COURT OF APPEAL, SECOND CIRCUIT

STATE OF LOUISIANA

Civil Case

DOCKET NO. 43,567-CA

CHASE BANK, N.A.

VERSUS

VINCENT L. LEGGIO

On appeal from the Shreveport City Court in the Parish of Caddo, State of Louisiana, Docket No. 2007R04188, Honorable David Rabb, Ad Hoc City Court Judge, presiding.

MOTION OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT, VINCENT L. LEGGIO

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I. INTRODUCTION

The National Association of Consumer Advocates (NACA), pursuant to 2-12.11 of the Uniform Rules for Louisiana Courts of Appeal, respectfully moves for leave to file an *amicus curiae* brief in support of appellant, Vincent L. Leggio.

II. INTEREST OF *AMICUS CURIAE*

NACA is an association of more than 1,000 attorneys across the United States who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. NACA is committed to consumer justice, and its members and their clients actively promote a fair marketplace that forcefully protects consumers, particularly those of modest means. To achieve this, NACA maintains a forum for information sharing among consumer advocates and serves as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices.

NACA is concerned about the increasing use of private, secret arbitration proceedings before the National Arbitration Forum (NAF) to collect consumer debts. In the present case, NACA is concerned with creditors' practices in attempting to confirm NAF arbitration awards against Louisiana consumers who did not consent to arbitration — including consumers who are victims of identity theft or mistaken identity, and who do not owe the underlying debt. This practice, of attempting to obtain a judgment confirming a private arbitration award with no proof of the consumer's consent to arbitrate, is contrary to law and unjustified as a matter of policy.

III. APPLICANT'S FAMILIARITY WITH THE ISSUES

Applicant's counsel have read the briefs filed by the parties to date, and are familiar with the issues and arguments presented in this appeal. NACA is knowledgeable about the issues that arise in consumer arbitrations, and specifically with the process of confirmation of arbitration awards by debt collectors. NACA provides educational

materials and resources for consumers about binding mandatory arbitration on its website, and co-sponsors annual conferences for consumer advocates which address consumer issues including the defense of arbitration claims.

IV. SPECIFIC ISSUES TO WHICH THE *AMICUS CURIAE* BRIEF WILL BE DIRECTED

NACA's proposed *amicus* brief, attached hereto, focuses on issues that are relevant to this appeal. First, the brief addresses the central question of this case—whether a party seeking to confirm a private arbitration award must prove that the arbitration proceeding was conducted pursuant to an agreement between the parties to arbitrate, even if the consumer did not previously file a motion to vacate the award. Closely connected is the issue whether a party against whom a private arbitration award is sought to be confirmed may defend on the ground that no underlying agreement to arbitrate exists. The brief explains how the arguments of the debt collector party in this appeal conflict with the reasoning of several state and federal courts on these precise issue, including several state supreme courts.

Second, the proposed *amicus* brief provides factual information about the National Arbitration Forum that is essential to appreciate the real-world impact of confirming arbitration awards with no proof of a contract to arbitrate. The data reported by NAF show that the vast majority of NAF arbitration awards against alleged debtors are entered without a hearing, based solely on information submitted by the creditor, and that NAF arbitrators rule for the creditor in over 99% of these cases. Based on this, and problems with NAF procedure identified by several courts, NACA is concerned that courts must not abdicate their judicial duty of determining that a valid arbitration agreement exists before confirming arbitration awards, especially in cases like the one in this appeal.

V. APPLICANT'S REASON FOR BELIEVING THAT A ADDITIONAL ARGUMENT IS NECESSARY

NACA believes that the *amicus* brief will assist the Court in understanding why the issues presented by this case are of substantial importance to Louisiana consumers and the public interest. As a leading consumer advocacy organization, NACA is in a position to provide the Court with insight into the importance of the issues and the broad impact this Court's resolution will have, beyond the present case.

VI. CONCLUSION

Based upon the forgoing, NACA respectfully requests that the court grant this motion and permit NACA to file its *amicus curiae* brief in support of the consumer party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing MOTION OF THE NATIONAL ASSOCIATE OF CONSUMER ADVOCATES FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT, VINCENT L. LEGGIO, by first class mail, properly addressed and postage prepaid, on this 17 day of June, 2008, on the following counsel of record:

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ORDER

IT IS ORDERED that the National Association of Consumer Advocates is granted leave to file an *amicus curiae* brief in this matter. The proposed brief attached to the motion for leave is accepted, and the clerk is ordered to file a copy into the record.

