Appeal Nos. 17-55813, 17-56082

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONSTER ENERGY COMPANY,
FKA HANSEN BEVERAGE COMPANY,
Petitioner-Appellee,

v.

CITY BEVERAGES, LLC,
DBA OLYMPIC EAGLE DISTRIBUTING,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE GARY KLAUSNER, JUDGE
CASE NO. 5:17-CV-00295-RGK-KK

BRIEF OF JAMS, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The amicus curiae represented in this brief does not have a parent corporation or a publicly held company which owns 10% or more of its stock. Fed. R. App. P. 26.1.

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STATEMENT OF INTEREST[1]

JAMS, Inc. provides alternative dispute resolution ("ADR") services, annually administering over 15,000 arbitrations, mediations, and reference proceedings conducted by its approximately 400 neutrals. Because it is neutral, JAMS refrains from supporting or opposing challenges made by parties to the arbitral process or arbitration awards. Accordingly, it did not file an Amicus Brief challenging Olympic Eagle Distributing or supporting Monster Energy Company in the appeal before the panel. Indeed, this is the first amicus brief JAMS has ever submitted in any case.

But the precedential aspects of the decision in this case, which vacates a final award issued by a JAMS arbitrator, are so deleterious to efficient commercial arbitration, and so incorrect in their factual assumptions (which step well outside the case record), that JAMS concluded it has no choice but to take this extraordinary step. Because the opinion applies to arbitrators who have any ownership stake whatsoever in an arbitration firm, no matter how small, and because

[1] Amicus certify that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the amicus and their counsel—contributed money that was intended to fund preparing or submitting the brief.

almost one-third of JAMS neutrals have an ownership stake in JAMS, the decision directly impacts JAMS's neutrals and JAMS's business.

As discussed below, the Court's decision effectively legislated two brand new vague and open-ended disclosure requirements for commercial arbitrations that rest on assumptions unsupported either by evidence in the record or reality outside the record. As a result of the opinion, parties in pending and final arbitration proceedings have already begun requesting additional information from JAMS, even beyond what is required by the decision (including personal financial information of the arbitrator), seeking bases to challenge an arbitrator or a final award after already losing an arbitration proceeding.

JAMS submits this brief to assist the Court in understanding why en banc rehearing in this case is important to the policies of efficiency, neutrality, and finality that rest behind commercial arbitration.

INTRODUCTION

Rehearing en banc should be granted because the decision greatly expands a potential arbitrator's disclosure requirements beyond anything found in the statutes, ethical standards, procedural rules, and case law governing arbitrator disclosures in commercial arbitration. It also undermines the efficiency and finality of arbitration by allowing

parties to challenge arbitrators and final arbitration awards based only on an *assumed* "specter of partiality."

The opinion is based on expansive assumptions that are not grounded in fact. First, the majority assumes that if an arbitrator affiliated with an arbitration provider owns an equity interest in the organization, then, *by definition*, that arbitrator's ownership interest "*greatly exceeds* the general economic interest that all [arbitrators] naturally have in the organization [and] is therefore substantial." Maj. Op. 12 (emphasis added). Second, the opinion further assumes that if an ADR provider has administered other matters for a party in the past, then an owner-arbitrator *intrinsically* has a substantial interest in that party's business with the provider. Maj. Op. 11-12.

But there is no evidence or legal support—in the case record or otherwise—for either of the majority's assumptions, which are factually incorrect. Owner-neutrals earn only a tiny fraction of their income from ownership profits, well below the threshold for judicial disclosure, and do not know who the company's repeat clients are. Because the majority made these assumptions acknowledging there was nothing in the record to support them, Maj. Op. 12 n.3, the opinion essentially establishes a per se presumption that arbitrators with *any* ownership interest in an ADR provider that has administered multiple cases

involving one of the parties *necessarily* suffer from "repeat player" bias in commercial cases they arbitrate. And the majority is factually wrong about that, given the nature of arbitration firm ownership.

