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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

Skot Heckman, Luis Ponce, Jeanene
 Popp, and Jacob Roberts, on behalf of
 themselves and all those similarly
 situated,

Plaintiffs,

v.

Live Nation Entertainment, Inc., and
 Ticketmaster LLC,

Defendants.

Case No. 2:22-cv-00047-GW-GJS

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANTS' MOTION TO
 COMPEL ARBITRATION**

The Honorable George H. Wu

Hearing Date: May 26, 2022

Hearing Time: 8:30 a.m.

Courtroom: 9D, 9th Floor

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	3
A. Plaintiffs’ Ticket Purchases & Agreement to the Amended Terms.....	4
B. The Current Terms of Use	7
C. New Era.....	8
III. LEGAL STANDARD	10
IV. ARGUMENT	11
A. The Terms Constitute a Valid, Enforceable Agreement.....	11
B. The Parties Clearly and Unmistakably Delegated Arbitrability to the Arbitrator.....	13
C. Replacing JAMS with New Era—an Arbitration Provider That Has Procedures in Place to Litigate Mass Arbitrations—Does Not Render the Terms Unconscionable.....	14
1. New Era’s Procedures for Mass Arbitrations Are Fair, Equitable, and Mirror the MDL Procedures Used By Courts.....	15
2. New Era’s Subscription Option Is Not Unconscionable.....	20
3. The \$300 Filing Fee Is Not Unconscionable	22
4. The Attorneys’ Fees Provisions Are Not Unconscionable.....	23
D. Even If the New Era Arbitration Agreement Were Unenforceable, Plaintiffs Would Still Be Required to Arbitrate	24
E. This Action Should Be Dismissed	25
V. CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Abernathy v. DoorDash, Inc.</i> , 438 F. Supp. 3d 1062 (N.D. Cal. 2020)	22
<i>Adams v. Postmates, Inc.</i> , 2020 WL 1066980 (N.D. Cal. Mar. 5, 2020)	22
<i>Ajzenman v. Office of Comm’r of Baseball</i> , No. CV 20-3643, 2020 WL 6031899 (C.D. Cal. Sept. 14, 2020)	5, 12
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011)	11, 24
<i>Brennan v. Opus Bank</i> , 796 F.3d 1125 (9th Cir. 2015)	11, 14
<i>Carmax Auto Superstores Cal. LLC v. Hernandez</i> , 94 F. Supp. 3d 1078 (C.D. Cal. 2015)	17
<i>Dickey v. Ticketmaster LLC</i> , No. CV 18-9052, 2019 WL 9096443 (C.D. Cal. Mar. 12, 2019)	1, 12, 13
<i>Epic Sys. Corp. v. Lewis</i> , 138 S. Ct. 1612 (2018)	10, 15, 25
<i>Fleming v. Weather Shield Mfg., Inc.</i> , No. 18-00589, 2018 WL 6010365 (C.D. Cal. May 14, 2018)	22
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	20
<i>Hansen v. Ticketmaster Entm’t, Inc.</i> , No. 20-cv-02685, 2020 WL 7319358 (N.D. Cal. Dec. 11, 2020)	5, 11
<i>Henry Schein, Inc. v. Archer & White Sales, Inc.</i> , 139 S. Ct. 524 (2019)	11
<i>Himber v. Live Nation Worldwide, Inc.</i> , No. 16-CV-5001, 2018 WL 2304770 (E.D.N.Y. May 21, 2018)	4, 14

1	<i>Hodges v. Comcast Cable Commc'ns,</i>	
2	21 F.4th 535 (9th Cir. 2021).....	15
3	<i>In re Grice,</i>	
4	974 F.3d 950 (9th Cir. 2020).....	10
5	<i>In re Holl,</i>	
6	925 F.3d 1076 (9th Cir. 2019).....	12
7	<i>In re Zimmer M/L Taper Hip Prosthesis,</i>	
8	MDL No. 2859, 2022 U.S. Dist. LEXIS 11866 (S.D.N.Y. Jan. 21,	
	2022).....	18
9	<i>In re Zyprexa Prod. Liab. Litig.,</i>	
10	467 F. Supp. 2d 256 (E.D.N.Y. 2006).....	18
11	<i>Johnmohammadi v. Bloomingdale's, Inc.,</i>	
12	755 F.3d 1072 (9th Cir. 2014).....	25
13	<i>Johnson v. Oracle Am., Inc.,</i>	
14	No. 17-cv-05157, 2017 WL 8793341 (N.D. Cal. Nov. 17, 2017)	13
15	<i>Lee v. Ticketmaster L.L.C.,</i>	
16	817 F. App'x 393 (9th Cir. 2020).....	5, 6, 12
17	<i>Lee v. Ticketmaster L.L.C.,</i>	
18	No. 18-CV-05987-VC, 2019 WL 9096442 (N.D. Cal. Apr. 1,	
	2019), aff'd, 817 F. App'x 393 (9th Cir. 2020)	12, 14
19	<i>McGrath v. DoorDash, Inc.,</i>	
20	No. 19-cv-05279, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020)	19
21	<i>McManus v. CIBC World Markets Corp.,</i>	
22	109 Cal. App. 4th 76 (2003).....	17
23	<i>Nevarez v. Forty Niners Football Co., LLC,</i>	
24	No. 16-CV-07013, 2017 WL 3492110 (N.D. Cal. Aug. 15, 2017)	12, 14
25	<i>Oberstein v. Live Nation Entertainment, Inc.,</i>	
26	No. CV 20-3888, 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021).....	passim
27	<i>Ortiz v. Volt Mgmt. Corp.,</i>	
28	No. 16-cv-07096, 2017 WL 1957072 (N.D. Cal. May 11, 2017).....	23

1	<i>Payne v. Tennessee,</i>	
2	501 U.S. 808 (1991)	18
3	<i>Peterson v. Lyft,</i>	
4	No. 16-cv-07343, 2018 WL 6047085 (N.D. Cal. Nov. 19, 2018)	25
5	<i>Pokrass v. The DirecTV Grp., Inc.,</i>	
6	No. EDCV 07-423, 2008 WL 2897084 (C.D. Cal. July 14, 2008)	15
7	<i>Sanchez v. Valencia Holding Co., LLC,</i>	
8	61 Cal. 4th 899 (2015)	14, 15
9	<i>Sandquist v. Lebo Auto., Inc.,</i>	
10	1 Cal. 5th 233 (2016)	20, 21
11	<i>Shoals v. Owens & Minor Distrib., Inc.,</i>	
12	No. 2:18-CV-2355, 2018 WL 5761764 (E.D. Cal. Oct. 31, 2018)	22
13	<i>Tompkins v. 23andMe, Inc.,</i>	
14	840 F.3d 1016 (9th Cir. 2016)	22, 23
15	STATUTES	
16	28 U.S.C. § 1407(a)	16
17	9 U.S.C. § 2	10

1 **I. INTRODUCTION**

2 This case is identical to another case that this Court sent to arbitration less
 3 than six months ago: *Oberstein v. Live Nation Entertainment, Inc.*, No. CV 20-3888,
 4 2021 WL 4772885 (C.D. Cal. Sept. 20, 2021) (Wu, J.). It is brought by the same
 5 plaintiffs’ counsel. The allegations are the same. The putative classes are the same.
 6 The claims are the same. Indeed, the complaint in this case is a nearly word-for-
 7 word copy of the *Oberstein* complaint. Why, then, are we here—yet again—and not
 8 in arbitration?

9 We are here because Plaintiffs are attacking as unconscionable one change
 10 that Ticketmaster and Live Nation made to their Terms of Use (“Terms”) last year:
 11 the current Terms select New Era ADR (“New Era”) as the default arbitration
 12 provider; by contrast, the prior version of the Terms (i.e., the one at issue in
 13 *Oberstein*) selected JAMS. Nothing else has changed in the intervening months that
 14 could somehow compel a different result than the one the Court reached so recently
 15 in *Oberstein*, after more than a year of litigation over the proper forum for Plaintiffs’
 16 claims. This case thus presents a single, narrow question: can Plaintiffs get out of
 17 arbitration, despite their repeated agreement to it, simply because the Terms now
 18 select New Era as the arbitration provider?

