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The Prevalence of Consumer Arbitration Agreements by America's Top Companies

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TABLE OF CONTENTS

INTRODUCTION	233
I. WHAT IS ARBITRATION?.....	235
II. METHODOLOGY	236
III. SEARCH RESULTS	238
IV. SOME ADDITIONAL OBSERVATIONS	240
CONCLUSION.....	246
APPENDIX.....	248

INTRODUCTION

This study examines the use of arbitration agreements in connection with consumer transactions by the top 100 largest domestic United States companies, as ranked by *Fortune* magazine.¹ These companies

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¹ The rankings come from the top 100 companies set forth in the Fortune 500 list of 2018. These companies are ranked based on total revenues for their respective fiscal

are the most successful, powerful companies in America, with combined revenues totaling over \$12.8 trillion, \$1.0 trillion in profits, \$21.6 trillion in market value, and representing more than two-thirds of the U.S. GDP.² As explained in more detail below, through their market power and their ability to impose arbitration agreements on consumers, these top companies are able to remove themselves from the traditional judicial system for disputes involving consumers.

This study focuses on two main issues: 1) How many of these top companies have used arbitration agreements in connection with customer transactions since 2010; and 2) Of those companies, how many use arbitration agreements containing a “class waiver” requiring customers to waive their right to proceed collectively or as part of a class. The study then concludes with some observations about the prevalence of consumer arbitration agreements among America’s top companies.

The key findings of this study are the following:

- Eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions.
- Of the eighty-one companies in the Fortune 100 with consumer arbitration agreements, seventy-eight companies include class waivers in their arbitration agreements.
- At least a majority of the households in the United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements.
- More than sixty percent of United States retail e-commerce sales are covered by broad consumer arbitration agreements.
- In 2018, at least 826,537,000 consumer arbitration agreements were in force, based on estimates from just a few companies for which information was readily available. The actual number of consumer arbitration agreements is likely higher. For a point of comparison, the U.S. population is about 328,000,000.

years. For a description of the methodology used by *Fortune* magazine to develop the rankings, please see *Fortune 500*, FORTUNE, <http://fortune.com/fortune500/list> (last accessed Feb. 11, 2019).

² *Id.*

The ability to access the courthouse is disappearing for American consumers because of the proliferation of arbitration agreements among the majority of America's leading companies. Claims involving personal injury, negligence, products liability, fraud, breach of contract, unfair business practices, Truth-in-Lending Act claims, antitrust or anti-competitive violations, and other violations of laws designed to protect vulnerable consumers may never be heard in a public court because of the widespread use of consumer arbitration clauses. Additionally, because of the use of class waivers, a company can block the ability of consumers to join together in a class or collective action if a company engages in widespread wrongdoing.

Compared to the rest of the world, which treats mandatory arbitration agreements in consumer transactions as generally unenforceable, the United States stands apart with a legal framework that aggressively enforces consumer arbitration agreements. The Supreme Court of the United States, through a series of flawed decisions going back to the 1980s, has created this expansive legal framework strongly supportive of arbitration.³ This permissive legal environment has enabled arbitration agreements to spread to virtually all types of consumer transactions and claims.

I. WHAT IS ARBITRATION?

Arbitration is a proceeding, governed by an agreement of the parties, whereby a dispute is resolved by a neutral third party whose decision will be final and binding on the parties. The main law governing arbitration in the United States is the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), which was enacted in 1925 and generally declares that arbitration agreements are binding.⁴ The FAA also provides courts with authority to confirm arbitral awards as well as vacate arbitral awards under very limited circumstances, sometimes referred to as among the narrowest judicial reviews known in the law.⁵

³ See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 138-47 (1992) (exploring the many flaws of the *Southland* decision); see, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

⁴ 9 U.S.C. § 2 (2018) ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

⁵ See, e.g., *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 123 (1st Cir.

As demonstrated by this study, the use of arbitration clauses in non-negotiable, adhesionary contracts is widespread in American society. However, during Congressional hearings regarding the FAA's enactment, there was some testimony that the FAA was designed for voluntary contracts involving meaningful consent and never intended for "take-it-or-leave-it," adhesionary contracts.⁶ Since the 1980s, the Supreme Court has ignored the original intent and meaning of the FAA and expanded its interpretation of this statute in multiple ways.⁷ As a result of these Supreme Court decisions, courts today routinely enforce arbitration clauses in take-it-or-leave-it, non-negotiable contracts, and arbitration clauses have spread to virtually every type of transaction in America.

When there is meaningful consent to arbitrate and where fair procedures exist, arbitration can provide an effective means to resolve disputes. Also, when appropriately used, arbitration can help promote party autonomy, an important value in a democratic society.⁸ However, as explained through some examples below, meaningful consent is often lacking in consumer arbitration agreements, and some corporate parties take advantage of their bargaining power by drafting harsh, one-sided terms in their arbitration agreements in order to tilt the arbitration process in their favor.

II. METHODOLOGY

To gather information about the use of consumer arbitration agreements among Fortune 100 companies, the author examined court opinions and pleadings filed since January 1, 2010, as well as publicly-accessible websites for each company. Court records were examined because it is possible that a particular company's website

2008) ("A federal court's review of an arbitrator's decision, however, is extremely narrow and exceedingly deferential. Indeed, it is among the narrowest known in the law." (citations omitted) (internal quotation marks omitted)).

⁶ *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9-11 (1923); cf. Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1948 (2015) (explaining that waiver of the right to Article III adjudication should be "knowing and voluntary").

⁷ See Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 *CARDOZO J. CONFLICT RESOL.* 653, 657-62 (2018) [hereinafter *A New Legal Framework*].

⁸ EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3-7 (2006).

may not include an arbitration agreement, although the company may still use arbitration agreements in connection with consumer transactions. For example, an arbitration agreement may be included in product packaging, which may be revealed in court pleadings, but not available on a company's website.

