20(b)(iii), I recommend adding the following text to incorporate proportionality into the determination for appropriate document exchange: "…out of the disputed issue and proportionate to the needs of the case."

Under Rule R-21, I respectfully request that you make clear this provision does not authorize arbitrators to order depositions. Many arbitrators are reading the text in Rule 21 to allow them to order the parties to sit for depositions, including corporate representative depositions, over their objections. These orders are turning the dispute from what is supposed to be a streamlined proceeding to a proceeding more reminiscent of federal court.

Under Rule R-30 or in the appropriate place, I recommend you re-add the language indicating, "The hearing generally will not exceed one day." In practice, the claimants ask for many more days than necessary for the hearing to increase the upfront costs for the respondents.

I recommend the following revision to the first sentence in Rule R-32(e): "To the extent permitted by law, [i]f a witness whose testimony…" This provision would often be enforceable under section 7 of the FAA, for example, because a party seeking to compel a witness to testify under that provision must do so in the district where the arbitrator is sitting, which may not be within 100 miles of the witness.

I also recommend revising Rule 32(d) to state, "Any such order ~~may~~ shall be conditioned … costs associated with such examination, including fees of the arbitrator." Without the fee-shifting requirement, the claimants can abuse this provision to increase the respondent's cost unnecessarily.

AAA Panelist Comment #8

Panelist: **Anonymous**
Date Received: **2/11/25**

AAA:

As a AAA panelist, I believe the revisions generally look good. Improving the flow of rules is a good idea. Placing the rules in chronological order (from commencing arbitration to rendering award) helps both parties and arbitrators better understand how the rules tie together and become aware of relevant rules. It is worth double-checking to confirm that the new order is strictly chronological.

The new Rule 11 regarding mediation needs more attention. For example, it provides "AAA may refer the parties to mediation." What does "refer" mean in this context? Does it mean: "Hey, we have mediation if you would like it"? Or, does it mean: "AAA has decided that you must mediate"? If "refer" has the latter, compulsory meaning, who at AAA decides this? What qualifications does that person have to make such a decision?

I strongly recommend that AAA avoid ordering anyone to mediation. As an experienced mediator and counsel to parties in mediation, I can say without doubt that mediation is effective only if both parties genuinely want to try to settle their dispute. Forcing an unwilling party into mediation is a waste of time and money. As an experienced mediator once told me: "You can't mediate with yourself." Moreover, ordering parties to mediation is likely to anger most parties. Indeed, an involuntary mediation order from AAA may be one issue that both parties can agree on.

Who pays for the mediation? Unless both parties must agree to mediation, some consumers or their counsel may demand mediation with no intention of settling but with the intended purpose of running up the business' costs. Allowing such conduct does mediation and consumer arbitration no good.

This new rule refers to AAA consumer mediation rules. However, no such rules appear on AAA's website, and none were provided in the e-mail package. So, it is impossible to fully evaluate this proposed change without seeing the consumer mediation rules.

AAA Panelist Comment #9

Panelist: **Hon. Dan Hinde**
Law Firm: **Dan Hinde PLLC**
City: **Houston, TX**
Date Received: **2/12/25**

I am writing to provide comments on the proposed revisions to the AAA Consumer Rules.

I have been on the Consumer Panel for several years and have handled numerous consumer arbitrations. I have a general comment for all consumer cases, but I also have some comments on personal injury cases brought under the Consumer Rules.

General Comment
First, I have a general comment applicable to all consumer cases. I do not think the rules regarding dispositive motions (old Rule R-33, proposed Rule R-31(b)) provide sufficient guidance. These rules provide no standard to guide an arbitrator on whether to grant a motion and dispose of (or narrow a case).

For example, Federal Rules 12 and 56 provide well known standards for when a court may dismiss a claim or grant a summary judgment without a full trial on the merits. But old Rule R-33 and proposed Rule R-31(b) do not state what the movant must show (or what the responding party may show in response) to determine whether to grant the motion in whole or in part.

Since one of the few grounds for vacating an arbitration award is when an arbitrator "refus[es] to hear evidence pertinent and material to the controversy," (FAA s. 10(a)(3)), this lack of any standard for determining when to dispose of a case without a Final Hearing is problematic and could build in grounds for vacatur of a decision granting a dispositive motion.

I suggest revising the rules on dispositive motions to state some sort of standard, whether it be failure to state a claim on which relief can be granted, no evidence to support an essential element of a claim, conclusive proof of a defense, etc.

Personal Injury Cases
In addition to the comment above regarding dispositive motions, I also have a couple of comments regarding personal injury cases that are handled under the Consumer Rules. A decent number of the cases I have handled involved personal injury claims. I do not think the Consumer Rules are well

adapted to handling personal-injury claims, and I do not think the proposed revisions really address this. Here are some thoughts:

First, I think there should be a set of mandatory disclosures. The default categories do not need to be as wide as typical in court cases. But I do think disclosure of the following should be routine in a personal injury consumer case:
Medical records, or an authorization to release medical records.
List of medical providers who treated the claimant for the alleged injury.
Disclosure of any insuring or indemnity agreements.
Disclosure of any settlements reached with other parties.
The amount of economic damages and method for calculating them.

Second, in some personal injury cases, respondents will challenge the amount of some medical bills as unreasonable even if the claimant establishes that the injury was caused by the respondent. In court cases in Texas, there is a statute that helps streamline identifying such medical bills so that the plaintiff does not have to call physicians to testify on the reasonableness of every bill. See Tex. Civ. Prac. & Rem. Code 18.001. I suggest there be some provision in the Consumer Rules that addresses how to specifically identify which bills will be challenged as unreasonable so that the parties can focus resources and hearing time solely on those bills and not have to depose every physician and call experts to opine on reasonableness of every bill.

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AAA Panelist Comment #10

Panelist: **Joanne Barak**
City: **Palisades, NY**
Date Received: **2/14/25**

Dear Folks,

In my experience, many consumers want to be seen and heard so that their full story is presented. Even if they are not ultimately successful in winning their case, the fact that they were able to have the opportunity to speak may have some benefit. For this reason, I would not raise the threshold of documents only cases to 50k. I might even lower it. If the parties agree to a desk arbitration, they can

agree regardless of the amount in dispute. Additionally, my preference is Zoom over telephone. But the parties should be given the option of one or the other. Hope I'm not an "outlier" on this issue.

Kind regards,

Joanne Barak

AAA Panelist Comment #11

Panelist: **Anonymous**
Date Received: **2/14/25**

I have reviewed the proposed rule revisions and generally agree with the changes. I have the following additional comments:

(1) I suggest eliminating the two-step process for dispositive motions. It creates redundancy, and the ruling on the initial question of whether a dispositive motion will be allowed telegraphs how the arbitrator views the proposed motion if one is allowed. Just let the arbitrator build deadlines into the case schedule for parties to file dispositive motions and have them decided. Most counsel, if they are sensitive to costs, will not file a dispositive motion unless they think it has a good likelihood of success.

(2) If it is possible, set some non-binding benchmarks for how long it should generally take cases to get from filing of the demand to the evidentiary hearing. I am used to litigating in courts that move cases along, and I try to follow that model in managing my docket as an arbitrator, yet most lawyers tend to request unreasonably long case schedules. I find that I often have a greater desire for expediting cases than the attorneys do, and some benchmarks as a reference point would help to adjust the expectations of attorneys and litigants for how long an arbitration case should take from filing to final disposition. The benchmarks could vary based on the number claims, number of parties, complexity of the case, etc.