19 No. As this Court has ruled numerous times now, the Terms are “clear and
 20 unmistakable” in delegating enforceability issues to the arbitrator, not the Court.
 21 *Oberstein*, 2021 WL 4772885, at *7; *Dickey v. Ticketmaster LLC*, No. CV 18-9052,
 22 2019 WL 9096443, at *8 (C.D. Cal. Mar. 12, 2019). And, in any event, there is
 23 nothing about New Era that’s remotely sub-standard for the industry, let alone
 24 *unconscionable*, as the law would require for Plaintiffs’ improbable gambit to
 25 prevail. Plaintiffs do not like New Era because, unlike JAMS and other arbitration
 26 providers, New Era offers comprehensive rules and procedures to administer and
 27 adjudicate mass individual consumer arbitrations on the merits. Mass arbitrations
 28 are a new but increasingly common strategy, pioneered by Plaintiffs’ counsel in this

1 case, Keller Lenkner. That strategy capitalizes on the fact that other arbitration
2 providers (like JAMS) do not have pre-established rules and procedures in place to
3 deal with the circumstance in which the same plaintiffs' counsel seeks to bring
4 thousands of individual consumer claims. As a result, at JAMS, the parties have to
5 confront anew, with respect to each suite of cases, the question of how to administer
6 numerous claims raising the same issues—on topics ranging from how to deal with
7 filing fees, to how to stage and order the overlapping litigations, and beyond.

8 New Era's rules and procedures solve these problems. They use a
9 "bellwether" approach that mirrors not only the well-accepted MDL process used by
10 federal courts, but also the process that Plaintiffs' own counsel have proposed for
11 other mass arbitrations. That process facilitates the arbitration of mass individual
12 consumer claims efficiently and fairly, and thereby *promotes* arbitration—exactly as
13 the Federal Arbitration Act intends. Far from being *unconscionable*, New Era's
14 rules and procedures are a material *improvement* over JAMS's.

15 Moreover, in assessing Plaintiffs' bid to override their repeated agreement to
16 arbitration, it is important to take a step back and look at what the operative contract
17 between Plaintiffs and Defendants actually says. The Terms are clear that, if New
18 Era cannot conduct the arbitration for any reason, the arbitration will be conducted
19 by another arbitration provider: FairClaims. And if FairClaims cannot conduct the
20 arbitration for any reason, the parties will mutually select another arbitration
21 provider to conduct the arbitration. In other words, if the Court for some reason
22 reached the question of enforceability *and* found that New Era's rules and
23 procedures were unconscionable, the result would not be what Plaintiffs seek here:
24 a class action in federal court. The case would proceed in arbitration, just in front
25 of a different arbitrator.

26 Plaintiffs are essentially asking the Court to issue an advisory opinion on the
27 enforceability of New Era's rules and procedures, even though the Terms clearly and
28 unmistakably delegate enforceability issues to the arbitrator. Indulging the

suggestion that the Court could and should tackle that issue, the result would be that New Era's rules and procedures are absolutely enforceable; it is not even a close question. But at the end of the day, there is *no* possible result here that would culminate in a federal class action. This case—just like *Oberstein*—must be sent to arbitration. To say that Plaintiffs' counsel are wasting the Court's time is an understatement.

II. FACTUAL BACKGROUND

On September 20, 2021, this Court granted Ticketmaster and Live Nation's motion to compel arbitration in the *Oberstein* case, finding that: (1) Ticketmaster and Live Nation's websites provided sufficient constructive notice of the Terms, thereby binding users to the Terms; (2) the authority to decide Plaintiffs' argument that their claims fell within an exception to the arbitration agreement had been clearly and unmistakably delegated to the arbitrator; and (3) the delegation clause itself was not unconscionable. *Oberstein*, 2021 WL 4772885, at *6-9. A month later, Plaintiffs appealed the Court's order to the Ninth Circuit. *See Oberstein v. Live Nation Entm't, Inc.*, No. 21-56200 (9th Cir. Oct. 29, 2021), ECF No. 1. That appeal is pending, and the parties are currently in the midst of briefing.

In the meantime, the same counsel initiated this case. The allegations, putative classes, and claims are the same. Indeed, with the exception of five paragraphs that Plaintiffs' counsel added at the beginning of the complaint (and the substitution of different named plaintiffs), the complaint here is a nearly identical, word-for-word copy of the *Oberstein* complaint. *Compare Heckman Compl.*, ECF No. 1, *with Oberstein Compl.*, No. CV 20-3888, ECF No. 1; *see also* Pls.' Notice of Related Cases at 2, ECF No. 5 (conceding that the cases are "substantively identical"). Those five paragraphs reveal the one thing that is "new" about this case: the named Plaintiffs here all agreed to the current Terms, in effect since July 2, 2021, which select New Era as the arbitration provider, rather than JAMS.

Ticketmaster and Live Nation's websites continue to provide "sufficient

constructive notice as required for mutual assent,” *Oberstein*, 2021 WL 4772885, at *7, and nothing has changed in the intervening months that would alter that conclusion. Nor do Plaintiffs allege otherwise. Nevertheless, we will briefly walk through Plaintiffs’ recent purchases, the notices of the Terms that they saw, and the substance of the Terms that they agreed to—repeatedly.

A. Plaintiffs’ Ticket Purchases & Agreement to the Amended Terms

During the putative class period, Plaintiffs have made over 200 purchases from Defendants’ websites: Skot Heckman purchased tickets more than 30 times, Luis Ponce purchased tickets more than 50 times, Jeanene Popp purchased tickets more than 30 times, and Jacob Roberts purchased tickets more than 90 times. Decl. of H. Green in Support of Defs.’ Mot. to Compel Arb. (“Green Decl.”) ¶¶ 5, 12, 20, 27. More specifically, since Defendants amended the Terms on July 2, 2021—on the Ticketmaster mobile and desktop sites alone—Heckman purchased tickets on four separate occasions, Ponce purchased tickets on five separate occasions, Popp purchased tickets on eight separate occasions, and Roberts purchased tickets on five separate occasions. *Id.* ¶¶ 6, 13, 21, 28.

In order to make those purchases, Plaintiffs had to assent to the current Terms multiple times—including each time they signed into their accounts, and each time they placed an order.¹ For example, when Plaintiffs made their post-July 2, 2021 purchases on the Ticketmaster desktop and mobile sites, they were required to sign in to their accounts in order to make every purchase. And each time they did that, they were notified: “By continuing past this page, you agree to the **Terms of Use**

¹ Users also have to agree to the Terms when they create their accounts; and, at the bottom of virtually every Live Nation and Ticketmaster website page that users navigate in the ticket selection and purchase process, there is a notice that, by using the site, users are agreeing to the Terms. See Decl. of K. Tobias in Support of Defs.’ Mot. to Compel Arb. (“Tobias Decl.”) ¶¶ 5, 14, 16, 25. Each of these additional points of assent are valid and binding. See, e.g., *Oberstein*, 2021 WL 4772885, at *6-7; *Himber v. Live Nation Worldwide, Inc.*, No. 16-CV-5001, 2018 WL 2304770, at *5 (E.D.N.Y. May 21, 2018). But to streamline this motion, the factual discussion will focus on the named Plaintiffs’ post-July 2, 2021 acceptances of the current Terms at the point of sign-in and the point of purchase.