The key findings of this report were determined by examining publicly-available records concerning the top 100 American companies, as listed in *Fortune*, as well as the companies' subsidiaries and related, affiliated entities. For example, Facebook, Inc., one of the Fortune 100 companies, is the parent company of Instagram, LLC, and Instagram's website is governed by an agreement containing an arbitration clause. Thus, for purposes of this study and its key findings, Facebook is considered or counted as using an arbitration agreement even though the terms of service governing Facebook's own website do not contain an arbitration clause. Similarly, Delta Air Lines, another Fortune 100 company, is considered as using an arbitration agreement for purposes of this study because a Delta SkyMiles credit card issued by American Express contains a broad arbitration clause. Even though a consumer with this particular credit card enters into a cardholder agreement with American Express, Delta Air Lines benefits from and can likely seek to enforce the broad arbitration clause found in the American Express cardholder agreement if Delta Air Lines becomes involved in a dispute about its SkyMiles loyalty program.⁹ This study includes the Fortune 100 companies as well as their subsidiaries and related, affiliated entities partly because the Fortune 100 companies likely benefited from these relationships. Additionally, courts have construed arbitration law in an expansive manner to permit non-signatories to enforce an arbitration clause in a contract between an affiliated company and a consumer.¹⁰ Because of these

⁹ Companies can use the doctrine of equitable estoppel to bind someone to an arbitration agreement, even if they did not sign a contract directly between themselves and that company. See, e.g., *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006) (“[E]quitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the . . . agreement in asserting its claims against the nonsignatory.”) (quoting *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395-96 (4th Cir. 2005)).

¹⁰ See, e.g., *In re Apple & AT & TM Antitrust Litig.*, 826 F. Supp. 2d 1168, 1176-79 (N.D. Cal. 2011) (allowing non-signatory Apple, Inc. to rely on the arbitration clause found in the service agreement between customers and AT&T in connection with a dispute involving the purchase of Apple iPhones with AT&T cellular service); *Stinson v. Best Buy Co.*, No. 0:18-CV-00295-JNE-KMM, 2018 WL 3850739, at *6-7 (D. Minn. June 26, 2018) (allowing Best Buy to enforce arbitration clause contained in cardholder agreement between consumer and Citibank in connection with Best Buy branded credit card).

expansive court rulings, this study uses a flexible, inclusive approach and examines the Fortune 100 companies, as well as their subsidiaries and related, affiliated companies.

III. SEARCH RESULTS

This study broadly measures the use of arbitration agreements for consumer disputes among Fortune 100 companies in recent years. The key finding is that eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions. Of these eighty-one companies, seventy-eight companies have drafted arbitration agreements containing class waivers, which explicitly prohibit individuals from pursuing claims on a classwide or collective basis.¹¹ Also, by looking at some additional statistics, which are explained below in the next section, one can conservatively estimate that at least a majority (and possibly even two-thirds by some estimates) of U.S. households are covered by consumer arbitration agreements, and at least a majority of U.S. retail e-commerce sales are covered by arbitration agreements. Additionally, at least 826,537,000 consumer arbitration agreements were in force in 2018, based on estimates from just a few companies for which information was readily available. The actual number of consumer arbitration agreements is likely higher.

With respect to the nineteen companies in the Fortune 100 without consumer arbitration clauses, it should be noted that some of these companies do not appear to engage in direct consumer transactions. For example, Boeing is listed in this study as not having a consumer arbitration clause. However, Boeing, as an aerospace and defense company, would not have a strong need for a consumer arbitration agreement, and similarly, none of the other aerospace and defense companies in the Fortune 100 have consumer arbitration agreements. Companies like Archer Daniels Midland, United Technologies, Lockheed Martin, Energy Transfer Equity, World Fuel Services, and General Dynamics are also listed in this study as not having consumer arbitration agreements. Because of the nature of their businesses, which tend to serve industrial or commercial clients (such as a

¹¹ Even if an arbitration clause does not contain an explicit class waiver, companies may argue that such “silent” clauses still nevertheless prohibit class proceedings. Many courts construe a silent arbitration clause as containing an implied class waiver. *See, e.g., Myers v. TRG Customer Sols., Inc.*, No. 1:17-CV-00052, 2017 WL 3642295, at *2 (M.D. Tenn. Aug. 24, 2017) (a silent arbitration clause implicitly bars class proceedings).

manufacturer of food additives sold to other food manufacturers as in the case of Archer Daniels Midland), these companies do not have a strong need for a consumer arbitration agreement.¹²

Companies varied as to the scope of their arbitration clauses, such as whether the arbitration clause would broadly cover all transactions, goods, or services offered by the company, or more narrowly cover just a smaller subset of transactions, goods, or services. For example, some companies, like Amazon, Walmart, Walgreens, Home Depot, Lowe's, and Best Buy have broad arbitration clauses purporting to cover all disputes between a consumer and the company, including disputes concerning any good or service sold through their websites. Several banks and credit card companies likewise had broad arbitration clauses covering any dispute between the consumer and company. However, other companies in the study used arbitration agreements in a more limited manner, for a particular service, product, or transaction. For example, some companies like Chevron, HP, and American Airlines used arbitration clauses limited in scope to disputes involving sweepstakes or contests for consumers. Similarly, Ford used an arbitration clause limited to disputes arising out of a credit installment plan, and General Motors used an arbitration clause limited to disputes arising out of an optional maintenance plan. Google's parent company had arbitration clauses in connection with its distribution of broadband internet services as well as for services offered through its Google Advertising Program. In sum, the scope or particular use of arbitration agreements varied from company to company, and some companies used arbitration on a more limited basis. However, in light of the bargaining power of each company in this study, each company has the potential to incorporate the use of a broad arbitration clause covering disputes for all types of consumer transactions. For example, instead of using arbitration clauses in connection with a credit installment plan, Ford probably could require arbitration in connection with all aspects of its car sales and services.