The Court's opinion has the unintended effect of undermining the key policy purpose of commercial arbitration: to provide an efficient, neutral, and final resolution of commercial disputes. The new requirements are so ill-defined and open-ended they will create delay, uncertainty, and added cost for the many sophisticated parties participating in complex commercial arbitrations. Parties will use the opinion to demand substantially more information about arbitrators and the ADR providers than any statutes, codes of ethics, or ADR provider policies currently require. It will create new bases for losing parties to attempt to challenge arbitrators and unravel final awards, slowing down the arbitration process and adding a big question mark to the periods that usually follow arbitration results.

This Court should therefore rehear this matter en banc to resolve these "question[s] of exceptional importance" to thousands of litigants within the Court's jurisdiction who pursue arbitration every year. Fed. R. App. P. 35(a)(2).

ARGUMENT

I. The Opinion's New Disclosure Requirements Are Unrelated To An Arbitrator's Appearance Of Impartiality.

The decision in this case established two brand new disclosure requirements that have never been ordered by any statute, rule, or opinion, and then applied these new requirements *retroactively* to vacate a final award because of the arbitrator's failure to comply with these previously not-required disclosures. Maj. Op. 11-13. The majority held that the arbitrator in this case (Retired California Judge John W. Kennedy) had a "sufficiently substantial" ownership interest in JAMS and that JAMS and Monster had engaged in "nontrivial business dealings" in the past, and that those two "facts" created an impression of bias requiring vacatur. Maj. Op. 11-12.

The majority acknowledged, however, that it had no "empirical evidence" supporting its factual conclusions, meaning they were based solely on the majority's *assumptions*. Maj. Op. 12 & n.3 (concluding it was unnecessary to know "the exact profit-share that the Arbitrator obtained" from "Monster-related arbitrations" to find that his interest in such business was "substantial"). First, the majority assumes that if an arbitrator affiliated with an arbitration provider owns an equity interest in the organization, then, *by definition*, that arbitrator's ownership interest "*greatly exceeds* the general economic interest that

all [arbitrators] naturally have in the organization [and] is therefore substantial." Maj. Op. 12 (emphasis added, footnote omitted). The opinion further assumes that if an ADR provider has administered a certain number of matters for a party in the past, then the provider has "done more than trivial business" with the party, establishing that an owner-arbitrator *intrinsically* has a substantial interest in that party's business with the provider. *Id.* at 11-12.

The majority's assumptions, however, are incorrect. As explained below, at JAMS, an owner-arbitrator's interest in the revenue generated from any particular party's business is de minimis. Moreover, even if an arbitrator owned a substantial interest in an ADR provider that had done more than "nontrivial business" with a party, that still does not support a *per se presumption* of bias in favor of that party.

A. An arbitrator's ownership interest in an ADR provider does not create a substantial interest in that party's business.

The majority stated an arbitrator's ownership interest in the entity administering the arbitration is "the key fact that triggered the specter of partiality." Maj. Op. 9. The majority further determined that the "*facts* demonstrate" the arbitrator in this case "had a 'substantial interest'" in JAMS and therefore a substantial interest in Monster-

generated JAMS revenue. Maj. Op. 12 (emphasis added). The majority's assumption that JAMS's owner-arbitrators have a substantial interest in business from "repeat players," which necessarily creates an impression of bias in favor of those parties, is not demonstrated by the facts, and is indeed contrary to them.

Although an ownership interest provides a small increase in a neutral's income, that increase is untethered to the revenue from any specific party, lawyer, or law firm. At JAMS, 128 of 395 neutrals are currently owners, and each has one equal share which cannot be marketed, devised, or transferred. Although JAMS owners are entitled to a profit allocation each year, no owner-neutral has ever received more than *one-tenth of one percent* of JAMS's total revenue ($100 for every $100,000 of revenue) in a single year. That is because JAMS revenue is paid mostly to the arbitrator who arbitrated the case, then used for expenses, and a small balance is distributed to the owners after the end of the fiscal year. The profit distributions are not tied to any specific matter and are paid in one lump sum. For example, the arbitration fee for this case was $160,000. Judge Kennedy's profit distribution as an owner is, at most, $160 (0.1%). That $160 was attributable half to Monster ($80) and half to Olympic ($80). Judge

Kennedy's profit distribution of $80 attributable to Monster does not equate to a "substantial interest" in Monster's JAMS business.