1 and understand that information will be used as described in our **Privacy Policy**.”
 2 The words “Terms of Use” appeared in bold, color-contrasting text, immediately
 3 above the “Sign In” button, and hyperlinked to the full text of the current Terms:

14 See Tobias Decl. ¶ 7. This is the exact same notice that the named plaintiffs saw in
 15 *Oberstein*, and that this Court (and others) found constitute constructive notice,
 16 binding users to the Terms. *Oberstein*, 2021 WL 4772885, at *6-7; *Hansen v.*
 17 *Ticketmaster Entm’t, Inc.*, No. 20-cv-02685, 2020 WL 7319358, at *1, *5 (N.D. Cal.
 18 Dec. 11, 2020); *Ajzenman v. Office of Comm’r of Baseball*, No. CV 20-3643, 2020
 19 WL 6031899, at *1-2, *4 (C.D. Cal. Sept. 14, 2020); *see also Lee v. Ticketmaster*
 20 *L.L.C.*, 817 F. App’x 393, 394-95 (9th Cir. 2020) (substantially identical notice).
 21 Since July 2, 2021, Heckman would have seen this notice on Ticketmaster’s sites at
 22 least four times; Ponce would have seen it at least five times; Popp would have seen
 23 it at least eight times; and Roberts would have seen it at least five times.²

24 In order to complete each of their post-July 2, 2021 purchases on the
 25 Ticketmaster desktop and mobile sites, Plaintiffs also would have been required to
 26 check a box affirmatively acknowledging their acceptance of the current Terms.

28 ² Roberts also saw this notice on Live Nation’s sites at least four more times
 since July 2, 2021. See Green Decl. ¶ 28; Tobias Decl. ¶ 18 & Exs. 17-18.

Specifically, depending on whether the particular event had special protocols related to COVID-19 in place at the time of purchase, Plaintiffs would have seen either: (a) “**I have read and agree to the current Terms of Use**,” as shown in the excerpt below, or (b) “**I have read and agree to the current Terms of Use**,” plus the event’s COVID disclosure, as shown in the other excerpt below, for example. Tobias Decl. ¶¶ 10-11.³ Either way, the notice required the user to check a box affirming their agreement to the Terms to make the purchase. The notice appeared in bold font, with the words “**Terms of Use**” in color-contrasting text (hyperlinked to the full text of the current Terms), immediately above the “Place Order” button:

☐ I have read and agree to the current Terms of Use . Place Order	☐ I have read and agree to the current Terms of Use , and acknowledge that the Event Organizer is requiring proof of COVID-19 vaccination to attend this event. Please check their website for details. Learn More Place Order
---	---

See Tobias Decl. ¶ 10. This notice is similar to the one that this Court found constituted constructive notice (thereby binding users to the Terms) in *Oberstein*—it appears in bold, color-contrasting, hyperlinked text immediately above the “Place Order” button. *Oberstein*, 2021 WL 4772885, at *6-7; *see also Lee*, 817 F. App’x at 394-95 (reaching the same conclusion, on *de novo* review, with respect to substantially identical notice on Ticketmaster’s purchase page); Tobias Decl. ¶ 13 & Exs. 11-12 (screenshots of notices at issue in *Oberstein*). But in contrast to the notice at issue in *Oberstein*, the purchase page notice in this case also required Plaintiffs to check a box affirming their agreement to the current Terms.⁴ And since July 2, 2021,

³ Each of the Plaintiffs saw (and checked the box in) version (a)—i.e., “**I have read and agree to the current Terms of Use**,” without a COVID disclosure—on at least one occasion since July 2, 2021. *See Green Decl. ¶¶ 8, 16, 23, 31; Tobias Decl. ¶¶ 10-11, 21-22.*

⁴ Notably, in *Oberstein*, Plaintiffs’ counsel complained that the notice on the purchase page did not include such a checkbox, arguing that, without it, the notice was “inconspicuous.” Pls.’ Opp’n to Am. Mot. to Compel Arb. at 2, *Oberstein*, No. CV 20-3888 (C.D. Cal. Mar. 19, 2021), ECF No. 92-1. The Court rejected that

Heckman has checked that box on Ticketmaster's sites four times, Ponce has checked it five times, Popp has checked it eight times, and Roberts has checked it five times.⁵ Each and every time they did so, Plaintiffs affirmed their agreement to the "current Terms of Use."

B. The Current Terms of Use

Over the years, Defendants have revised the Terms from time to time. Tobias Decl. ¶ 28. The current Terms have been in effect since July 2, 2021. *Id.* The core provisions of those Terms are substantially the same as prior versions enforced by this Court and others: like those prior versions, the current Terms provide for binding, individual arbitration, state that the arbitration agreement is governed by the Federal Arbitration Act ("FAA"), and delegate the power to decide arbitrability to the arbitrator. *Compare id.* Exs. 29 & 30, with *id.* Exs. 31-35 & 36-40. The primary difference is the arbitration provider. The prior version of the Terms (at issue in *Oberstein*) selected JAMS. By contrast, the current version provides:

Any arbitration will be administered by New Era ADR in accordance with their Virtual Expedited Arbitration Rules and Procedures, as well as any applicable General Rules and Procedures, except as modified by the Terms

In the event that New Era ADR is unable to conduct the arbitration for any reason, the arbitration will be conducted by FairClaims pursuant to its FastTrack Rules & Procedures, and/or any applicable rules for consumer arbitrations, available at www.fairclaims.com. In the event that FairClaims is unable to conduct the arbitration for any reason, you and we will mutually select an alternative arbitration provider, and the arbitration will be conducted pursuant to that provider's applicable rules

Id. Ex. 29 at 8 & 30 at 12.

argument, finding "that the Defendants' websites already provide adequate constructive notice as is." *Oberstein*, 2021 WL 4772885, at *6. Nevertheless, for almost two years now, the purchase page has included the checkbox that Plaintiffs' counsel claimed was needed to bind users to the Terms. Tobias Decl. ¶ 11.

⁵ Roberts also checked this box *four more times* on Live Nation's sites. Green Decl. ¶ 28; Tobias Decl. ¶ 21 & Exs. 21-24.

1 C. New Era

2 JAMS's rules and procedures are designed for traditional, one-off
 3 arbitrations—for example, where one consumer brings claims against a company in
 4 a standalone case. But there is a new and increasingly common trend in arbitration:
 5 mass individual arbitrations, in which hundreds or thousands (and sometimes tens
 6 of thousands) of individual, but otherwise identical, claims are brought in arbitration.
 7 Keller Lenkner, Plaintiffs' counsel in this case, pioneered this strategy—starting first
 8 with mass numbers of employment claims, and expanding more recently to mass
 9 numbers of consumer claims.⁶ JAMS, however, does not have any rules or
 10 procedures in place for mass individual arbitrations, employment or consumer.⁷
 11 How will thousands of individual arbitrations be administered and actually
 12 arbitrated—and on what timeline? How will arbitrators for so many cases be
 13 appointed? How will discovery be conducted? Will there be a process to avoid
 14 inconsistent rulings on common issues? What fees should be assessed when there
 15 are thousands of nearly identical claims?⁸ There are no rules or procedures in place

17 ⁶ See, e.g., Opp'n to Mot. to Compel Arb. at 3, *Abadilla et al. v. Uber Techs.,*
 18 *Inc.*, No. 3:18-cv-07343 (N.D. Cal. Jan. 14, 2019), ECF No. 53 (Keller Lenkner filed
 12,501 employment arbitrations against Uber in 2018); Opp'n to Am. Mot. to
 19 Compel Arb. at 6, *Abernathy et al. v. DoorDash, Inc.*, No. 3:19-cv-07545 (N.D. Cal.
 Jan. 16, 2020), ECF No. 157 (Keller Lenkner filed 6,250 employment arbitrations
 20 against DoorDash in 2019-2020); R. Cole Decl. ¶¶ 18-19, *In re Intuit Free File*
Litig., No. 3:19-cv-02546 (N.D. Cal. Dec. 7, 2020), ECF No. 192 (Keller Lenkner
 filed over 100,000 consumer arbitrations against Intuit in 2019 and 2020).