Shreveport, Louisiana, this _____ day of _____, 2008.

_____

JUDGE

COURT OF APPEAL, SECOND CIRCUIT

STATE OF LOUISIANA

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VERSUS

VINCENT L. LEGGIO

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Honorable David Rabb, Ad Hoc City Court Judge

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICUS CURIAE* FOR THE DEFENDANT/APPELLANT, VINCENT L. LEGGIO

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TABLE OF AUTHORITIES

Cases:

Offerdahl v. Silverstein, 569 N.W.2d 834, 836 (Mich. Ct. App. 1997).

Painewebber Incorporated v. The Chase Manhattan Private Bank, 260 F.3d 453, 462 (5th Cir. 2001).

Sprague v. Household International, 473 F. Supp. 2d 966 (W.D. Mo. 2005).

Volt Information Sciences. Inc. v. Bd. of Trustees ofLeland Sanford Jr. Univ.. 489 U.S. 468,479 (1989).

Other Authorities:

Associated Press, *Arbitration Stacked Against Consumers*, S.F. Chronicle, Sept. 28,2007, at C 1 and C2.

Business Week, June 16, 2008, *Banks vs. Consumers: Guess Who Wins*, http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm?chan=magazine+channel_top+stories

Christian Science Monitor, *Consumer Advocates Slam Credit-card Arbitration*, July 16,2007, at 13.

Michael Geist, *Fair? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 Brook. J. Int'l Law 903 (2002).

National Arbitration Forum, California Consumer Arbitrations, at http://www.arb-forum.com/main.aspx?itemID=563&hideBar=False&navID=188&news=3

Pam Smith, *Arbitrators Attack State Disclosure Law*, The Recorder, Oct. 18, 2005.

Public Citizen, *The ArbitrationTrap: How Credit Card Companies Ensnare Consumers*, Sept. 2007, at http://www.citizen.org/documents/Final_wcover.pdf

STATEMENT OF INTEREST

The National Association of Consumer Advocates (NACA) is an association of more than 1,000 attorneys who represent hundreds of thousands of consumers victimized by abusive business practices. NACA is committed to consumer justice. NACA is concerned about the increasing use of arbitration proceedings before the National Arbitration Forum (NAF) to collect consumer debts, in particular given that NAF arbitrators rule for the creditor in the vast majority of cases.

INTRODUCTION

This case poses two simple questions, which are of great consequence to Louisiana consumers: (i) In a judicial proceeding to confirm an arbitration award, may a defendant object on the ground that he never agreed to arbitrate, and (ii) must the plaintiff prove that the parties entered into a contract in which they agreed to submit their disputes to arbitration, before the court can grant the motion to confirm the award? The answer to both questions is clearly "yes."

Arbitration is a matter of contract. Because an arbitrator derives the power to decide a dispute solely from an agreement by the parties to arbitrate, a court cannot confirm an arbitration award—just as it cannot compel arbitration—unless it first determines that a valid arbitration agreement exists.

This principle cannot be abandoned merely because the party against whom an arbitration award has been rendered did not move to vacate the award within 90 days. Rather, as most courts have recognized, the validity of the underlying arbitration award rests on the issue of whether the parties entered into a contract in which they agreed to arbitrate. It is the duty of the

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INTRODUCTION

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This principle cannot be abandoned merely because the party against whom an arbitration award has been rendered did not move to vacate the award within 90 days. Rather, as most courts have recognized, the validity of the underlying arbitration award rests on the issue of whether the parties entered into a contract in which they agreed to arbitrate. It is the duty of the

court to determine this threshold issue. Without proof of a valid contract to arbitrate, the court may not confirm the arbitration award.