Further, the revenue attributable to any one party in a given time period, even a "repeat player," is a small fraction of the organization's total revenues. For example, JAMS administered 97 arbitrations and 17 mediations involving Monster between 2004 and March 2017 (the month and year of the report on which the majority relies), but JAMS administered approximately 127,785 total cases during that same time period.[2] Thus, the arbitration matters JAMS administered for Monster accounted for only approximately 0.09% of all matters administered by JAMS during this period. Even if Judge Kennedy was a JAMS owner during that entire 13-year period, his 0.1% profit allocation of Monster's extremely small slice of JAMS's overall business does not "greatly exceed[]" the financial interest of non-owners in Monster's business. *See* Maj. Op. 12.

[2] The majority stated that JAMS had administered 97 arbitrations for Monster "over the past five years." Maj. Op. 12. That is inaccurate. The 97 arbitrations were administered for Monster over approximately 13 years. The total count of all proceedings per party (*i.e.*, more than five years) is included in column E of the California Code of Civil Procedure Section 1281.96 report JAMS publishes every quarter.

Additionally, the number of matters administered for a party is not a reliable metric for determining whether the ADR provider conducted "more than trivial business" with that party. *Id.* A party could commence a single complex matter that produces significant revenue, while another party could commence dozens of simple matters that produce far less revenue. The "repeat player" who produced less revenue would meet the majority's "more than trivial business" standard while the party with only one (or only a few) large matters would not. For example, during the time period JAMS administered 97 arbitrations and 17 mediations for Monster, JAMS administered 140 arbitrations, 10 reference proceedings, and 87 mediations involving Monster's law firm (Solomon, Ward, Seidenwurm & Smith), and 93/28 arbitrations, 65/5 references, and 429/157 mediations for Olympic's two law firms (Bryan Cave and Foster Pepper), respectively. Under the majority's decision, JAMS would not need to disclose the number of matters it administered for each of these law firms, even if the revenue generated from one of the firms substantially exceeded the revenue generated from Monster.

Therefore, the majority's assumption that owner-neutrals have a "substantial interest" in revenue attributable to a repeat player that "greatly exceeds the general economic interest that all JAMS neutrals

naturally have in the organization" is unsupported and, in fact, contradicted by the facts. *See* Maj. Op. 12. Because the arbitrator here had a very small ownership interest in JAMS, and JAMS has provided a very small percentage of its dispute resolution services to Monster, but the Court vacated the arbitration award anyway, the decision essentially held that if an arbitrator owns *any* equity interest in an ADR provider that has previously administered more than one matter with a party to the arbitration, that per se creates an impression of bias supporting vacatur. *Id.* at 11-12 & n.3.

B. Even a substantial ownership interest in an ADR provider that had more than "nontrivial business" with a party does not create an appearance of bias in favor of that party.

Although the majority's assumptions were wrong, even if a neutral had a large ownership interest in an ADR provider that had administered a significant portion of its cases for a party, that does not mean the neutral intrinsically has a financial incentive (or any incentive) to rule in favor of the purported "repeat player."[3]

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[3] The majority adopted a "repeat player" bias theory which posits that the provision of prior services by a neutral or a sponsoring organization alone creates an impression of bias in future matters for the "repeat player." Maj. Op. 15. Although there have been studies purportedly showing such a bias, the studies *all involve mandatory consumer and*

At JAMS, a neutral's income is not affected in any material way by the amount of business a party has done with the organization, whether the neutral is an owner or not. First, as recognized by the dissent, "arbitrators are hired and paid by the parties for whom they conduct private arbitrations." Dis. Op. 19. Therefore, the vast majority of a neutral's compensation, whether an owner or not, is derived directly from work performed on matters over which they preside.