21 ⁷ As of the date of filing, none of the old establishment arbitration providers
 22 (JAMS, AAA, CPR) have adopted pre-established rules and procedures for
 23 administering mass individual arbitrations of consumer claims (like the ones asserted
 by Plaintiffs here). CPR does offer special rules and procedures for mass arbitrations
 24 of employment claims, but those rules and procedures do not apply to consumer
 claims. See Decl. of T. O'Mara in Support of Defs.' Mot. to Compel Arb. ("O'Mara
 Decl.") Ex. C (CPR Employment-Related Mass Claims Protocol).

25 ⁸ JAMS's rules, for example, require an up-front filing fee of \$1,750 for each
 26 case, regardless of whether it's a standalone or one of 10,000 individual (but
 otherwise identical) cases filed at the same time. See JAMS Arbitration Schedule of
 27 Fees and Costs, www.jamsadr.com/arbitration-fees (last visited Mar. 8, 2022). In
 either case, the company pays \$1,500 of the fee, and the claimant pays \$250 (unless
 28 the claimant can demonstrate an inability to pay, in which case the company pays
 the entire \$1,750). *Id.*; JAMS Consumer Arbitration Minimum Standards,
www.jamsadr.com/consumer-minimum-standards/ (last visited Mar. 8, 2022).

1 to answer these questions. As a result, the parties involved in mass individual
 2 arbitrations end up embroiled in contentious negotiations over how to conduct
 3 discovery and arbitrate the claims (e.g., bellwether arbitrations, consolidation, etc.),
 4 over the number and type of arbitrators, and over whether the typical fees should be
 5 modified. Those negotiations can last for months, even years. Adjudication of
 6 claims on the merits is, at best, delayed and sometimes never occurs at all.⁹

7 New Era, founded in 2020, stepped in to fill the void. Unlike other arbitration
 8 providers, it offers comprehensive rules and procedures to administer and adjudicate
 9 both traditional, standalone arbitrations and mass individual consumer arbitrations
 10 efficiently—and to conclusion, on the merits. The rules and procedures for mass
 11 arbitrations apply where the presiding neutral¹⁰ determines that more than five
 12 arbitrations have been filed that present common issues. O’Mara Decl. Ex. A,
 13 Rules 2(x), 6(b) (“New Era Rules”). In such cases, the arbitrations will be subject
 14 to a bellwether process which (as explained in more detail in Section IV.C.1, below)
 15 mirrors the process routinely used by federal courts in multi-district litigations
 16 (“MDLs”). See New Era Rules 6(b)(ii)(1) & 6(b)(iii)(3).

17 _____
 18 Multiply those numbers by 5,000 arbitrations, and the upfront fees (to say nothing
 19 of the administration fees, all paid by the company) quickly become astronomical,
 20 making the prospect of arbitrating the cases on the merits a dim one.

21 ⁹ See, e.g., Mot. to Compel Arb. at 9-10, *Abadilla et al. v. Uber Techs., Inc.*,
 22 No. 3:18-cv-07343 (N.D. Cal. Dec. 5, 2018), ECF No. 3 (parties spent nine months
 23 trying to work out mass arbitration procedures: arbitrations filed August-November
 24 2018; parties unsuccessfully attempted to negotiate process for arbitrating the merits;
 25 plaintiffs then moved to compel arbitration; case was voluntarily dismissed in May
 26 2019); Opp’n to Am. Mot. to Compel Arb. at 4-11, *Abernathy et al. v. DoorDash,*
 27 *Inc.*, No. 3:19-cv-07545 (N.D. Cal. Jan. 16, 2020), ECF No. 157 (parties spent over
 28 1.5 years trying to work out mass arbitration procedures: arbitrations threatened in
 March 2019, and filed in July-September 2019; parties and AAA unsuccessfully
 attempted to negotiate workable fee schedule and process for handling demands;
 plaintiffs then moved to compel arbitration, which the court granted, in part, in
 February 2020; case was voluntarily dismissed in December 2020).

¹⁰ The neutral is selected by the parties using a rank-and-strike process. See New
 Era Rules 2(j) & 6(b)(iii). New Era neutrals are members of the National Academy
 of Distinguished Neutrals, which accepts only professional neutrals who are referred
 by at least two current members and have arbitrated at least 20 civil cases to final
 award or mediated at least 200 private civil disputes. Our Neutrals, New Era ADR,
 www.neweraadr.com/neutrals/ (last visited Mar. 6, 2022); Membership
 Requirements, www.nadn.org/membership (last visited Mar. 6, 2022).

New Era offers two pricing options for its services: (1) a “pay as you go” option, where, for each arbitration filed, the company pays \$9,500 and the consumer pays \$500, New Era Rules 1(a)(ii), 6(a)(iii)(1)(c); or (2) a subscription option, which consists of an annual subscription fee (paid by the company), plus a reduced per-case filing fee (i.e., \$300 instead of \$500), New Era Rule 1(e)(i).¹¹ The New Era Rules provide an example of how these two options compare: if 100 mass individual arbitrations were filed with New Era, a non-subscribing company would be charged \$950,000 (100 x \$9,500), and each claimant would pay a \$500 fee; by contrast, a subscribing company with a \$250,000 annual subscription would pay its \$250,000 subscription fee, and each claimant would pay a reduced fee of \$300. New Era Rules 1(e)(i)(5), 1(a)(ii), 6(a)(iii)(1)(d). Defendants have a subscription with New Era.

III. LEGAL STANDARD

The Federal Arbitration Act (“FAA”) governs Plaintiffs’ claims. *See* Tobias Decl. Exs. 29-40 (current and prior versions of the Terms, stating that the FAA governs). Under the FAA, an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Congress enacted the FAA in order “to replace [a] widespread judicial hostility” toward arbitration “with a liberal policy favoring arbitration.” *In re Grice*, 974 F.3d 950, 955 (9th Cir. 2020). This liberal policy applies specifically to the parties’ chosen arbitration rules and procedures: “[n]ot only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties’ chosen arbitration procedures.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Courts must “rigorously ... enforce arbitration agreements according to their terms, including terms that specify ... *the rules* under which that arbitration will be conducted.” *Id.*

¹¹ Under the subscription option, the reduced per-case filing fee may be allocated to consumers and/or the company, pursuant to the parties’ arbitration agreement; the subscription fee, however, is paid entirely by the company. New Era Rules 1(a)(iii)(1), 1(e)(i)(3)-(4).

(emphasis in original). By “affording parties discretion in designing arbitration processes,” the FAA promotes “efficient, streamlined procedures tailored to the type of dispute.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Pursuant to the FAA’s strong policy favoring arbitration, the district court’s role in ruling on a motion to compel arbitration is typically “limited to determining: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Oberstein*, 2021 WL 4772885, at *2. But where (as here) the parties delegate to the arbitrator the power to decide gateway arbitrability issues—such as the scope and enforceability of the arbitration agreement—the district court’s inquiry is even more limited. “[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). To determine whether there is a valid delegation, the court undertakes a limited inquiry into whether the parties “clearly and unmistakably” delegated the power to decide arbitrability to the arbitrator. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015).

IV. ARGUMENT

A. The Terms Constitute a Valid, Enforceable Agreement

There is no question that each Plaintiff in this case repeatedly (dozens if not hundreds of times) agreed to various versions of the Terms over the years, and that each Plaintiff repeatedly agreed to the current Terms over the past eight months.

In particular, since July 2, 2021, Plaintiffs assented to the current Terms each time they signed in to their accounts (which they were required to do in order to purchase tickets). See Tobias Decl. ¶¶ 7-9, 18-20. Specifically, at the point of sign-in, Plaintiffs were presented with a notice that this Court has already found is conspicuous and binds users to the Terms. See *Oberstein*, 2021 WL 4772885, at *6-7 (exact same notice at sign-in “provided sufficient constructive notice as required for mutual assent”); see also *Hansen*, 2020 WL 7319358, at *1, *5 (exact same

notice at sign-in bound users to the Terms); *Ajzenman*, 2020 WL 6031899, at *2, *4 (same); *Lee*, 817 F. App'x at 394-95 (same conclusion, on *de novo* review, with respect to substantially identical notice at sign-in).

