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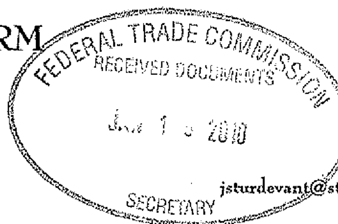

January 16, 2010

Federal Trade Commission (*via overnight service*)
Office of the Secretary
Room H-135 (Annex A)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Debt Collection Roundtable 3 – Comment, Project No. P094806

To Whom It May Concern:

I am writing to submit some additional materials that followed up on my remarks about abuses related to the imposition and implementation of mandatory pre-dispute arbitration clauses in consumer and employment agreements during our panel presentation on October x, 2009. I apologize for the delay in getting these materials to you. I tried to submit online but received an MAC error message.

The materials focus on the extortionate threats made to JAMS (formerly Judicial Arbitration and Mediation Services, Inc.) and the American Arbitration Association (AAA), in addition to the well-document and publicized abuses in connection with consumer debt collection arbitrations administered by the National Arbitration Forum (NAF). These documents and documentary support demonstrate, at least to me and others, the insidious nature of the relationships between corporate entities and the largest providers of arbitration services in this country. They also point up the inherent unfairness of those proceedings and the bias that tips so heavily in favor of the corporate entity interest.

I hope you will make these documents a portion of the written record of these hearings. I would be happy to answer any questions that you or any member of the staff might have.

Sincerely,

James C. Sturdevant

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Supplemental Information Regarding Extortionist Threats to JAMS and AAA Regarding Corporate Entities' Demands That Arbitration Services Refuse to Administer Classwide Arbitrations

by James C. Sturdevant
The Sturdevant Law Firm,
A Professional Corporation

The following information focuses on the extortionist threats in 2004 and 2005 by representatives of large corporate entities and the commercial law firms that represent them against JAMS (formerly Judicial Arbitration and Mediation Services, Inc.) and the American Arbitration Association (AAA) in an effort to ensure that neither of those two arbitration providers would administer a classwide arbitration. This chronological information is highly relevant to a determination of whether consumer and employment arbitrations, supposedly mandated by provision in take-it-or-leave-it form agreements provided by corporate entities, create unconscionable conditions completely at odds with fair and impartial decision makers and the entities that oversee them and administer private contractual arbitrations. The following is the chronological information regarding the extortionist threats made by large corporate interests both to JAMS and AAA which have resulted in changed policies by both arbitration providers.

I. JAMS

A. Congressional Legislation.

The new JAMS policy became effective at a time when Congress was seriously considering legislation introduced in both the House and the Senate to prohibit binding pre-dispute arbitration clauses in all consumer, employment, and franchise agreements. I was in Washington on April 29 for "Lobby Day," during which Senator Feingold reintroduced the bill he had introduced in several prior sessions. Unlike in prior years, this legislation had a real chance of passage because of the significant record of abuse by corporate entities, not only in seeking to impose forced arbitration on consumers and employees, but doing so in a way that sharply limits the rights and remedies of consumers and employees. For example, Senator Feinstein, who has a record of supporting arbitration, told us through her aid that "Things have changed," and are leading Senator Feinstein to view forced arbitration in a different light. This was significant movement from a key Senator on this issue. Senator Feinstein is looked to by a number of moderate Democrat Senators with respect to their vote on this issue.

The members of the coalition in support of this legislation is illuminating. The following list is illustrative, but not inclusive: The National Association of Consumer Advocates, The National Consumer Law Center, AARP, The National Employees Lawyers Association, The American Association for Justice, The Consumer Federation of America, Consumer Action, Public Citizen, US PIRG, SEIU, the AFL-CIO, and a number of other smaller labor organizations. I have personally worked with members of the coalition now for more than three years as the impetus for a change in federal legislation has increased dramatically.

Chronology of Events

JAMS Policy concerning class wide adjudication when banned by pre-dispute arbitration clause.

Date	Event
1996	JAMS issues "Minimum Standards of Procedural Fairness." Standard No. 3 provides that JAMS will not administer an arbitration unless remedies otherwise available under federal, state or local law remain available.
October 4, 2002	SFTLA's Resolution boycotting AAA.
September 1, 2004	JAMS issues Interim Policy explaining reasons and background.
November 12, 2004	JAMS issues its "Policy Regarding Use of Class Action Preclusion Clauses in Consumer Cases" providing that it will refuse to honor and conduct arbitration under arbitration clauses that prohibit class wide adjudication.
March 10, 2005	JAMS rescinds its November, 2004 policy under the banner of neutrality.
April, 2005	Meeting between representatives of JAMS and subcommittee of SFTLA Board concerning JAMS retraction of its November, 2004 policy statement.
April 27, 2005	SFTLA issues its written resolution providing that it will encourage its members not to use JAMS arbitrators and mediators unless a client insists because of the recision of the November, 2004 policy statement under the threat by commercial entities and their law firm of the withdrawal of all mediation and arbitration business from JAMS nationwide.
May 19, 2005	JAMS publicly issues "white paper" authored by Jay Welsh and Kimberly Taylor imposing absolute and ultimate burden on consumer/employee to obtain decision from highest court in each particular state where arbitration is to be held holding that class wide adjudication ban in arbitration clause is unconscionable under that state's law.
June 27, 2005	California Supreme Court issues decision in *Discover Bank v. Superior Court* holding class action bans in most consumer cases unconscionable.
March, 2007	SFTLA sends out public invitation to its April, 2007 Trial Lawyer of the Year Awards (TLOY) Dinner listing JAMS prominently as sponsor of the event.