Nowhere is this judicial role more critical than in actions to confirm debt collection awards issued by the National Arbitration Forum (NAF). The NAF routinely issues awards on behalf of creditors without any meaningful requirement that the creditor prove the debtor agreed to arbitration or even owes the debt. In such cases, the only check on this private proceeding is when a court is asked to put its judicial imprimatur on the creditor's award. If the arguments advanced by the creditor plaintiff become the law of Louisiana, courts will be powerless to require the creditor to prove that the consumer agreed to arbitration, as long as the consumer has failed to affirmatively move to vacate the award. It will not matter whether the consumer was never notified of the arbitration; never served with notice of the confirmation proceeding; or never even opened the account in question.

A rule requiring Louisiana courts to rubber-stamp arbitration awards against unsuspecting consumers, no matter how strong the consumer's argument that he never consented to arbitration, and no matter how little evidence is presented that the consumer ever agreed to arbitrate, would result in a radical reduction of judicial protection to Louisiana consumers.

These issues were recently addressed in an *en banc* decision by the Louisiana Court of Appeal for the Fifth Circuit in *NCO Portfolio Management, Inc. v. Bertram Gougisha,* No. 07-CA-604, consolidated with *FIA Card Services, N.A. v. Dorothy E. Chouest,* No. 07-CA-882, consolidated with *MBNA America Bank, N.A. v. Nicole E. Burdett,* No. 07-CA-884, 2008 WL 1970319, _____ So.2d. _____ (La. App. 5th Cir. April 29, 2008).

NACA strongly urges this Court to adopt the holdings of *NCO v. Gougisha* and to clarify that in Louisiana, as in other jurisdictions, a party seeking to confirm an arbitration award must first prove the existence of a contract in which the parties agreed to submit the dispute to arbitration, and that it is the duty of the court to make this determination, regardless of whether any motion to vacate has been filed.

ARGUMENT

THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT SHOULD BE CLARIFIED BY THIS COURT.

I. An Arbitrator Cannot Declare His Own Jurisdiction.

The Plaintiff in this appeal argues that because a National Arbitration Forum ("NAF") arbitrator found that the parties had agreed to arbitrate, the court is not permitted to question that finding. This argument flies in the face of years of U.S. Supreme Court jurisprudence holding that, because an arbitrator derives jurisdiction to decide disputes solely from an agreement between the parties, the question of whether the parties agreed to arbitrate a dispute is one that a court—not an arbitrator— must decide.

It is black-letter law that an arbitrator has no authority to decide anything unless he or she is given that authority by the parties through a valid arbitration agreement. As the Supreme Court has made clear: Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *AT& T Technologies, Inc. v. Commc'ns. Workers of America*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986)

(citations and quotations omitted); see also *Volt Information Sciences. Inc. v. Bd. of Trustees of Leland Sanford Jr. Univ.,* 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration Act] is a matter of consent, not coercion.").

It is settled law that "the question of arbitrability ... is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, supra,* 475 U.S. at 656. The Court explained that "'[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the [contract] does in fact create such a duty.'" *Id.,* quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-47, 84 S.Ct. 909, 912-13, 11 L.Ed.2d 898 (1964). Id.

Likewise, the federal appellate courts have recognized that "[d]etermining whether there is a written agreement to arbitrate the controversy in question is a first and crucial step in any enforcement proceeding before a district court," *MCI Telecommunications Corp. v. Exalon Industries, Inc.,* 138 F.3d 426, 429 (1st Cir. 1998). Similarly, the Fifth Circuit has stated that "[i]n determining whether the parties have agreed to arbitrate the dispute in question, we must consider '(1) whether a valid agreement to arbitrate between the parties exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement.'" *Painewebber Incorporated v. The Chase Manhattan Private Bank,* 260 F.3d 453, 462 (5th Cir. 2001).

Because arbitrators have no authority absent a valid agreement to arbitrate, the threshold determination of whether such an agreement exists is one that only a court—not an arbitrator—can make. The reason for not

permitting an arbitrator to determine his/her own jurisdiction is simple: "[i]n the context of arbitration, the threshold issue [of whether a particular party is subject to an arbitration agreement] is not governed by the terms of the arbitration agreement, which would be a circular proposition, but by the court." *Offerdahl v. Silverstein*, 569 N.W.2d 834, 836 (Mich. Ct. App. 1997).