The notice at sign-in alone binds Plaintiffs to the current Terms.¹² But there's more: since July 2, 2021, each Plaintiff also checked a box, *many times*, affirming that they read and agreed to the current Terms. See Tobias Decl. ¶¶ 10-12, 21-23. This Court and others have repeatedly found that similar notices (without the additional step of a checkbox) on Defendants' purchase pages are conspicuous and bind users to the Terms. See *Oberstein*, 2021 WL 4772885, at *6-7; *Lee*, 817 F. App'x at 394-95; *Ajzenman*, 2020 WL 6031899, at *2, 4; *Nevarez v. Forty Niners Football Co., LLC*, No. 16-CV-07013, 2017 WL 3492110, at *7-10 (N.D. Cal. Aug. 15, 2017). The notice on the purchase page is now, if anything, even more conspicuous: it includes a box that users must check, attesting that they "have read and agree to the current Terms," before they can purchase tickets. Courts routinely find that checkbox notices bind users to the terms at issue. See *In re Holl*, 925 F.3d 1076, 1084 (9th Cir. 2019) ("no question" that plaintiff "affirmatively assented to the ... Terms" where "[h]e checked a box acknowledging as much"). Indeed, in *Oberstein*, Plaintiffs' counsel expressly conceded that a checkbox "approach supports a finding that website users had actual notice of the Terms." Appellant's Opening Br. at 28, *Oberstein*, No. 21-56200 (9th Cir. Feb. 7, 2022), ECF No. 18.

Less than six months ago, after careful consideration of the notices on Defendants' websites, this Court concluded: "Ultimately, the Court joins many others in again finding that the Defendants' websites provided sufficient constructive notice as required for mutual assent." *Oberstein*, 2021 WL 4772885, at *7. Absolutely nothing has changed since then that could compel a different finding.

¹² The Court need only find that Plaintiffs assented to the Terms at *one* point in the user flow to conclude that the Terms are enforceable. See *Lee v. Ticketmaster L.L.C.*, No. 18-CV-05987-VC, 2019 WL 9096442, at *1 n.1 (N.D. Cal. Apr. 1, 2019), *aff'd*, 817 F. App'x 393 (9th Cir. 2020); *Dickey*, 2019 WL 9096443, at *7.

1 Plaintiffs assented to the current Terms, which select New Era as the arbitration
2 provider for any disputes—and they did so many, many times.

3 **B. The Parties Clearly and Unmistakably Delegated Arbitrability to**
4 **the Arbitrator**

5 Because Plaintiffs agreed to be bound by the Terms, this case must be sent to
6 arbitration. Nevertheless, the Complaint makes clear that Plaintiffs intend to
7 challenge the enforceability of the Terms on the basis that they are “permeated with
8 unconscionability,” due to the decision to switch from JAMS to New Era. Compl.
9 ¶ 5. But as this Court has already determined—multiple times—the Terms are “clear
10 and unmistakable” in delegating such enforceability issues to the arbitrator, not the
11 Court. *Oberstein*, 2021 WL 4772885, at *7; *Dickey*, 2019 WL 9096443, at *8.

12 The Terms specify that “[t]he arbitrator, and not any federal, state or local
13 court or agency, shall have exclusive authority to the extent permitted by law to
14 resolve all disputes arising out of or relating to the interpretation, applicability,
15 enforceability, or formation of this Agreement, including, but not limited to any
16 claim that all or any part of this Agreement is void or voidable.”¹³ See Tobias Decl.
17 Ex. 29 at 8 & Ex. 30 at 13 (current Terms) (emphases added); see also *id.* Exs. 31-
18 40 (prior versions).¹⁴ “Multiple other courts,” in addition to this one, “have looked

19 _____
20 ¹³ In addition, the Terms also specify that the arbitration “will be administered
21 by New Era ADR in accordance with their Virtual Expedited Arbitration Rules and
22 Procedures, as well as any applicable General Rules and Procedures, except as
23 modified by the Terms.” Tobias Decl. Ex. 29 at 9 & Ex. 30 at 13. The New Era
24 Rules specify that “[a]ny question or matter of arbitrability of a dispute shall be
25 determined solely by the neutral(s) provided by New Era ADR Inc. and not in a court
26 of law or other judicial forum. *The parties agree and acknowledge that they are
waiving their right to seek a determination of arbitrability in a court of law or other
judicial forum.*” New Era Rule 2(z)(i) (emphasis in original). This is further “clear
and unmistakable” evidence that the parties intended the arbitrator to determine the
threshold question of arbitrability. See, e.g., *Johnson v. Oracle Am., Inc.*, No. 17-
cv-05157, 2017 WL 8793341, at *6-9 (N.D. Cal. Nov. 17, 2017) (enforcing
arbitration agreement incorporating arbitration provider’s rules, which gave
“arbitrator authority to decide arbitrability disputes”).

27 ¹⁴ The delegation clause in the current Terms is identical to prior versions
28 (including the versions at issue in *Oberstein* and *Dickey*), save for one difference; it
includes a narrow exception: “in the event of a dispute about which particular version
of this Agreement you agreed to, a court will decide that specific question.” *Id.*

1 at the exact same language and also confirmed that it satisfies the ‘clear and
 2 unmistakable’ standard.” *Oberstein*, 2021 WL 4772885, at *7 (citing *Lee*, 2019 WL
 3 9096442, at *1, *aff’d*, 817 F. App’x 393 (9th Cir. 2020)); *Nevarez*, 2017 WL
 4 3492110, at *11; *Himber*, 2018 WL 2304770, at *5.

5 As this Court explained just a few months ago, because “the delegation clause
 6 clearly and unmistakably delegates arbitrability to the arbitrator, the Court’s
 7 unconscionability inquiry is limited to the delegation clause instead of the arbitration
 8 clause as a whole.” *Oberstein*, 2021 WL 4772885, at *8. In other words, the only
 9 unconscionability challenge the Court may entertain is a challenge to whether the
 10 delegation clause itself is unconscionable. The Court already carefully considered
 11 this specific question in *Oberstein*, and found that the delegation clause was not
 12 unconscionable. *Id.* at *8-9. As a result, Plaintiffs’ challenge to the enforceability
 13 of the current Terms on the basis that they are “permeated with unconscionability”
 14 must be sent to arbitration, because it is the arbitrator who must rule on these
 15 arguments. *Id.* at *8 (ruling that plaintiffs’ claim that the arbitration clause as a
 16 whole was unconscionable must go to the arbitrator). The Court’s inquiry can and
 17 should end there. Nothing about the selection of New Era changes this.

18 **C. Replacing JAMS with New Era—an Arbitration Provider That**
 19 **Has Procedures in Place to Litigate Mass Arbitrations—Does Not**
 20 **Render the Terms Unconscionable**

21 In any event, if the Court were to reach Plaintiffs’ challenge to the
 22 enforceability of the Terms, Plaintiffs’ various arguments—all of which attack the
 23 use of New Era as somehow unconscionable—are meritless. To prove
 24 unconscionability under California law, a plaintiff must show both procedural and
 25 substantive unconscionability—i.e., “an absence of meaningful choice on the part of
 26 one of the parties together with contract terms which are unreasonably favorable to

27 _____
 28 Tobias Decl. Ex. 29 at 8 & Ex. 30 at 13. This exception does not apply here;
 Plaintiffs concede that they each purchased tickets after the current Terms took
 effect, and that those Terms are the relevant version. See Compl. ¶¶ 1-5, 25-28.

the other party.” *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 910 (2015).
The party asserting unconscionability bears the burden of proof. *Id.* at 911.

Plaintiffs cannot show procedural unconscionability. Contracts of adhesion covering non-essential recreational activities (like attending concerts or sporting events) are not procedurally unconscionable, because “the consumer always has the option of simply foregoing the activity.” *Pokrass v. The DirecTV Grp., Inc.*, No. EDCV 07-423, 2008 WL 2897084, at *6 (C.D. Cal. July 14, 2008). Here, Plaintiffs “could choose not to attend these specific recreational events.” *Oberstein*, 2021 WL 4772885, at *9. But Plaintiffs did choose to purchase from Defendants, many times. The Terms are not procedurally unconscionable.