May 2, 2007	SFTLA TLOY Awards Dinner including a full page sponsorship by JAMS in the awards dinner program.
March, 2008	SFTLA sends out public invitation to its April, 2008 TLOY Awards Dinner listing JAMS prominently as sponsor of the event.
April 23, 2008	SFTLA TLOY Awards Dinner including a sponsorship by JAMS in the awards dinner program.

B. Current Issues Affecting Forced Arbitration.

There are several issues which now dominate litigation challenging forced arbitration. Clauses containing prohibitions on classwide adjudication is one. Another, and equally important, is the so-called "gateway" issue of who decides key questions before and during arbitration – judges or arbitrators. Consumer and employee advocates have argued for years that the Federal Arbitration Act and the California Arbitration Act both require that judges, not arbitrators, decide these fundamental questions. So far, we have been successful. The United States Supreme Court and the California Supreme Court have issued repeated decisions that the issue of whether there is an agreement to arbitrate or whether there are defenses to any such agreement are issues for judges, not arbitrators, to decide. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* (1967) 388 U.S. 395. The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "*question of arbitrability*," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers* (1986) 475 U.S. 643, 649, 106 S.Ct. 1415 (emphasis added). Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide. *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943-46. Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court. *See, e.g., AT&T Technologies, Inc. v. Communications Workers* (1986) 475 U.S. 643, 651-52 (holding that a court should decide whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83; *Discover Bank v. Superior Court* (2005) 36 Cal.4th 138; *Gentry v. Superior Court* (2007) 42 Cal.4th 443.

Similarly, under California law, judges are integral to the process involving class actions. Judges, not arbitrators, are required to decide whether a class should be certified and what notice is appropriate. *Keating v. Superior Court* (1982) 31 Cal.3d 584, *rev'd on other grounds sub nom, Southland Corp. v. Keating* (1984) 465 U.S. 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42. Only when an arbitration clause is silent with respect to classwide adjudication is it up to the arbitrator to decide, under the circumstances presented, whether classwide adjudication is appropriate. *Bazzle v. Green Tree Financial Corp.* (2003) 537 U.S. 1098.

The United States Supreme Court has been clear in its jurisprudence that an arbitrator makes decisions *only* with respect to the *scope* of arbitrability when the entire agreement is challenged as illegal. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* (1967) 388 U.S. 395; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440. But when *only* the arbitration clause (not the entire agreement) is challenged as illegal under state law, judges must make the decision. *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

II. AAA

A. One Kind of Extortionist Threat to AAA.

JAMS is not the only arbitration service to be subject to the pressures of corporate entities to compel policy changes. For example, following the March, 2005 rescission of its policy respecting class actions by JAMS, AT&T moved to compel arbitration and the arbitrator, affiliated with AAA, authorized a classwide arbitration. AT&T in writing told AAA that if it did not reverse the arbitrator's decision, business interests would withhold business from AAA as they had threatened to do with JAMS. This chain of events is recounted at some length in a published federal decision. *In re Universal Service Fund Telephone Billing Practices Litigation*, 370 F.Supp.2d 1135 (D. Kan. 2005).

B. Other Examples of AAA Policies and Conduct in Favor of Corporate Interests.

In the first couple of years of the 20th Century AAA took steps to repeatedly express public favoritism toward corporate interests over consumers and employees. These included the following:

- AAA filed amicus briefs in several cases supporting the corporate interests against the positions advanced by the employee or consumer.
- AAA engaged in extensive advertising championing its representation of corporate interests from Alcoa to Xerox.
- AAA frequently abandoned special protocols it adopted for arbitration involving healthcare, and consumer or employee issues at the behest of the corporate entity.
- AAA publicly opposed legislation in California designed to require transparency in arbitration involving consumers and employees; and
- AAA publicly excoriated plaintiffs lawyers regarding their support of such legislation.

For all of these reasons, many plaintiffs trial lawyer organizations, including Consumer Attorneys of California and the San Francisco Trial Lawyers Association, publicly informed their members that their organizations were boycotting all neutrals affiliated with AAA, asserting the demonstrated lack of fairness by AAA.