SUPREME COURT OF LOUISIANA

No. 10-C-1372

FIA CARD SERVICES, N.A.,

Plaintiff-Respondent,

v.

WILLIAM F. WEAVER,

Defendant-Appellant

On Appeal from the Court of Appeal,
First Circuit, Parish of East Baton Rouge

APPELLANT'S ORIGINAL BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This case turns on a basic principle of law: a court must not confirm an arbitration award—just as it must not compel arbitration—unless it is satisfied that a valid arbitration agreement exists. This rule makes sense. An arbitrator derives her authority solely from an agreement by the parties. Absent such an agreement, the arbitrator has no power to decide a dispute. If an arbitrator nonetheless issues an award, that award is not enforceable in court.

Plaintiff-Respondent FIA Card Services, N.A. ("FIA") seeks to turn that principle on its head. Through its debt-collection law firm, Wolpoff & Abramson, FIA brought a claim in the National Arbitration Forum ("NAF") to collect an alleged debt from William Weaver.[1] As in virtually all debt collection arbitrations, the NAF awarded FIA the full amount it sought. FIA then waited until the 90-day time limit for vacatur of the award had passed before filing a petition to confirm the award in the 19th Judicial District Court, Parish of East Baton Rouge. In support of its petition, it submitted the robo-signed NAF award and a generic, unsigned, undated copy of an MBNA cardholder agreement with no evidence linking that document to either FIA or William Weaver. Mr. Weaver swore under oath that he had not agreed to arbitrate. But FIA argued—and the courts below agreed—that because the arbitration award had not been vacated within the 90-day statutory deadline, *it had to be confirmed regardless of whether the parties had never agreed to arbitration*.

If the decision below becomes the law of Louisiana, courts will lose their power to enforce the only requirement that makes private arbitration legitimate in the first place: consent. Instead, courts will become mere rubber stamps for the debt collection industry. Consumers in debt collection cases, most of whom are pro se, predictably lose in default arbitrations and predictably miss the statutory deadline to vacate the award. In virtually all of these cases, the first *and only* time a court looks at the arbitration is when the debt collector files a petition to confirm. Courts must retain the power to consider the question of whether a valid agreement to arbitrate exists and to deny confirmation of an award if there is insufficient proof of an agreement. The decision below must be reversed.

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[1] Although this fact had not yet come to light, at the time of Mr. Weaver's arbitration, the NAF and Wolpoff were both owned by the same New York hedge fund. When the conflict of interest was exposed in law enforcement actions and a Congressional investigation, the NAF ceased to administer all consumer arbitrations.

First, "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *AT&T Techs., Inc. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 648–49 (1986). Thus, an arbitration clause is not enforceable by a court unless both parties consented. *Aguillard v. Auction Mgmt. Corp.*, 2004-C-2804, 2004-C-2857 (La. 6/29/04), 908 So. 2d 1, 8. That legal principle does not disappear just because one party obtains an arbitration award or because one party does not file a motion to vacate. Rather, as this Court has explained, "[a] party can move in district court to vacate an arbitration award (*or, alternatively, can contest a motion to confirm an award*) on certain enumerated grounds, including the ground that the arbitrators have 'exceeded their powers.'" *Collins v. Prudential Ins. Co. of Am.*, 99-C-1423 (La. 1/19/00) 752 So. 2d 825, 829–30 (emphasis added). Without a valid arbitration agreement, an arbitrator has *no* power to enter an award; she has by definition exceeded her powers. While a court may not re-try the dispute or substitute its judgment for that the arbitrator on the merits, the argument that *no arbitration agreement exists* is unique. It is a challenge to the arbitrator's jurisdiction. And like a jurisdictional challenge, it may be raised—and a court may consider it—at any point. There is no legal "gotcha" that entitles debt collectors to sidestep that basic rule of law or that strips consumers of the right to defend themselves in judicial proceedings. Indeed, the Federal Arbitration Act ("FAA") permits a court to confirm an arbitration award only if "the parties *in their agreement* have agreed" to judicial confirmation, 9 U.S.C. § 9 (emphasis added), and requires that the party seeking confirmation must provide "the agreement" pursuant to which the award was made. 9 U.S.C. § 13. Thus, despite the fact that Mr. Weaver had not brought an action to vacate the award against him, the trial court should not have confirmed the award unless it was satisfied that a valid arbitration agreement existed.