Moreover, nothing about New Era renders the Terms substantively unconscionable. To be substantively unconscionable, “[i]t is not enough that terms are slightly one-sided or confer more benefits on a particular party; a substantively unconscionable term must be so unreasonable and one-sided as to ‘shock the conscience.’” *Id.* There is nothing like that here. To the contrary—unlike JAMS and other arbitration providers—New Era’s rules, procedures, and fee structure all facilitate the arbitration of mass numbers of individual consumer claims on the merits, efficiently and fairly. Selecting New Era promotes arbitration, as the FAA intends. *See Epic Sys. Corp.*, 138 S. Ct. at 1621 (FAA requires courts to “rigorously ... enforce” the parties’ agreement regarding “the rules under which ... arbitration will be conducted”); *Hodges v. Comcast Cable Commc’ns*, 21 F.4th 535, 547 (9th Cir. 2021) (FAA protects “efficient, streamlined procedures” for consumer arbitrations). That’s not remotely unconscionable.

1. New Era’s Procedures for Mass Arbitrations Are Fair, Equitable, and Mirror the MDL Procedures Used By Courts

Plaintiffs claim that New Era’s rules force consumers “to submit to batched arbitration proceedings,” which Plaintiffs characterize as “a novel and one-sided process that is tailored to disadvantage consumers.” Compl. ¶ 4. That’s false. New

1 Era's rules do not provide for "batching"; nor are New Era's procedures "novel" or
 2 "one-sided." To the contrary, New Era uses a bellwether approach that mirrors not
 3 only the well-accepted MDL process used by federal courts, but also the process that
 4 Plaintiffs' own counsel have proposed for other mass arbitrations.

5 New Era's rules provide that—where the neutral determines that there are
 6 more than five cases that present the same or similar evidence, witnesses, or issues
 7 of law and fact—those cases are governed by New Era's mass arbitration rules. New
 8 Era Rules 2(x), 6(b)(ii)(1), 6(b)(iii)(3)(a). Contrary to Plaintiffs' claim, New Era
 9 does not "group [consumers'] cases together for any reason it deems appropriate."
 10 Compl. ¶ 4. New Era may initially, "[s]olely for administrative purposes," treat
 11 cases as part of a mass arbitration, so that those cases can be sent to a neutral for
 12 determination as to whether they involve common issues. New Era Rules 2(x)(ii) &
 13 6(b)(ii)(2). But it is the presiding neutral—not New Era—who has the "[u]ltimate
 14 authority" to make that determination. *Id.* And the neutral does so by applying a
 15 standard which tracks the MDL statute. *Compare* New Era Rules 2(x) & 6(b)(ii)(1)
 16 (providing that "cases or proceedings [that] present the same, or similar evidence;
 17 present the same, or similar, witnesses; and/or rely on determination of the same, or
 18 similar, facts and issues of law" are governed by the mass arbitration rules and
 19 procedures), *with* 28 U.S.C. § 1407(a) (providing that "civil actions involving one
 20 or more common questions of fact ... may be transferred to any district for
 21 coordinated or consolidated pretrial proceedings").

22 The neutral who presides over the mass arbitration—and who makes the
 23 threshold determination as to whether the cases involve common issues—is chosen
 24 by the parties using New Era's rank-and-strike process. New Era Rule 6(b)(iii)(1).¹⁵

25
 26 ¹⁵ Specifically: New Era provides a list of neutrals; each party may strike 1-2
 27 neutrals; each party ranks the remaining neutrals; if one neutral has the best score,
 28 that neutral is appointed; in the event of a tie, neutrals with the worst scores are
 dropped, the parties re-rank the remaining neutrals, and the neutral with the best
 score is appointed; and, if the re-ranked scores remain tied, New Era randomly
 appoints one of the remaining neutrals. New Era Rules 6(b)(iii)(1) & 2(j)(iii).

1 That process does not “abridge consumers’ rights to select neutral decisionmakers,”
 2 as Plaintiffs claim. Compl. ¶ 4. To the contrary, numerous arbitration providers use
 3 similar rank-and-strike processes, and those processes are routinely blessed by
 4 courts. *See, e.g.*, JAMS Streamlined Arbitration Rules & Procedures, Rule 12,
 5 www.jamsadr.com/rules-streamlined-arbitration/ (last visited March 8, 2022)
 6 (“JAMS Rules”) (describing rank-and-strike process); *Carmax Auto Superstores*
 7 *Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1107 (C.D. Cal. 2015) (approving
 8 neutral selection process where arbitration provider sent list of seven neutrals; each
 9 party struck unacceptable neutrals; and arbitration provider selected neutral from
 10 remaining names); *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76,
 11 94-97 (2003) (arbitrator selection process where each party had one peremptory
 12 challenge and unlimited challenges for cause not unconscionable). Nor is it unfair
 13 or even unusual that “later-filing consumers will not be able to participate” in the
 14 arbitrator selection process. *See* Compl. ¶ 4. Plaintiffs who file related claims in
 15 federal court after the conclusion of JPML proceedings selecting the transferee court
 16 do not have the opportunity to weigh in on the proper transferee court. Similarly, at
 17 JAMS, parties to a consolidated proceeding are deemed to have waived their right
 18 to select an arbitrator. *See* JAMS Rule 6(e)(iii) (providing that, “[u]nless applicable
 19 law provides otherwise, where JAMS decides to consolidate a proceeding into a
 20 pending Arbitration, the Parties to the consolidated case or cases will be deemed to
 21 have waived their right to designate an Arbitrator”).

22 Once the presiding neutral determines that the cases involve common issues
 23 and should proceed under the mass arbitration rules, the New Era Rules provide that
 24 three bellwether cases will be arbitrated to conclusion: one chosen by the claimants,
 25 one chosen by the respondents, and one chosen through a process set by the neutral.
 26 New Era Rule 6(b)(iii)(3).¹⁶ After the neutral issues a decision in each bellwether,
 27

28 ¹⁶ The New Era Rules also provide that the “neutral shall have the discretion to
 increase the number of Bellwether Cases ... but only if it is necessary to allow for a

1 the parties participate in a mandatory, non-binding settlement conference. New Era
 2 Rule 6(b)(4). If the conference does not result in settlement, the neutral will apply,
 3 as precedent, the decisions from the bellwether cases to all common issues in each
 4 remaining individual case, and then create a process for resolving remaining cases
 5 that involve individual issues. New Era Rules 6(b)(iii)(4)-(6). If the conference
 6 does result in settlement, any party can opt out of that settlement and continue to
 7 proceed individually: the neutral will apply, as precedent, the decisions from the
 8 bellwether cases to all common issues in the opt-out cases, and create a process for
 9 resolving individual issues in those cases. *Id.*

10 There is nothing “novel” or “one-sided” about this process. Bellwether cases
 11 are used routinely in MDLs, where (as in a mass arbitration) there are multiple
 12 similar cases that are not proceeding as a class action; bellwethers are “important
 13 case management tools” that allow the decisionmaker “to give the major arguments
 14 of both parties due consideration without facing the daunting prospect of resolving
 15 every issue in every action.” *In re Zimmer M/L Taper Hip Prosthesis*, MDL No.
 16 2859, 2022 U.S. Dist. LEXIS 11866, at *31-33 (S.D.N.Y. Jan. 21, 2022). Moreover,
 17 under New Era’s rules, the outcome of the bellwether cases is not unfairly “forced”
 18 on consumers, as Plaintiffs claim. Compl. ¶ 4. Application of precedent to common
 19 issues is routine and expected; it promotes stability and efficiency, and protects
 20 reasonable expectations. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 827 (1991)
 21 (adherence to precedent “promotes the evenhanded, predictable, and consistent
 22 development of legal principles, fosters reliance on judicial decisions, and
 23 contributes to the actual and perceived integrity of the judicial process”). Indeed, in
 24 an MDL, “[o]rders issued by a federal transferee court remain binding if the case is
 25 sent back to the transferor court.” *In re Zyprexa Prod. Liab. Litig.*, 467 F. Supp. 2d
 26 256, 273 (E.D.N.Y. 2006). There is nothing unfair about applying decisions on

27
 28 fundamentally fair process. Each party is entitled to an equal number of Bellwether
 Cases.” New Era Rule 6(b)(iii)(3)(d).