For more details about the scope or particular uses of arbitration agreements for each company, please see the list of arbitration agreements referenced in the Appendix to this study. The Appendix

¹² See Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) ("The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers. The systematic eschewing of arbitration clauses in business-to-business contracts also casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses.").

sets forth information in two different tables. First, there is a table listing each Fortune 100 company by its ranking, from 1 to 100, along with a citation or link through which one can find a copy of the company's arbitration agreement. Second, there is a table organizing the Fortune 100 companies by sector, such as energy, healthcare, media, retail, and technology. By looking at the second table, one can see how many Fortune 100 companies within a particular sector use consumer arbitration agreements.

IV. SOME ADDITIONAL OBSERVATIONS

By focusing on a handful of companies, it is also possible to make some additional observations regarding the pervasiveness of arbitration agreements in American society. For example, looking at Amazon alone, it has been estimated that Amazon's sales will represent almost half (49.1%) of all e-commerce sales in the United States in 2018,¹³ with approximately 564 million products for sale,¹⁴ and with approximately ninety-five million Amazon Prime subscribers in the United States.¹⁵ Also, although estimates vary, it appears that roughly half to approximately sixty-four percent of households in the United States subscribe to Amazon Prime.¹⁶ By looking at Amazon alone, one can conclude that at least a majority of households (and possibly almost two-thirds of households by some estimates) in the United States are bound by consumer arbitration agreements because Amazon Prime membership includes a broad arbitration clause in the governing agreement. Also, adding the online sales of Walmart, Home Depot, and Best Buy to the online sales of Amazon,¹⁷ all of which are

¹³ See Lauren Thomas & Courtney Reagan, *Watch Out, Retailers. This is Just How Big Amazon is Becoming*, CNBC (July 13, 2018, 11:24 AM ET), <http://www.cnbc.com/2018/07/12/amazon-to-take-almost-50-percent-of-us-e-commerce-market-by-years-end.html>.

¹⁴ See *How Many Products Does Amazon Sell Worldwide — January 2018*, SCRAPEHERO (Jan. 15, 2018), <http://www.scrapehero.com/how-many-products-amazon-sell-worldwide-january-2018>.

¹⁵ See *Number of Amazon Prime Members in the United States as of June 2018 (In Millions)*, STATISTICA, <http://www.statista.com/statistics/546894/number-of-amazon-prime-paying-members> (last visited Feb. 11, 2019).

¹⁶ See Louis Columbus, *10 Charts That Will Change Your Perspective of Amazon Prime's Growth*, FORBES (Mar. 4, 2018, 5:00 PM), <https://www.forbes.com/sites/louiscolombus/2018/03/04/10-charts-that-will-change-your-perspective-of-amazon-primes-growth>; Shep Hyken, *Sixty-Four Percent of U.S. Households Have Amazon Prime*, FORBES (June 17, 2017, 9:07 AM), <http://www.forbes.com/sites/shephyken/2017/06/17/sixty-four-percent-of-u-s-households-have-amazon-prime>.

¹⁷ See *Top 10 US Companies*, Ranked by Retail Ecommerce Sales Share, 2018 (% of*

covered by broad arbitration agreements, one can conclude that at least a majority of U.S. retail e-commerce sales are covered by arbitration agreements.¹⁸

By examining a handful of companies (Amazon, Walmart, and eBay), it appears that during December 2018, at least 447,437,000 consumer arbitration agreements were arguably in force, based on the number of unique visitors to the websites of Amazon, Walmart, and eBay.¹⁹ The arbitration agreements for these companies are so broad that these agreements purport to cover anyone who visits their websites.²⁰ In July 2018, JPMorgan Chase and Wells Fargo combined reportedly had about 53.6 million users of their mobile banking apps,²¹ which are also covered by broad arbitration clauses. Furthermore, during the second quarter of 2018, it was estimated that AT&T had about 147.3 million wireless subscribers, with Verizon having about 152.7 million wireless subscribers,²² and these companies have broad arbitration clauses for their wireless subscribers. It was also estimated that Comcast had about 25.5 million

US Retail Ecommerce Sales), EMARKETER (Sept. 14, 2018), <http://www.emarketer.com/Chart/Top-10-US-Companies-Ranked-by-Retail-Ecommerce-Sales-Share-2018-of-US-retail-ecommerce-sales/220521>.

¹⁸ eBay is not part of the Fortune 100, and thus eBay is not a part of this study. However, eBay is one of the largest online selling platforms, and eBay also has a broad arbitration clause. For eBay's user agreement, see *User Agreement*, EBAY, <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259> (last visited Feb. 11, 2019). By adding eBay's online sales to the above calculations involving Amazon, Walmart, Home Depot, and Best Buy, one can conclude that more than sixty percent of U.S. retail e-commerce sales are covered by broad consumer arbitration agreements.

¹⁹ During December 2018, Amazon had 206,103,000 unique visitors in the U.S., with Walmart having 131,911,000 unique visitors, and eBay having 109,423,000 unique visitors. See *Latest Rankings*, COMSCORE, <http://www.comscore.com/Insights/Rankings> (last visited Feb. 2, 2019).

²⁰ It is possible that not all of these arbitration agreements would be enforceable. Enforceability could depend on how the consumer accessed the website and whether the website provided reasonable notice of the terms. See, e.g., *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016).

²¹ See Tatjana Kulkarni, *Lead Widens for JPMorgan Chase in Race for Mobile Banking Users*, BANKINNOVATION, (July 16, 2018), <https://www.bankinnovation.net/2018/07/lead-widens-for-jpmorgan-chase-in-race-for-mobile-banking-users/>.