The determination of whether an agreement to arbitrate exists is unique: unlike a typical factual finding, it goes to the heart of the arbitrator's power to decide a dispute. Particularly given the high volume of debt collection arbitrations conducted by NAF on behalf of creditors, and the documented cases in which NAF arbitrators have entered awards against consumers who had never agreed to arbitration (and who, in some cases, were not even cardholders), it is essential that courts first determine that the defendant in a confirmation proceeding is bound by an arbitration agreement, before confirming an award.

II. A Party Seeking To Confirm an Arbitration Award Must Prove the Existence of a Contract to Arbitrate.

A myriad of courts across the country have held that the 90-day statute of limitations for filing a motion to vacate does not bar a party from arguing that no agreement to arbitrate exists in opposition to a petition to confirm the award. Similarly, a party seeking to confirm an arbitration award must file proof that the parties agreed to submit the dispute in question to binding arbitration, as a prerequisite to obtaining relief. The reasoning of these courts is convincing.

For instance, the federal First Circuit has flatly rejected the argument that the Plaintiff makes in this case. In *MCI Telecommunications Corp. v.*

Exalon Industries, Inc., 138 F.3d 426 (1st Cir. 1998), the court analyzed the question under the FAA's 90-day time limit, and explained:

> [I]f the agreement to arbitrate does not exist, there is no obligation to arbitrate. A party that contends that it is not bound by an agreement to arbitrate can therefore simply ... raise the inexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award, without the limitations contained in section 12, which are only applicable to those bound by a written agreement to arbitrate.

Id. at 430.

Likewise, the Arkansas Supreme Court in *Danner v. MBNA America Bank, N.A.*, 369 Ark. 435, ___ S.W.3d ____, 2007 WL 1219747 (Ark. April 26, 2007), rejected MBNA's argument that the court was required to confirm an award simply because the defendant did not move to vacate. "We find no indication that Congress intended for a party to be found to have waived the argument that there was no written agreement to arbitrate if that party failed to raise the argument within the time period established by [FAA] section 12."

The supreme courts of Kansas, Montana, Wisconsin, and Michigan have all reached the same conclusion. *MBNA America Bank, N.A. v. Credit*, 132 P.3d 898 (Kan. 2006) (court need not confirm NAF arbitration award against alleged debtor simply because debtor failed to timely challenge award); *Bank of America v. Dahlquist*, 152 P.3d 718 (Mont. 2007) (party is not required to challenge within three months an award issued by an arbitrator who lacked jurisdiction to decide the case, because such an award is void ab initio); *Milwaukee Police Ass 'n v. Milwaukee*, 285 N.W.2d 119 (Wis. 1979) (party may oppose confirmation even if time limit for vacatur

has passed); *Arrow Overall Supply Co. v. Peloquin Enterprises*, 323 N.W.2d 1 (Mich. 1982)(plaintiff moved to confirm an arbitration award, and the defendant responded that there was no agreement to arbitrate. The trial court confirmed the award, holding that the defendant's argument was untimely. Reversing, the high court held that "the defense of 'no valid agreement to arbitrate' may be raised in an action to confirm or enforce an arbitration award." Id. at 2). See also *Fischer v. MBNA America Bank, N.A.*, 248 S.W. 3d 567, 2007 WL 779295 (Ky. Ct. App. Mar. 16, 2007) (court erred by striking consumer's response to petition to confirm as untimely, where consumer argued that no agreement existed);; In re North of England S.S. Co., 57 F.2d 672, 673 (2d Cir. 1932)("Although more than three months have elapsed ..., the appellant may still assert objections to the confirmation of the award.").

If the rule urged by the creditor plaintiff is adopted, Louisiana consumers will have far less protection against the entry of invalid arbitration awards than consumers in any of these other jurisdictions. This Court should follow the rulings of *NCO v. Gougisha*, *supra*, and the many federal and state courts in holding that a party seeking to confirm an arbitration award must affirmatively prove that an arbitration agreement exists when it files a motion to confirm an arbitration award, regardless of whether the award has been vacated.

In addition to *NCO v. Gougisha, supra,* the Louisiana Supreme Court decades ago recognized that questions of the validity *ab initio* of an alleged arbitration agreement are questions for the courts to decide, not the arbitrator. "It would be an absurdity to compel arbitration of the conditions in a contract which does not exist in its entirety in legal contemplation. ... By its very terms [La.R.S. 9] Section 4201 presupposes the existence of a valid

contract as a basis for invoking arbitration." *George Engine Co., Inc. v. Southern Shipbuilding Corporation,* 350 So.2d 881 (La. 1977).

