

October 26, 2020

Mr. Christopher Poole
Chief Executive Officer, JAMS
5 Park Plaza Suite 400
Irvine, CA 92614

Via Email

RE: Diversity, Equity, and Inclusion at JAMS

Dear Mr. Poole,

Public Justice writes to join the National Employment Lawyers Association (“NELA”) and its related charitable organization, The Employee Rights Advocacy Institute For Law & Policy (“The Institute”) in calling for broad reforms to promote inclusivity, equity, and diversity in JAMS’ provision of arbitration services.¹

This past summer a (now former) JAMS neutral, Richard Neville, circulated abhorrent, racist views demonstrating that he was anything but a fair, neutral arbitrator. Public Justice commends JAMS for quickly severing its relationship with Neville and establishing a CEO Task Force on Diversity that is working to enhance JAMS recruiting and vetting processes, increase the use of diverse neutrals, and implement mandatory anti-racist training. Moving forward, Public Justice urges JAMS and its CEO Task Force to take bold, concrete action and consider the broader ways in which it can make arbitration more inclusive and equitable.

Public Justice is a national public interest law firm that fights for equal access to justice, and the protection of consumers’ and workers’ rights. To further this goal, Public Justice works to combat forced arbitration, in which those with little or no bargaining power are required to enter into arbitration agreements with large powerful corporations in order to secure employment, set up a bank account, obtain healthcare, or even use a cell phone. At the same time, Public Justice has consistently taken the position that arbitration can be a fair forum in which to resolve disputes, when it is freely chosen by consumers or workers after a dispute has arisen. However, the concerns raised in the NELA/Institute letter regarding the composition of your roster of arbitrators and your systems to assess and guard against bias, when combined with the finality and lack of transparency surrounding the arbitral process, undermine the legitimacy of JAMS arbitration as a fair forum in which workers and consumers of all backgrounds can resolve their disputes. We share those legitimacy concerns.

But JAMS can build a more transparent and accountable arbitration process. Public Justice strongly supports NELA and the Institute’s recommendations, including a review

¹ See NELA and The Institute Call on JAMS to Examine Past Cases for Bias (Sept. 8, 2020), <https://www.nela.org/2020-09-ltr-jams/>.

of every discrimination case that the former JAMS neutral Richard Neville oversaw; public reporting of each neutral's decisions in each type of dispute; a formal process for monitoring and evaluating neutrals to identify bias; a more thorough and rigorous initial vetting process; and a public report that details what JAMS is doing to recruit plaintiff-side attorneys, attorneys of color, public interest attorneys, and bilingual attorneys, and how JAMS intends to monitor and improve its recruiting efforts moving forward.

Public Justice calls on JAMS to take particularly bold action with respect to recruiting and using more diverse neutrals. In JAMS' roster of neutrals, women and people of color are underrepresented in every category.² But it is people of color, women, and other protected classes that are often subjected to mandatory arbitration after facing discrimination in the workplace. Such a non-diverse arbitrator pool calls into question the integrity of the entire dispute resolution process.³ And it's not just the perception of bias that JAMS should be worried about. A recent study revealed that male judges are more likely than female judges to rule against a plaintiff in a sex discrimination suit, and white judges are more likely than black judges to rule against a plaintiff in a race discrimination suit.⁴

If JAMS cares about creating a more inclusive, equitable service, it should guarantee that every slate of arbitrators includes a certain percentage of female arbitrators and arbitrators of color, and if JAMS cannot provide a reasonable percentage of diverse arbitrators in any given circumstance, then the consumer or worker should be allowed to request an arbitrator that the other side isn't permitted to strike. Additionally, JAMS' mandatory anti-racist training for neutrals should include implicit bias training, so that neutrals can be exposed to their own unconscious attitudes and beliefs that may affect how they consider and decide disputes.

JAMS should also look beyond its recruitment and management of neutrals, and consider how to make arbitration proceedings themselves more accessible. JAMS should ensure that individual consumers or workers who are deaf or hard of hearing, or speak only (or primarily) a language other than English are provided interpreters or other accommodations like CART (Communication Access Realtime Translation) at no cost to them. State courts are required to provide such accommodations free of cost for those with disabilities under Title II of the Americans with Disabilities Act and federal courts have a policy of doing the same.⁵ The many local and state courts and agencies that receive federal financial assistance are also required to provide accommodations free of

² See Kimberly Taylor, Senior Vice President and Chief of Legal and Operations Officer at JAMS, *Model Arbitration Rider Encourages Diversity in Selection of Neutrals*, Corporate Counsel Business Journal (Oct. 2018) at 1; see also Terry O'Neill, *Success for #MeToo Means Reopening Courthouse Doors*, LAW360 (Feb. 20, 2018), <https://www.law360.com/articles/1011972/success-for-metoo-means-reopening-courthouse-doors> (reporting that universe of ADR panelists is comprised of 22 percent women and 9 percent persons of color).

³ See Michael Green, *Arbitrarily Selecting Black Arbitrators*, 88 Fordham L. Rev. 2255, 2266 (2020).

⁴ See Christina Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 Political Research Quarterly 788, 793 (2016).

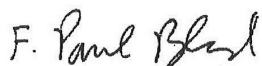
⁵ See Courts, National Association for the Deaf, <https://perma.cc/X2AM-KDTJ>.

cost for those who are “Limited English Proficient” under Title VI of the Civil Rights Act of 1964.⁶ JAMS should also develop a process by which individuals can communicate any access needs they might have, whether it’s a need for frequent breaks during a session, extra time to process written material, or ramp access. Accessibility is particularly important during the COVID-19 pandemic because arbitration proceedings have moved to digital platforms, creating new barriers for persons with disabilities.⁷

JAMS should not only develop inclusive policies that make arbitration proceedings more accessible—it should advertise them. Neither the JAMS rules nor the JAMS website state what to do if you need a language interpreter or other accommodation, much less whether it will be paid for. This lack of public information regarding the accessibility of arbitration proceedings deters individuals from pursuing their claims in arbitration in the first place.

Although there are structural barriers to inclusion and equity in arbitration proceedings, JAMS has the opportunity to take bold action to make arbitration fairer and more accessible. To summarize, JAMS should: (1) guarantee that every slate of arbitrators includes a certain percentage of female arbitrators and arbitrators of color, and if JAMS cannot provide a reasonably diverse slate, then the consumer or worker should be allowed to request an arbitrator that the other side isn’t permitted to strike; (2) require neutrals to participate in implicit bias training; (3) ensure parties have cost-free access to language interpreters when needed; (4) develop a process by which parties can communicate their access needs; (5) make sure that digital platforms used during COVID are accessible to those with disabilities; and (6) publicize its policies on accessibility and inclusion.

Thank you again for your commitment to eliminating bias, enhancing diversity, and striving for equality in arbitration proceedings. Public Justice looks forward to learning more about the specific concrete steps that the CEO Task Force decides to take.



Paul Bland
Executive Director
Public Justice

⁶ Civil Rights Division Communication to State Courts Regarding Language Access, Dep’t of Justice, <https://www.justice.gov/file/1250731/download>.

⁷ See David Allen Larson, *Digital Accessibility and Digital Accommodations in Online Dispute Resolution: ODR for Everyone*, Ohio State J. on Dispute Resolution (2019) (outlining best practices for digital accessibility).