²² See Rachel Gunter, *Telecom Takeaways: Verizon, AT&T, T-Mobile, Sprint*, MARKET REALIST (Oct. 23, 2018, 2:17 PM), api.marketrealist.com/api/serie/2018/10/the-cable-factor-in-the-t-mobile-sprint-deal/pdf; Andrew Smith, *Verizon Intends to Participate in the Upcoming Spectrum Auctions*, MARKET REALIST (Oct. 18, 2018, 6:57 AM), <https://marketrealist.com/2018/10/verizon-intends-to-participate-in-the-upcoming-spectrum-auctions>.

internet subscribers in late 2017,²³ and Comcast uses a broad arbitration clause.

Combining the unique visitors to the websites of Amazon, Walmart, and Ebay, together with the mobile banking app users of Chase and Wells Fargo, the wireless subscribers of AT&T and Verizon, and Comcast's internet subscribers, one can estimate that there are at least 826,537,000 consumer arbitration agreements in force during 2018. These estimates are based on information regarding only eight companies. As a result, the actual number of consumer arbitration agreements is probably higher, and for a point of comparison, the U.S. population was about 328,000,000 in late 2018.²⁴

As mentioned above, arbitration can be an effective and appropriate method of dispute resolution when there is meaningful consent and fair, neutral procedures. However, the extensive use of consumer arbitration agreements by the top companies in America raises several issues. With the bargaining power of these companies, meaningful consent is probably lacking, and companies can structure or design the arbitration procedures in their favor. Part of the concern with widespread consumer arbitration is due to the fact that the legal framework governing most forms of arbitration in the United States is based on the FAA, an out-of-date statute from the 1920s, which the Supreme Court has misconstrued and expanded over time.²⁵ One could make rational arguments that due to special concerns regarding consumers, the FAA should be amended and better calibrated to help ensure fairness and meaningful consent with respect to consumers. In other words, to the extent that consumer arbitration is allowed to occur, a special legal framework should arguably govern the enforceability of consumer arbitration agreements. For example, heightened disclosure requirements for consumer arbitration clauses, or allowing consumers the right to reject an arbitration agreement, could help promote meaningful consent. Also, the FAA could be amended to require certain minimal procedural protections for consumers in connection with the arbitration process.²⁶

²³ See Eli Blumenthal, *Comcast's New Modem is Ready for the Gigabit Future*, USA TODAY (Dec. 6, 2017, 12:00 AM ET), www.usatoday.com/story/tech/2017/12/06/comcast-modem-xfi-advanced-gateway/924608001.

²⁴ See *U.S. Population Live*, WORLDOMETERS, <http://www.worldometers.info/world-population/us-population> (last visited Feb. 2, 2019).

²⁵ Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 117-22 (2016).

²⁶ Recent legislative proposals have involved a ban on certain types of pre-dispute arbitration agreements. For example, the 2013 version of the Arbitration Fairness Act ("AFA") would invalidate any contract provision that "requires arbitration of an

The increasing use of broad consumer arbitration agreements may provide benefits to overburdened courts, and the fair, neutral, consensual use of arbitration can provide many benefits to disputing parties. But as a society, do we want companies designing their own tribunals without much oversight for virtually all types of claims against the company?²⁷ In a recent class action case, Amazon was accused of illegally selling harmful, controlled substances without a prescription, in violation of federal and state laws. However, a magistrate judge issued an order recommending the grant of Amazon's motion to compel arbitration.²⁸ If the district court judge accepts the magistrate's recommendation, the plaintiff consumer would have to submit his claim about the illegal drug sales to an arbitrator instead of a public court with broad procedural protections. In another case, consumers alleged that Amazon engaged in false advertising and unfair business practices because Amazon allegedly created false impressions of cost savings by advertising its prices as "discounted," but Amazon's "discounted" prices were allegedly the actual retail prices used by other stores. In response to this lawsuit about false advertising and unfair business practices, a court enforced Amazon's arbitration clause and ordered the plaintiff consumers to submit their claims to arbitration.²⁹ Arbitration proceedings are generally private and confidential. As a result, these arbitration proceedings will likely frustrate the ability of the public to learn the full extent of Amazon's

employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 402(a) (2013). The 2018 version of the AFA used the same language. Arbitration Fairness Act of 2018, S. 2591, 115th Cong. § 402(a) (2018).

²⁷ In the wake of the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), courts have lost the ability to monitor or police arbitration agreements for fairness. *Id.* at 72. By including a secondary arbitration agreement within a larger arbitration agreement (sometimes called a delegation clause), whereby a consumer or employee purportedly agrees to arbitrate whether they agreed to arbitrate, drafting parties can block a court's ability to review the fairness of arbitration agreements. In effect, many courts today are merely rubber-stamping arbitration agreements drafted by corporate parties. *See, e.g., Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 636 (2014) (court has no authority to review the enforceability of an arbitration agreement because of delegation clause within the arbitration agreement). For a broad discussion of such delegation clauses, and a critique of the Court's holding in *Rent-A-Center*, see generally David Horton, *Arbitration about Arbitration*, 70 STAN. L. REV. 363, 406-13 (2018).

²⁸ *Nicosia v. Amazon.com, Inc.*, No. 14-CV-4513, 2017 WL 10111078 (E.D.N.Y. Aug. 18, 2017).

²⁹ *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1057 (S.D. Cal. 2015).

alleged false advertising, unfair business practices, and sales of harmful drugs.

These cases and the broad use of arbitration in America raise an important policy question. Should we, as a society, ban the arbitration of certain claims so that the claims can be heard publicly in court?³⁰ For example, perhaps allegations of wrongdoing involving risk of bodily harm or allegations of anticompetitive conduct should not be subject to arbitration. However, under the current legal framework, Amazon and the majority of America's largest companies have unilaterally removed themselves from the public court system for claims brought against them by consumers. If our society wants to prioritize the enforcement of certain types of claims of public interest, our government could guarantee a judicial forum with broad procedural protections, including the ability for similarly-situated claims to be resolved collectively through a class action. Also, through open, public hearings in a courthouse, our lawmakers and society could become better informed of allegations of corporate wrongdoing, and the negative publicity from open court proceedings could have a deterrent effect on possible future wrongdoing.