1 common issues in the bellwether cases to individual cases not resolved after the
 2 settlement conference. And, of course, a claimant always has the opportunity to
 3 arbitrate any issues unique to her individual claim. New Era Rules 6(b)(4)-(6).

4 Other arbitration providers have developed similar procedures for mass
 5 arbitrations of employment claims.¹⁷ For example, CPR’s protocol for employment-
 6 related mass claims provides for ten randomly-selected test cases followed by
 7 mediation; if a global resolution is not reached, any party may proceed individually
 8 in court or arbitration, and if a global resolution is reached, an unsatisfied claimant
 9 may opt-out and proceed in individual arbitration. See O’Mara Decl. Ex. C (CPR
 10 Employment-Related Mass Claims Protocol). A court in the Northern District of
 11 California reviewed this protocol and found that it was “fair and impartial—i.e., one
 12 that is not predisposed more favorably to ... defendants generally compared to other
 13 generally accepted conventional arbitration rules.” See *McGrath v. DoorDash, Inc.*,
 14 No. 19-cv-05279, 2020 WL 6526129, at *9-11 (N.D. Cal. Nov. 5, 2020).¹⁸

15 Indeed, in a mass arbitration that they initiated against Uber at JAMS,
 16 Plaintiffs’ own counsel proposed procedures for administering those arbitrations that
 17 are strikingly similar to New Era’s.¹⁹ See O’Mara Decl. Ex. B (*Abadilla v. Uber*
 18 *Techs., Inc.*, No. 3:18-cv-07343, Ex. I to Mot. to Compel Arb., ECF No. 3-4 (N.D.
 19 Cal. Dec. 5, 2018)). Specifically, Warren Postman, counsel for Plaintiffs here,

21 ¹⁷ See *supra* n.7.

22 ¹⁸ Likewise, FedArb designed an MDL-like process pursuant to which a panel
 23 of three arbitrators decides all common issues, and those decisions are binding on
 24 all current and future claimants. See FedArb Framework for Mass Arbitration
 Proceedings, www.fedarb.com/rules/framework-for-mass-arbitration-proceedings-adr-mdl/ (last visited March 8, 2022).

25 ¹⁹ Because JAMS does not have rules and procedures for mass arbitrations, the
 26 parties and JAMS had to engage in negotiations over how the arbitrations would
 27 proceed (e.g., what procedures would apply, and what fees would be paid); those
 28 negotiations were so fraught and contentious, the dispute over arbitration ultimately
 ended up in court. See, e.g., Mot. to Compel Arb. at 9-10, *Abadilla*, No. 3:18-cv-
 07343 (N.D. Cal.), ECF No. 3. This illustrates what can happen in the absence of
 pre-established rules and procedures to administer mass arbitrations efficiently and
 on the merits. Indeed, *Abadilla* was never litigated on the merits. See *id.*

1 proposed that: (1) the parties jointly select three bellwether cases from each of three
 2 relevant jurisdictions; (2) the parties select an arbitrator using an alternating strike
 3 process; (3) after conclusion of the bellwethers, the parties participate in non-binding
 4 mediation to decide on a formula for extrapolating the results of the bellwethers to
 5 the remaining claims; and (4) if the mediation did not result in agreement, the parties
 6 brief the appropriate formula before a single arbitrator, who would then decide how
 7 to extrapolate the results of the bellwethers. *Id.* *These were the procedures that*
 8 *Plaintiffs’ own counsel proposed.* They are—undeniably—incredibly similar to
 9 New Era’s procedures. Now, in this case, the same counsel suddenly claim that
 10 those procedures are so “novel” and “one-sided” as to shock the conscience and
 11 render the Terms unenforceable. That’s absurd.

12 **2. New Era’s Subscription Option Is Not Unconscionable**

13 Plaintiffs also take issue with New Era’s subscription option, pursuant to
 14 which businesses pay an annual subscription fee in advance, covering a set number
 15 of arbitrations; this compares to the “pay as you go” model, which is used by other
 16 arbitrations providers, such as JAMS. *See* Compl. ¶ 3 (claiming that the subscription
 17 model puts New Era “on retainer” for companies). Plaintiffs never identify how the
 18 subscription option supposedly makes the Terms unconscionable, but the argument
 19 seems to be that this option gives New Era and its arbitrators a business incentive to
 20 rule in favor of subscribing defendants. *See id.* This argument is meritless.

21 California law is clear that “the belief that arbitrators might over time be
 22 biased toward the repeat players that bring them business” is not a basis for finding
 23 an arbitration agreement unconscionable. *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th
 24 233, 259 (2016). Courts may not presume “that arbitrators are ill-equipped to
 25 disregard such institutional incentives and rule fairly and equitably,” because “the
 26 FAA requires that [they] treat arbitration as a coequal forum for dispute resolution.”
 27 *Id.*; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991)
 28 (declining “to indulge the presumption that the parties and arbitral body conducting

1 a proceeding will be unable or unwilling to retain competent, conscientious and
2 impartial arbitrators”).

3 Nothing about New Era’s subscription option changes this analysis. First, to
4 be clear, New Era’s role is administrative; New Era does not make any substantive
5 determinations in the arbitrations it administers. *See, e.g.*, New Era Rule 2(x)(ii)(2)
6 (“New Era ADR makes no determination with respect to issues of law and fact.”).
7 The neutral, not New Era, decides all substantive issues, including whether
8 individual arbitrations present common issues such that the mass arbitration rules
9 should apply. *See* New Era Rules 2(x)(ii)(2) & 6(b)(ii)(2). There is absolutely no
10 basis to presume that New Era’s experienced, qualified neutrals (who are members
11 of the National Academy of Distinguished Neutrals) cannot rule fairly and equitably.
12 *See Sandquist*, 1 Cal. 5th at 259 (2016).

13 Second, any purported incentives associated with New Era’s subscription
14 option are the same as the incentives at play every time a company specifies an
15 arbitration provider in its terms of use. When a company agrees with consumers in
16 its terms of use to arbitrate disputes at a particular arbitration provider, it is agreeing
17 to pay that provider its applicable fees for any arbitrations brought under those terms,
18 essentially keeping the provider “on retainer.” Compl. ¶ 3. That is exactly the case
19 here; the only difference is that New Era offers companies the predictability of an
20 annual up-front fee, compared to the variability of the “pay as you go” model.

21 Moreover, the New Era Rules provide an example of how the subscription
22 model (compared to “pay as you go” pricing) results not only in predictability, but
23 also in less total money being paid to New Era in the event of a mass arbitration:

24 Example of default vs subscription pricing:

25 Default Pricing = 100 Mass Arbitration cases at \$10,000
per case fee = \$1M

26 Sample of Subscription Fees = 100 Mass Arbitration cases
27 on \$250,000 annual subscription fee + \$300 per case filing
28 fee = \$280,000

New Era Rule 1(e)(i)(5). This subscription pricing is a far cry from what JAMS and other arbitration providers claim they are owed in the event of a mass arbitration.²⁰ If JAMS collecting millions from companies does not create improper bias (and the law is clear that it does not), then it's hard to fathom how New Era's subscription option possibly could. Any "assertion that business incentives bias [New Era's] arbitrators to repeat player defendants" who pay a subscription is flatly "inconsistent with ... the FAA" and should be rejected. *Shoals v. Owens & Minor Distrib., Inc.*, No. 2:18-CV-2355, 2018 WL 5761764, at *6 (E.D. Cal. Oct. 31, 2018).