Second, JAMS neutrals do not receive financial credit or bonuses for the creation or retention of customer relationships, nor any financial reward if a party returns to JAMS for a subsequent matter. Therefore, even if a party involved in an arbitration with a particular owner-neutral did return to JAMS, the owner-neutral would receive at most 0.1% of the revenue generated from that subsequent matter unless the parties in the subsequent matter requested the same neutral. And while every neutral, regardless of ownership status, has a financial interest in being asked to arbitrate a subsequent matter for a party, that does not lead to favoritism of one party over the other because the

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employment arbitration, not commercial arbitration between sophisticated parties. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 6-7 & n.32-34 (Feb. 2019).

arbitrator benefits if *either* party requests his or her services in the future.

Third, neutrals have no ability to steer appointments of matters to themselves. JAMS, as with many ADR service organizations, provides for the selection of neutral arbitrators through a strike and rank process of which the arbitrator has no knowledge and in which they do not participate. *See* JAMS Comp. Arb. R. 15(a)-(e), *available at* https://tinyurl.com/vn32mdo; AAA Comm. Arb. R. R-12, *available at* https://tinyurl.com/tvaphpd; ADR Servs., Inc. Arb. R. 11, *available at* https://tinyurl.com/rwyxauz; Judicate W. Comm. Arb. R. 5.A.3, *available at* https://tinyurl.com/rmqsya4. At JAMS, strike lists are assembled by a trained case manager based on a variety of factors, such as the parties' agreement (specifically whether the agreement calls for the inclusion of specific neutrals), the location of the dispute, the issues involved, the amount of the claim being asserted, diversity of the panel, and expertise of the panelists. Neither a neutral's status as an owner nor the fact of prior service for a party are criteria for inclusion on a strike list.

Further, owner-neutrals do not receive any information regarding the total fees collected from any party and do not have access to information that would enable a neutral to determine the extent to

which a party, or counsel or law firm for a party, has contributed to the overall profits of JAMS. In fact, all neutrals—whether an owner or not—have information only about the matter for which they are being considered as an arbitrator, including the total number of times a party or counsel in the current matter have appeared *before the specific neutral* in the past. They are not told how many times a party, attorney, or law firm has used JAMS's ADR services with other neutrals. That is because the important information for parties to know is what relationships and professional interactions the proposed *arbitrator* has had with the *parties* or their *counsel.*

Finally, though it should go without saying, revenue generated through service as a neutral and/or as a sponsoring organization is not dependent upon delivering a specific outcome; quite the opposite. To ensure arbitrators can provide decisions that are neutral, they are provided immunity. *See Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987). Like judicial immunity, arbitral immunity "protect[s] the decision-maker from undue influence and protect[s] the decision-making process from reprisals by dissatisfied litigants." *Id.*

In sum, there is simply no factual or record basis to *assume* that any ownership interest in an arbitration provider creates *any* potential bias in favor of any party or lawyer, even a "repeat player." To the

contrary, every neutral, *regardless of ownership status*, has the same interest in providing high quality neutral services so that even losing parties or their counsel will consider their appointment in other matters.

II. The Additional Disclosures Required By The Majority's Opinion Do Not Further Arbitration's Public Policy Goals Of Neutral And Final Dispute Resolution, And May Undermine Them.

To fulfill the policy goals of neutral arbitration—and ensure that unhappy litigants cannot easily unravel a final award, so that arbitration remains an efficient and final dispute resolution process—numerous statutes, rules, and canons of ethics have been promulgated to guide the scope of required arbitrator disclosures.[4] These disclosures

[4] The numerous rules and standards governing arbitrator disclosures all require proposed arbitrators to disclose if they themselves have any financial or personal interest in the parties or outcome of the arbitration or themselves have any financial, business, or personal relationships with any of the parties. *See*, *e.g.*, Cal. Code Civ. Proc. § 1281.9(a); ABA/AAA Code of Ethics for Arbitrators in Comm. Disputes, Canon II; Cal. Rules of Court Ethics Standards, Standards 1(a), 7 (d)(10), (11); Revised Uniform Arbitration Act, § 12; JAMS Comp. Arb. R. 15(h); AAA Comm. Arb. R. R-17(a); ADR Servs. Arb. R. 12; Judicate W. Comm. Arb. R. 5.A.4.b. None of the existing rules and standards require disclosure about the *ADR provider's* prior dealings with a party in commercial arbitrations. Indeed, California law explicitly only requires disclosures about the ADR provider's prior

provide the parties with the information they need to vet the proposed neutral and to either accept or reject the appointment before the parties invest time and money into the arbitral process.