In addition to concerns about the scope of claims that should be arbitrated, another concern involves the procedures used in consumer arbitration. When looking at the bargaining power of the companies in this study, it is probably fair to say or assume that most consumers did not have a meaningful choice to negotiate the arbitration agreements covered in this study. In most cases, it is very likely that the arbitration agreements were a non-negotiable term of the consumer transaction, and it is also very likely that most consumers were unaware of or did not understand the significance of the arbitration agreement in connection with their transactions.³¹

Given the bargaining power of the companies involved in this study, it is possible for companies to abuse the arbitration process by drafting harsh arbitration clauses with one-sided terms that serve to benefit the company at the consumer's expense. For example, the arbitration agreement covering the use of Procter & Gamble's websites contains

³⁰ For a novel argument that such arbitration clauses violate the Petition Clause of the First Amendment, see Matthew J. Stanford, *Diminution Doctrine: Arbitration's First Amendment Problem*, 52 UC DAVIS L. REV. ONLINE 91-94 (2018).

³¹ CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at §§ 1.4.2, 3.4.3 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (demonstrating that most consumers lack awareness of the existence or meaning of an arbitration clause).

harsh terms, such as a requirement that consumers arbitrate in Cincinnati, Ohio, as well as limitations on damages and a requirement that all disputes must be submitted within one year, which may be shorter than the applicable limitations period for filing a lawsuit in court. Companies tend to justify their use of arbitration by praising the benefits of arbitration as a simplified or more efficient method of dispute resolution compared to litigation.³² However, Procter & Gamble's harsh provisions regarding location, limits on damages, and an abbreviated statute of limitations do not necessarily lower the process costs of arbitration compared to litigation. Requiring arbitration to take place in Ohio does not reduce the procedures of arbitration compared to litigation. Shortening the time period to file a complaint does not simplify an arbitration proceeding compared to a litigation proceeding.

Instead, these particular terms appear to be designed to favor Procter & Gamble's interests over the interests of consumers by making it more difficult and less attractive for consumers to bring claims. In the consumer case against Amazon for false advertising, the judge ordering arbitration expressed concern about Amazon's use of arbitration and observed that "Amazon's Arbitration Agreement is not a paragon of consumer protection."³³ The judge also expressed "hope that Amazon would take every possible step to maximize consumers' ability to make informed decisions," but unfortunately, the governing legal framework "imposes less lofty expectations."³⁴ Instead of arbitration being used as a good faith, effective way to resolve disputes, some companies may abuse their market power to impose arbitration agreements with one-sided terms for the purpose of suppressing consumer claims.

Unfortunately, when an arbitration agreement contains harsh terms, there is no uniform, clear answer as to how courts will treat such agreements. Some courts may fully enforce the agreement, while others may invalidate the entire agreement or merely sever the harsh terms and still compel arbitration.³⁵ America's arbitration laws are

³² See, e.g., *U.S. Chamber Commends Supreme Court for Preserving Availability of Arbitration to Consumers and Businesses*, U.S. CHAMBER OF COM. (June 19, 2013), <http://www.uschamber.com/press-release/us-chamber-commends-supreme-court-preserving-availability-arbitration-consumers-and>.

³³ *Fagerstrom*, 141 F. Supp. 3d at 1057.

³⁴ *Id.*

³⁵ See Szalai, *A New Legal Framework*, *supra* note 7. Compare *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. 2002) (invalidating Countrywide's arbitration clause), with *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 n.5 (5th Cir. 2004) (enforcing the same arbitration clause).

outdated and long overdue for amendment.³⁶ In light of the proliferation of consumer arbitration agreements among America's top companies, our society and legislators should address concerns about the broad use of arbitration and the potential for abuse under our current, permissive legal framework governing arbitration. For example, Congress should consider enacting a law guaranteeing procedural protections in consumer arbitration proceedings, such as basic discovery, a fair location for the hearings for consumers to enable meaningful participation, a prohibition against abbreviated statutes of limitations, a prohibition against damage limitations, class procedures in limited circumstances, a requirement that the arbitration proceedings and filings should be public, and heightened judicial review of arbitral awards for certain types of claims. Also, another possibility to help ensure fairness in the proceedings would be for an administrative agency to monitor procedural rules in consumer arbitration and to propose and adopt amendments when necessary through a public process.³⁷

CONCLUSION

This study provides some new statistics to help demonstrate that the use of consumer arbitration agreements is not an isolated business practice in America. There are hundreds of millions of consumer arbitration agreements, and the majority of America's top companies use such agreements. Also, many of the agreements identified in this study involve online transactions, and as our economy and social interactions develop a larger online presence, our human interactions and resulting disputes can increasingly fall outside the jurisdiction of traditional brick-and-mortar courts. As a result of the proliferation of consumer arbitration clauses, it has become increasingly difficult for American consumers to access the public justice system. Instead, consumers are required to bring their claims of wrongdoing in a largely unregulated system designed by companies accused of wrongdoing.

As a society, are we comfortable with the widespread, largely unregulated use of consumer arbitration agreements? Congress could

³⁶ For some ideas regarding how to amend the FAA, see EDWARD BRUNET ET AL., *supra* note 8.

³⁷ Such a system already exists with the Securities and Exchange Commission and its continuous oversight of FINRA arbitration proceedings. See *Arbitration Rules*, FINRA, <http://www.finra.org/arbitration-and-mediation/arbitration-rules> (last visited Feb. 11, 2019).

require certain protections for consumer arbitration proceedings, such as guarantees of meaningful consent, fair procedures, and quality standards for arbitration providers. Such a system for consumers already exists in the European Union.³⁸ Arbitration, when used appropriately, can provide an effective way to resolve disputes, and our legal system can learn from appropriate uses of arbitration. For example, we can also improve and modernize our traditional brick-and-mortar courthouses for certain types of disputes by having courts borrow desirable features of fair, simplified arbitration proceedings, including online dispute resolution.³⁹ A robust, fair, consensual system of private arbitration can spur innovation in the traditional courts.