III. The Approach Advocated by the Creditor Parties Would Jeopardize The Rights of Victims of Identity Theft and Others, like Leggio, who Never Agreed to Arbitrate.

In the trial court, Leggio formally and repeatedly denied that he ever agreed to arbitrate. Similarly, victims of identity theft who have never entered into any agreement with a creditor, much less an agreement to arbitrate, would be denied their right to contest a petition to compel arbitration or to confirm an arbitration award if the creditor's arguments were adopted. Courts have uniformly rejected attempts by creditors to force unwitting parties into arbitration without their consent.

On point is *Pike v. Freeman*, 266 F.3d 78 (2d. Cir.2001), in which a creditor alleged that an identity theft victim had consented to arbitrate her claims against the creditor for unauthorized collection efforts, and moved to compel arbitration. The court, after acknowledging that arbitration may only be enforced pursuant to an agreement between the parties, noted that the consumer contested responsibility for the debt and had tendered an affidavit claiming no knowledge of the existence of the account at issue, and asserting that the unpaid charges were a result of identity theft and fraud. The court found that the plaintiff met her burden of showing the existence of an issue of fact as to the making of an agreement for arbitration, and that a trial on that issue was necessary.

See also *Poulson v. Trans Union LLC,* 370 F.Supp.2d 592 (E.D. Tex. 2005), involving an ex-spouse whose her former husband added her name to an account without her knowledge. The court explained:

Arbitration is a matter of contract, and courts may require a party to

submit its dispute to arbitration only if the party has expressly agreed to do so. *Personal Security & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 392 (5th Cir.2002). To determine whether the parties have agreed to arbitrate the dispute, a court must first determine whether there is a valid agreement to arbitrate between the parties and then determine whether the parties' dispute falls within the scope of the arbitration agreement. *Id.* Ordinary state law principles that govern contract formation apply to the determination of whether the parties have a valid arbitration agreement. *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir.2002). In determining whether a dispute falls within the scope of the arbitration agreement, ambiguities are resolved in favor of arbitration, but this does not apply to determining whether a valid arbitration agreement exists. *Id.*

Similarly in *Riley v. GMAC*, 226 F.Supp.2d 1316 (S.D. Ala. 2002), the court in an unreported order denied Discover's motion to compel arbitration against an identity theft victim, finding that the victim did not consent to an arbitration clause and arbitration cannot be enforced absent an agreement to arbitrate.

It is contrary to established law, and offends fundamental principles of fairness, to allow one party to arbitrarily block another party's access to the courts and compel that party to participate in a private arbitration tribunal, without allowing that party to object and present evidence that that they never agreed to arbitrate. It is similarly contrary to law to allow a party to confirm and make executory a privately obtained arbitration award against another without presenting competent evidence that the award was obtained pursuant to the other party's agreement to arbitrate. Identity theft victims, and parties like Leggio who contest the existence of an agreement to

arbitrate, should not be deprived of an opportunity to contest the validity of the award sought to be enforced.

IV. The Approach Advocated by the Creditor Parties Would Jeopardize The Rights of Consumers In Debt Collection Arbitrations.

The private arbitration company designated by Chase in its credit card contracts, the National Arbitration Forum (NAF), conducts a high volume of debt collection arbitrations on behalf of its creditor and debt collector clients. A recent analysis of the NAF's consumer arbitrations in California show that debt collection arbitrations against cardholders account for over 50% of NAF arbitrations in the state.1 The vast majority are "default" proceedings in which the arbitrator rules only on information provided by one side: the creditor. In these "default" cases, creditors win 99.9% of cases.2 See Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers, Sept. 2007, at http://www.citizen.org/documents/Final_wcover.pdf, at 14.3

Problems with NAF default awards have been documented by the courts. In a recent New Hampshire case, a creditor attempted to confirm an award that the NAF had entered against a man whose ex-wife had opened a credit card account without his consent, and which he had never used or made payment on. The court refused to confirm the award, explaining:

> To hold otherwise would allow any credit card company to force victims of identity theft into arbitration, simply because that person's name is on the account Under MBNA's reasoning, any identity theft

[1] The NAF does not provide data on arbitrations in any other state, and only recently started complying with California law. *See* Pam Smith, *Arbitrators Attack State Disclosure Law,* The Recorder, Oct. 18, 2005.