The decision in this case greatly expands arbitrators' disclosure requirements beyond anything found in existing law, requiring that arbitrators in this Circuit now disclose, in addition to information about their own interests and relationships to the parties or the proceeding, (1) whether they have any equity interest in the *ADR provider*, no matter how small, and (2) the *ADR provider's* prior business dealings with any of the parties. Maj. Op. 14, 17. While it may seem that additional disclosures can only be a good thing, these new requirements actually raise more questions than they answer. They greatly complicate the arbitrator selection and challenge process, undermine the important goals of efficiency and finality, and invite unhappy litigants to engage in an unending effort to disrupt both pending and final arbitrations.

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services in *consumer and employment* arbitrations, indicating the California Legislature's determination that such information was not required in commercial arbitrations. *Compare* Cal. Code Civ. Proc. § 1281.96; Cal. Rules of Court Ethics Standard 8(b), *with* Cal. Code Civ. Proc. § 1281.9; Cal. Rules of Court Ethics Standard 7(d).

The majority downplays the impact of its decision by assuming that ADR providers "will have no difficulty fulfilling, and even exceeding, the [new disclosure] requirements" going forward. Maj. Op. 16; *see also* Maj. Op. 14. But the majority overlooks how vague and open-ended the new disclosure requirements are and the impact these requirements will have on the arbitrator selection and challenge process going forward. *See* Dis. Op. 23-25; Reh'g Pet. 17-18.

The decision provides an avenue for parties resisting arbitration altogether to strike all arbitrators from a list simply because the ADR provider had done more than "nontrivial business" with the other party in the past.[5] The decision also provides an avenue for parties to strike all owner-neutrals from lists of potential arbitrators for reasons entirely unrelated to whether the particular arbitrator may be biased.

Moreover, because the majority's two newly-required disclosures are so vague and extend far beyond any potential bias of a particular arbitrator, the opinion invites disappointed parties to challenge an arbitrator in a pending proceeding, or seek to unravel virtually any

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[5] By its terms, the decision requires *all* arbitrators affiliated with an ADR provider to disclose the provider's "nontrivial" business dealings with a party even if the arbitrator is not an owner and even if the provider does not have owner-neutrals. Maj. Op. 14, 17; *see* Dis. Op. 22-23 n.5.

arbitration award, based on a post-hoc claim of nondisclosure—even though, as in this case, no statute, rule, or opinion had ever required such a disclosure. *See* Dis. Op. 22-23 (providing examples of disclosures that are not specifically required by the majority opinion, but which a party could claim after-the-fact should have been disclosed); Reh'g Pet. 17-18 (same).

For example, assume an arbitrator discloses an ownership interest in his or her administrating organization and that the organization has previously mediated ten cases with a party, but the opposing party accepts that arbitrator nonetheless. If at any time during the pending arbitration, the arbitrator makes a ruling the party does not like or issues an award the party is unhappy with, that party can ask additional questions in an effort to have the arbitrator disqualified or the award vacated. This is not at all speculative. Parties in pending and final arbitration proceedings have already begun requesting additional information from JAMS, beyond what is required by the decision (including personal financial information of the arbitrator), seeking some basis to challenge the arbitrator or the final award.

The full Court should rehear the matter so, at a minimum, it can establish precise guidelines for what information must be disclosed and what non-disclosures may give rise to an appearance of partiality.

CONCLUSION

For the reasons discussed above, amicus curiae JAMS, Inc. urges the full Court to grant rehearing en banc.

Respectfully Submitted,
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Date: December 16, 2019

By: *_/s/ Kelly Woodruff_*

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CERTIFICATE OF COMPLIANCE

Counsel for Amicus Curiae JAMS, Inc. certifies:

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 29–2(c)(2). This brief contains 3,656 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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