It is hoped that this study, by providing new statistics about the prevalence of consumer arbitration agreements, can contribute to the national dialogue about dispute resolution and inform the decisions of judges, legislators, policymakers, academics, and others as they continue to study and consider the use of arbitration for consumer-related disputes.

³⁸ See Pablo Cortéz & Rafał Mańko, *Developments in European Civil Procedures, in THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION* 41, 49-62 (Pablo Cortes ed., 2017) (discussing the European Small Claims Procedure, which strikes a successful balance between formal litigation and alternative dispute resolution); *Resolve Your Consumer Complaint*, EUROPEAN COMMISSION, https://www.ec.europa.eu/info/live-work-travel-eu/consumers/resolve-your-consumer-complaint_en (last visited Feb. 11, 2019).

³⁹ For a discussion about the use of online dispute resolution by courts, please see JOINT TECH. COMM., JTR RESOURCE BULLETIN: ODR FOR COURTS (2017), <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20for%20courts%20v2%20final.ashx>.

APPENDIX

Table 1. This table sets forth the Fortune 100 companies by rank from 1 to 100, along with citations or links to their arbitration agreements, which were last visited on November 1, 2018. The third column indicates whether the arbitration agreement contains a class waiver provision.

PDF readers may automatically generate hyperlinks within a PDF file, and these hyperlinks may be incorrect or appear to lead to an unavailable page. These problems tend to occur if the URL spans more than one line of text within a PDF file. In order to view the arbitration agreements set forth below in Table 1, it is best to copy and paste the URL into an internet browser, but before pressing enter to visit the particular web address, make sure the URL does not contain additional spaces. Additional spaces tend to appear where the URL continues to a second or third line in the table below. For example, if one copies and pastes the URL for Amazon's arbitration agreement set forth below, there will likely be an extra space in the middle of the term "footer" because this particular URL continues to a second line of text in the middle of this term. Deleting the extra spaces for every time the URL spans an extra line will provide the correct URL. Copies of all the arbitration agreements set forth below are on file with the author.

COMPANY	ARBITRATION AGREEMENT (as of Nov. 1, 2018)	CLASS WAIVER
Walmart	1) help.walmart.com/app/answers/detail/a_id/8#19 2) savingscatcher.walmart.com/terms 3) www.walmartmoneycard.com/account/legal-info-page?productname=mc-cbr&doc=cha	1) yes 2) yes 3) yes
Exxon Mobil	1) www.exxon.com/en/exxon-mobil-rewards-plus-terms 2) www.citicards.com/cards/acq/cma.do?screenId=1346 1 (scroll down to ExxonMobil Smart Card)	1) yes 2) yes
Berkshire Hathaway	1) brick.com/terms-use 2) www.nfm.com/billing_agreement.html	1) yes 2) yes
Apple	In re Apple & AT & TM Antitrust Litig., 826 F. Supp. 2d 1168 (N.D. Cal. 2011) (court allows Apple to rely on AT&T's arbitration agreement in connection with a dispute about iPhones and AT&T cellular service)	yes
UnitedHealth Group	www.myuhc.com/member/preLoginLegalLayout.do?psnName=link.nav.footer.legal#Agreement and Terms	yes
McKesson	1) www.hedgespharmacy.com/terms-of-use 2) www.tomballhealthmart.com/termsfuse	1) yes 2) no
CVS Health	www.cvs.com/help/terms_of_use.jsp	yes
Amazon.com	www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088	yes

AT&T	www.att.com/esupport/article.html#!/wireless/KM1041856	yes
General Motors	1) 8152981715c3577a6f1a-5f1a805b7b134a30bda82e0b78afd4e7.ssl.cf2.rackcdn.com/2018_Petros_and_Money_Summer_Tour_Sweepstakes_Rules%205.16.18.pdf 2) www.chevrolet.com/content/dam/chevrolet/na/us/english/index/owners/warranty/02-pdfs/11GGC0115-150-dec-vsc-gap-chevy-sample.pdf 3) www.chevrolet.com/content/dam/chevrolet/na/us/english/index/owners/warranty/02-pdfs/10GPMA0215-prepaid-maint-chevy-sample.pdf	1) yes 2) yes 3) yes
Ford Motor	<i>Burcham v. Ford Motor Credit Co., LLC</i> , 2017 WL 2773697 (S.D. Ill. June 23, 2017)	yes
Amerisource Bergen	none	
Chevron	1) www.chevronwithtechron.com/promotions/visa/ 2) www.synchronybankterms.com/gecbrterms/pdf/FR833282333_CHEVRON_AND_OR_TEXACO_TECHRON_ADVANTAGE_DC_20530C.pdf	1) yes 2) yes
Cardinal Health	www.cardinalhealth.com/en/support/terms-and-conditions-english.html	yes
Costco	1) www.citicards.com/cards/wv/pdf/CMA_CostcoConsADA-3.pdf?JFP_TOKEN=389L983N 2) www.citicards.com/cards/wv/JRS/ACQ/img/CMA_Costco-1_Internet.pdf 3) www.squaretrade.com/merchant/pdf/terms-conditions/2017-05-19_ST-TCs-Costco.pdf	1) yes 2) yes 3) yes
Verizon	www.verizonwireless.com/legal/notices/customer-agreement/	yes
Kroger	1) www.kroger.com/bbqtime/rules 2) www.kfp prepaid.com/wp-content/uploads/Kroger-123REWARDS-CHA-for-MC-ReBranding-V5.pdf	1) yes 2) yes
General Electric	www.sunautoservice.com/media/71307/cc1application.pdf	yes
Walgreens Boots Alliance	1) www.walgreensbootsalliance.com/terms 2) www.walgreens.com/topic/help/generalhelp/termsofuse.jsp?foot=terms	1) yes 2) yes
JPMorgan Chase	1) www.chase.com/digital/digital-payments/chase-pay/disclosures/terms 2) chaseonline.chase.com/Content.aspx?ContentId=COLSA1A_LA	1) yes 2) yes
Fannie Mae	none	
Alphabet	1) fiber.google.com/legal/terms/residential 2) www.google.com/ads/terms 3) <i>Trudeau v. Google LLC</i> , 2018 WL 4846796 (N.D. Cal. Oct. 3, 2018)	1) yes 2) yes 3) yes
Home Depot	www.homedepot.com/c/Terms_of_Use/	yes