[2] NAF sued the District Attorney of San Francisco in an attempt to avoid complying with state law requiring it to publish this information.

victim would be subject to arbitration simply because the perpetrator used the fraudulently obtained credit card after the arbitration provisions became effective.

MBNA America Bank, N.A. v. Cornock, No. 03-C-0018 (N.H. Super. Ct. March 20, 2007). See also *CACV v. Corda*, 2005 WL 3664087 (Conn. Super. Dec. 16,2005) (NAF's procedures "certainly result[] in a high likelihood that the outcome of the arbitration will be in the [debt collector's favor"); *Credit*, 132 P.3d at 902 (describing "national trend in which consumers are questioning MBNA and whether arbitration agreements exist" and criticizing "MBNA's casual approach to this litigation"); *MBNA America Bank, N.A. v. Barben*, 111 P.3d 663 (Kan. Ct. App. 2005) (noting a NAF award contained "patently ... untrue" information); *MBNA America Bank, N.A. v. Engen*, 128 Wa. App. 1050 (Wash. App. 2005) (reversing award entered by NAF against consumer who never agreed to arbitrate); cf. *Sprague v. Household International*, 473 F. Supp. 2d 966, 976 n. 8 (W.D. Mo. 2005) (criticizing NAF's position in the case as providing "further support for Plaintiffs' allegation that the NAF is biased in favor of financial institutions"); *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671 (Ct. App. 2002) (finding repeat-player bias by NAF). Furthermore, NAF arbitrators who rule against creditors such as MBNA have been "blackballed" from deciding other debt collection cases.3

A recent Business Week article reveals how NAF markets itself to credit card companies and collection agencies in "confidential" presentations

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[3] Independent investigations have confirmed that the NAF steers cases towards arbitrators who predictably rule for corporations over consumers. *E.g.*, Michael Geist, *Fair? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 Brook. J. Int'l Law 903, 912 (2002) (statistical analysis showed NAF funneled cases to arbitrators who most often ruled for its clients).

as an effective tool for collecting debts and increasing recoveries.[4] Consistent with this pro-recovery marketing, NAF sends its arbitrators preprinted award forms along with claims, with the amount sought by the creditor already filled in.[5]

As the Christian Science Monitor recently reported: Richard Neely, a retired chief justice of the West Virginia Supreme Court, says he received two cases from the NAF in which he wouldn't charge consumers for the creditor's litigation related fees. He never received another case. After she decided against a credit-card company, awarding a consumer damages, Elizabeth Bartholet, a former NAF arbitrator and Harvard law professor... was repeatedly removed from cases by the credit-card company. Rather than telling alleged debtors that the creditors removed her, she said, at times NAF mailed letters saying she had a scheduling conflict and had withdrawn. Baribeau, supra, at 13.6

These examples underscore the need for this court's careful consideration of this appeal. If the rule advanced by the plaintiff-appellee is adopted, courts will be required to confirm arbitration awards against any individual fails to bring a court action to vacate the award—even over the express objection of the consumer that he never agreed to arbitrate in the first place.

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[4] Business Week, *Banks vs. Consumers: Guess Who Wins*, June 16, 2008 http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm?chan=magazine+channel_top+stories.

[5] Id.

[6] *See also* Associated Press, *Arbitration Stacked Against Consumers,* S.F. Chronicle, Sept. 28,2007, at C 1 and C2. The raw data is at National Arbitration Forum, California Consumer Arbitrations, at http://www.arb-forum.com/main.aspx?itemID=563&hideBar=False&navID=188&news=3.

CONCLUSION

This Court should adopt the rule that a party moving to confirm an arbitration award must prove the existence of a contract in which the parties agreed to arbitrate, and that the party opposing the motion may object on the grounds that no agreement to arbitrate exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATE OF CONSUMER ADVOCATES IN SUPPORT OF VINCENT LEGGIO by first class mail, properly addressed and postage prepaid, on this 17 day of June, 2008, on the following:

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