3. The \$300 Filing Fee Is Not Unconscionable

Plaintiffs also suggest that the Terms are unconscionable because consumers are asked to pay a discounted²¹ \$300 filing fee. See Compl. ¶ 3. But such fees are nothing new. JAMS, AAA, and others all require claimants to pay per case filing fees of similar amounts, as do the federal courts.²² Moreover, courts routinely approve arbitration agreements that require claimants to pay filing fees of this amount. See *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1026 (9th Cir. 2016) (cost-shifting provision in consumer arbitration agreement is unenforceable "[o]nly if the agreement 'impos[es] arbitral forum fees that are prohibitively high,' such that the agreement 'effectively blocks every forum for the redress of disputes, including arbitration itself'"); *Fleming v. Weather Shield Mfg., Inc.*, No. 18-00589, 2018 WL

²⁰ See, e.g., *Adams v. Postmates, Inc.*, 2020 WL 1066980, at *1 (N.D. Cal. Mar. 5, 2020) (AAA demanded \$10 million in fees); *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020) (AAA demanded \$9.5 million in fees); Opp'n to Mot. to Compel Arb. at 1, *Abadilla et al. v. Uber Techs.*, No. 3:18-cv-07343 (N.D. Cal. Jan. 14, 2019), ECF No. 53 (Uber supposedly owed JAMS \$18 million).

²¹ As noted above, where the company has a subscription with New Era, the per case filing fees "are discounted from the default per case pricing as a result of the subscription fee." New Era Rule 1(e)(i)(3)(b).

²² See, e.g., JAMS Consumer Minimum Standards, www.jamsadr.com/consumer-minimum-standards/ (last visited March 8, 2022) (providing for \$250 fee); CPR Due Process Protections, www.cpradr.org/resource-center/rules/pdfs/Due-Process-Protections.pdf (last visited March 8, 2022) (providing that consumers may be required to pay an amount equivalent to filing a lawsuit in court); C.D. Cal. Schedule of Fees, www.cacd.uscourts.gov/sites/default/files/forms/G-072/G-72.pdf (\$402 fee to file a civil lawsuit in C.D. Cal.).

6010365, at *7 (C.D. Cal. May 14, 2018) (Wu, J.) (cost-shifting provision in arbitration agreement not unconscionable where “[t]he sole cost Plaintiff would bear is a \$300 filing fee”). Further, the Terms are clear that Defendants—in addition to paying for the arbitration itself—will pay the consumer’s \$300 filing fee if the consumer cannot pay. See Tobias Decl. Ex. 29 at 8 & Ex. 30 at 12 (“[I]f New Era ADR determines that you are unable to pay any part of the filing fee, we will pay that part too.”); New Era Rule 6(b)(iii)(2)(c) (financial hardship affidavits). That certainly does not “shock the conscience” or come close to meeting the threshold the Ninth Circuit has set for unconscionability of fees: i.e., “arbitral forum fees that are prohibitively high,’ such that the agreement ‘effectively blocks every forum for the redress of disputes, including arbitration itself.’” *Tompkins*, 840 F.3d at 1026.

4. *The Attorneys’ Fees Provisions Are Not Unconscionable*

Finally, Plaintiffs argue that New Era’s rules are unconscionable because they strip away their statutory right to attorneys’ fees and costs. Compl. ¶ 5. That’s false. The Terms expressly state that, “in cases where a statute gives you the right to recover attorneys’ fees if you prevail, the arbitrator may award attorneys’ fees pursuant to that statute.” Tobias Decl. Ex. 29 at 8 & Ex. 30 at 12-13 (“Any arbitration will be administered by New Era ADR in accordance with their [rules] ... except as modified by the Terms.”). In addition, New Era’s rules provide that “[t]he neutral may grant any remedy or relief that is just and equitable and within the scope of the parties’ agreement or applicable law.” New Era Rule 2(e); *see also, e.g., Ortiz v. Volt Mgmt. Corp.*, No. 16-cv-07096, 2017 WL 1957072, at *4 (N.D. Cal. May 11, 2017) (provision that “arbitrator may be entitled to award reasonable attorneys’ fees and costs to the prevailing party, in accordance with the law” not unconscionable; “[t]he arbitrator’s discretion with regard to attorneys’ fees is bounded by what otherwise would be allowed under the applicable laws”).

* * *

1 There’s nothing about New Era’s rules and procedures that’s unconscionable
 2 or unenforceable. The subtext of Plaintiffs’ complaints is this: they prefer the current
 3 situation at JAMS and other arbitration providers, where there are no established
 4 rules and procedures in place to administer and actually arbitrate mass arbitrations,
 5 because the resulting chaos gives them outsized settlement leverage, right out of the
 6 gate. But that preference has absolutely nothing to do with arbitrating claims on the
 7 merits; it only concerns a perceived tactical advantage for Plaintiffs’ counsel. If the
 8 concern was about facilitating the arbitration of mass claims—and reaching an
 9 efficient resolution on the merits—there would be no complaint about New Era
 10 whatsoever. New Era makes the actual arbitration of mass claims *more* feasible.
 11 That is (and should be) a welcome result for all involved. Moreover, that result is
 12 specifically what the FAA so strongly encourages. *See Concepcion*, 563 U.S. at 344
 13 (“The point of affording parties discretion in designing arbitration processes is to
 14 allow for efficient, streamlined procedures tailored to the type of dispute.”).

15 **D. Even If the New Era Arbitration Agreement Were Unenforceable,**
 16 **Plaintiffs Would Still Be Required to Arbitrate**

17 If the Court for some reason reached the question of enforceability *and* found
 18 that New Era’s rules and procedures were unenforceable, the result would not be
 19 what Plaintiffs seek here: a class action in federal court. The case would still proceed
 20 in arbitration, just not at New Era. The Terms clearly provide that, if New Era is
 21 unable conduct the arbitration for any reason, its will instead be conducted by
 22 FairClaims, another arbitration provider. Tobias Decl. Ex. 29 at 8 & Ex. 30 at 12.
 23 And if FairClaims is unable to conduct the arbitration for any reason, the parties will
 24 mutually select another arbitration provider to conduct the arbitration. *Id.* In other
 25 words, if there were some problem with New Era (which there manifestly is not),
 26 the answer is not a class action in federal court; it’s an arbitration conducted by
 27 another arbitration provider. This is what Plaintiffs agreed to, repeatedly, when they
 28 checked the box affirming their agreement to the Terms: arbitration. Plaintiffs did

1 not have to check that box; they did not have to purchase tickets from Defendants
 2 and agree to arbitrate their disputes. But they did—many, many times. The Court
 3 should enforce that clear agreement.

4 **E. This Action Should Be Dismissed**

5 The Court “may either stay the action or dismiss it outright when, as here, the
 6 court determines that all of the claims raised in the action are subject to arbitration.”
 7 *Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014).
 8 Here, as courts have found in many other cases, dismissal is the most efficient path
 9 forward. See, e.g., *Peterson v. Lyft*, No. 16-cv-07343, 2018 WL 6047085, at *6
 10 (N.D. Cal. Nov. 19, 2018) (granting motion to compel arbitration, dismissing case).

11 **V. CONCLUSION**

12 The FAA directs courts to “respect and enforce the parties’ chosen arbitration
 13 procedures” and “rigorously ... enforce arbitration agreements according to their
 14 terms, including terms that specify ... *the rules* under which that arbitration will be
 15 conducted.” *Epic Sys. Corp.*, 138 S. Ct. at 1621. The parties here unquestionably
 16 agreed to New Era’s procedures and, barring that, to arbitration before FairClaims
 17 or a mutually agreed upon arbitration provider. What they did not agree to is
 18 litigation in federal court. Defendants therefore respectfully request that the Court
 19 compel individual arbitration and dismiss or, in the alternative, stay this action.

20 Dated: March 8, 2022

Respectfully Submitted,

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