Bank of America Corp.	olui2.fs.ml.com/publish/content/application/pdf/gwml/merrillynchself-directedinvestingclientrelationshipagreement.pdf	yes
Express Scripts Holding	none	
Wells Fargo	1) www08.wellsfargomedia.com/assets/pdf/personal/online-banking/2018-OAA-enterprise-marketing.pdf 2) www.wellsfargo.com/credit-cards/agreements/rewards-agreement/#Section31	1) yes 2) yes
Boeing	none	
Phillips 66	1) commercial.syf.com/Ecom-Web/eapply-commercial/Internet/p66brc/en/pdf/TermsConditions.pdf 2) images.synchronycredit.com/consumereApply/Internet/p66/en/pdf/TermsConditions.pdf	1) yes 2) yes
Anthem	www.anthem.com/ca/health-insurance/nsecurepdf/English_CA_dentalvision_smgrp_empapp	yes
Microsoft	www.microsoft.com/en-us/servicesagreement	yes
Valero Energy	www.valero.com/en-us/Documents/Credit%20Card/TermsConditions%202018%200701.pdf	yes
Citigroup	online.citi.com/JRS/popups/ao/Consumer_Client_Manual.pdf	yes
Comcast	www.xfinity.com/corporate/legal/visitoragreement	yes
IBM	www.identityguard.com/service-terms-of-use	yes
Dell Technologies	www.dell.com/learn/us/en/uscorpl/terms-of-sale-consumer	yes
State Farm Insurance Cos.	<i>Vindiola v. State Farm Mut. Auto. Ins. Co.</i> , 2017 WL 4029708 (N.D. Cal. Sept. 13, 2017)	yes
Johnson & Johnson	www.neutrogena.com/terms.html	yes
Freddie Mac	none	
Target	www.target.com/c/terms-conditions/-/N-4sr7l	yes
Lowe's	www.lowes.com/l/terms-and-conditions-of-use.html	yes
Marathon Petroleum	d.comenity.net/marathoncard	yes
Procter & Gamble	www.pg.com/en_US/terms_conditions/terms_conditions.shtml#laws	no
MetLife	online.metlife.com/edge/web/public/benefits/redirectgetForms?attachmentKey=55539&groupNumber=158532	no
UPS	www.ups.com/assets/resources/media/terms_service_us.pdf	yes
PepsiCo	www.fritolay.com/legal/terms-of-service.htm	yes
Intel	www.mcafee.com/consumer/en-us/policy/global/legal.html?tab=license	yes
DowDuPont	www.dupont.com/bi/next-sweepstakes/contest-rules-and-regulations.html	yes

Goldman Sachs Group	www.marcus.com/content/dam/mosaic/savings/pdf/Marcus_Deposit_Account_Agreement.pdf	yes
American Airlines Group	1) www.aa.com/content/images/travelInformation/EN_AAMailInAppInternet.pdf 2) www.aa.com/i18n/customer-service/support/sundance-film-festival-sweepstakes.jsp?anchorLocation=DirectURL&title=FlightSymbolSweeps	1) yes 2) yes
Best Buy	www.bestbuy.com/site/help-topics/conditions-of-use/pcmcat204400050067.c?id=pcmcat204400050067	yes
Cigna	www.cigna.com/assets/docs/individual-and-families/2016/medical/nc/nc-cigna-access-hsa-bronze-6200-mioa0002.pdf	yes
Charter Communications	www.spectrum.com/policies/terms.html	yes
Delta Air Lines	www.americanexpress.com/us/content/pdf/cardmember-agreements/blue-delta-skyMiles/Blue_Delta_SkyMiles_06-30-2018.pdf	yes
Facebook	1) www.facebook.com/msqrd/terms 2) help.instagram.com/581066165581870?helpref=faq_content	1) yes 2) yes
Honeywell International	www.honeywellstore.com/terms_of_use.asp	yes
Merck	www.merck.com/policy/terms-of-use/merck-apps-home.html	yes
Allstate	www.esurance.com/competition-rules/passitonrules	yes
Tyson Foods	www.tysonfoods.com/terms-of-use	yes
United Continental Holdings	www.united.com/CMS/en-US/products/travelproducts/Pages/billion.aspx	yes
Oracle	none	
Tech Data	none	
TIAA	1) www.tiaa.org/public/pdf/ira_acct_agreement.pdf 2) www.tiaa.org/public/pdf/OptionsApplicationForm.pdf	1) yes 2) yes
TJX	tjmaxx.tjx.com/store/jump/topic/find-help/legal/2400080#termsofuse	yes
American Express	web.aexp-static.com/us/content/pdf/cardmember-agreements/blue/Blue_From_American_Express_06-30-2018.pdf	yes
Coca-Cola	us.coca-cola.com/terms-of-use/	yes
Publix Super Markets	www.publix.com/publix-website-policies	yes

Nike	1) www.biketownpdx.com/rental-agreement 2) abcspportscamps.com/filemanager_v4/collegebaseballcamps_v4a/1/61/items/3599A6F3-A266-E2B7-53077A1E6EC57BF4.pdf 3) www.ussportscamps.com/peace-of-mind-policy 4) ultramook50k.oregoncoastalflowers.com/wp-content/uploads/sites/41/2015/02/Nike-Consent-Form.pdf	1) yes 2) no 3) no 4) no
Andeavor	www.fleetcardsusa.com/termsarcobusiness	yes
World Fuel Services	none	
Exelon	www.constellation.com/bin/residential/Terms?planId=113883	yes
Massachusetts Mutual Life Insurance	1) concord.com/terms 2) www.massmutual.com/lcmei/secure/pages/eiHelpText.jsp?helpPage=login#login 3) wwwrs.massmutual.com/Retire/SPD/forms/img3008.pdf	1) yes 2) yes 3) yes
Rite Aid	1) assetscdn.incomm.com/static/riteaid_pg/pdfs/RiteAid_DiscoverRewardCard_CardHolderAgreement_PG.pdf 2) assetscdn.incomm.com/static/riteaid_pg/pdfs/RiteAid_DiscoverRewardCard_TermsConditions_PG.pdf	1) yes 2) yes
ConocoPhillips	none	
CHS	none	
3M	1) multimedia.3m.com/mws/media/1421082O/3m-1080-live-wrap-competition-rules.pdf 2) multimedia.3m.com/mws/media/1546331O/s7641-3m-futuro-brace-for-luxury-sweepstakes-final-5-09-18-pdf.pdf	1) yes 2) yes
Time Warner	policies.warnerbros.com/terms/en-us/html/terms_en-us_1.0.0.html	yes
General Dynamics	none	
USAA	1) www.usaa.com/inet/pages/precomm_credit_cards_rates_and_fees_data_tags 2) content.usaa.com/mcontent/static_assets/Media/credit_card_combined_agreement_with_pricing_arbitration_addendums.pdf?cacheid=2807369658_p&_ga=2.106261507.1826638588.1540521049-1130837718.1540521049	1) yes 2) yes

Table 2. This table lists the Fortune 100 companies by sector. The number next to each company's name indicates its ranking on the Fortune 100. A check plus next to a company's name represents that the company has a consumer arbitration clause with a class waiver, and a check without a plus next to a company's name represents that the company has a consumer arbitration clause without a class waiver. When no check appears next to a company's name, there is no public record of the company having a consumer arbitration clause in recent years.

<u>Aerospace and Defense</u>	
27 Boeing	
51 United Technologies	
59 Lockheed Martin	
99 General Dynamics	
<u>Apparel</u>	
89 Nike	✓ +
<u>Chemicals</u>	
47 DowDuPont	✓ +
<u>Energy</u>	
2 Exxon Mobil	✓ +
13 Chevron	✓ +
28 Phillips 66	✓ +
31 Valero Energy	✓ +
41 Marathon Petroleum	✓ +
64 Energy Transfer Equity	
90 Andeavor	✓ +
91 World Fuel Services	

92 Exelon	✓ +
95 ConocoPhillips	
<u>Financials</u>	
3 Berkshire Hathaway	✓ +
20 JPMorgan Chase	✓ +
21 Fannie Mae	
24 Bank of America Corp.	✓ +
26 Wells Fargo	✓ +
32 Citigroup	✓ +
36 State Farm Insurance	✓ +
38 Freddie Mac	
43 MetLife	✓
52 Prudential Financial	✓ +
60 AIG	✓ +
66 Nationwide	✓ +
67 Morgan Stanley	✓ +
68 Liberty Mutual Insurance	✓ +
69 New York Life Insurance	✓ +
70 Goldman Sachs Group	✓ +
79 Allstate	✓ +
84 TIAA	✓ +
86 American Express	✓ +
93 Massachusetts Mutual	✓ +
100 USAA	✓ +

<u>Food and Drug Stores</u>	
17 Kroger	✓ +
19 Walgreens Boots Alliance	✓ +
53 Albertsons Cos.	✓ +
88 Publix Super Markets	✓ +
94 Rite Aid	✓ +
<u>Food, Beverages, and Tobacco</u>	
45 PepsiCo	✓ +
48 Archer Daniels Midland	
80 Tyson Foods	✓ +
87 Coca-Cola	✓ +
96 CHS	
<u>Healthcare</u>	
5 UnitedHealth Group	✓ +
7 CVS Health	✓ +
25 Express Scripts Holding	
29 Anthem	✓ +
37 Johnson & Johnson	✓ +
49 Aetna	✓ +
56 Humana	
57 Pfizer	
61 Centene	✓
63 HCA Healthcare	
73 Cigna	✓ +

78 Merck	✓ +
<u>Household Products</u>	
42 Procter & Gamble	✓
<u>Industrials</u>	
18 General Electric	✓ +
65 Caterpillar	✓ +
77 Honeywell International	✓ +
97 3M	✓ +
<u>Media</u>	
55 Disney	✓ +
98 Time Warner	✓ +
<u>Motor Vehicles & Parts</u>	
10 General Motors	✓ +
11 Ford Motor	✓ +
<u>Retailing</u>	
1 Walmart	✓ +
8 Amazon.com	✓ +
15 Costco	✓ +
23 Home Depot	✓ +
39 Target	✓ +
40 Lowe's	✓ +
72 Best Buy	✓ +

85 TJX	✓ +
<u>Technology Companies</u>	
4 Apple	✓ +
22 Alphabet	✓ +
30 Microsoft	✓ +
34 IBM	✓ +
35 Dell Technologies	✓ +
46 Intel	✓ +
58 HP	✓ +
62 Cisco Systems	✓ +
76 Facebook	✓ +
82 Oracle	
<u>Telecommunications</u>	
9 AT&T	✓ +
16 Verizon	✓ +
33 Comcast	✓ +
74 Charter Communications	✓ +
<u>Transportation</u>	
44 UPS	✓ +
50 FedEx	✓ +
71 American Airlines Group	✓ +
75 Delta Air Lines	✓ +
81 United Continental	✓ +

<u>Wholesalers</u>	
6 McKesson	✓ +
12 AmerisourceBergen	
14 Cardinal Health	✓ +
54 Sysco	
83 Tech Data	