FIA did not meet its burden of showing that an arbitration agreement existed between the parties. A generic, barely legible, unsigned, undated, unauthenticated copy of an MBNA credit card agreement is not sufficient to show that Weaver agreed to arbitrate. It does not show that the original agreement between MBNA and Mr. Weaver contained an arbitration clause (or that such a term was lawfully added to the agreement and accepted by Mr. Weaver); it does not show that FIA somehow acquired the rights to collect an MBNA debt; and it does not show that FIA has standing to enforce the arbitration clause.

Furthermore, an NAF arbitration award, at best, shows only that an arbitrator signed a piece of paper, not that the arbitrator found evidence that the parties agreed to arbitrate. Before the NAF was forced to withdraw from the consumer arbitration business in the wake of congressional and law enforcement investigations, the NAF sent arbitrators stacks of form awards, each with the amount to be awarded to the creditor already filled in. They acted as robo-signers, paid to churn out dozens of awards per day. Arbitrators who bucked the system and ruled for consumers were assigned no more cases. It is now common knowledge that NAF arbitrators routinely issued default awards without any meaningful requirement that the creditor prove the debtor agreed to arbitration or even owed the debt at issue. In such cases, it is imperative that a court asked to judicially confirm the creditor's award verify that the award was actually entered pursuant to a valid agreement.

State and federal courts across the country, including two Louisiana appellate courts, have rejected attempts by FIA, MBNA and their debt collectors to confirm arbitration awards without proof of an arbitration agreement. As Louisiana's Fifth Circuit Court of Appeal explained:

> The creditor/plaintiffs . . . argue that the state courts are prohibited from reviewing the threshold determination of whether a binding arbitration agreement exists because the arbitrator has already made that determination and courts are prohibited from reviewing the merits of an arbitration award. We consider the question of the existence of a binding arbitration award to be independently reviewable by the courts. Since binding arbitration is imposed contractually, in order to confirm an award a party must prove that the procedure has been agreed to by the parties.

NCO Portfolio Mgmt., Inc. v. Gougisha, 07-CA-064, *consolidated with FIA Card Servs., N.A. v. Chouest*, 07-CA-882, *consolidated with MBNA Am. Bank, N.A. v. Burdett*, 07-CA-884 (La. App. 5 Cir. 4/29/08), 985 So. 2d 731, 735 (*en banc*), *writ denied*, 2008-C-1146 (La. 9/26/08), 992 So. 2d 986. The Fifth Circuit was right.

The Court should reverse the decision of the First Circuit below and hold that a party may oppose confirmation of an arbitration award on grounds that no valid agreement to arbitrate exists, regardless of whether any motion to vacate has been filed—and a court must not confirm an arbitration award without first verifying that an underlying arbitration agreement exists.

STATEMENT OF THE CASE

A. National Arbitration Forum and NAF Arbitration in This Case

The NAF is a private, for-profit firm headquartered in Minneapolis.[2] Until recently, the NAF was the nation's largest provider of consumer arbitrations, conducting over 200,000 arbitrations per year and "dominat[ing] credit card arbitrations."[3] The vast majority of the NAF's debt collection arbitrations were default proceedings in which the arbitrator ruled based on information provided by the creditor. Creditors won 99.9% of default cases.[4] From 2003 to 2007, debt collection cases against MBNA and FIA cardholders accounted for more than 50% of the NAF's consumer arbitration business in the only state for which this data is available.[5]

On approximately February 23, 2007, FIA, through its debt collection law firm, Wolpoff & Abramson, filed a claim in the NAF against Mr. Weaver asking for an award of $29,569.16 plus interest and attorneys' fees. R.39–40.

FIA appears to have submitted two documents with its claim. The first is a one-page, unauthenticated "Summary of Account Information" that lists Mr. Weaver's name, address, social security number, account number, "principal balance," and interest rate. R.40. It does not mention FIA or arbitration. A line at the bottom of the page states, "information drawn from account records and current as of the date filed." *Id.* The document does not indicate when it was "filed" or with what entity. *Id.* The second document is a partially legible photocopy of a brochure. R.42–48. It does not mention FIA or William Weaver. A generic, undated NAF "Notice of Arbitration" addressed to "Respondent" asserted that "The Forum is an independent and impartial arbitration organization, which does not . . . represent parties." R.41.

On July 24, 2007, the NAF issued a default award in favor of FIA for $32,012.40. R.27. The award asserts that, "[o]n or before 02/22/2007 the Parties entered into a written agreement to arbitrate their dispute" and that "[t]he Parties' Arbitration Agreement is valid and enforceable." *Id.* That language is standard on NAF arbitration awards, which are sent to arbitrators with the

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[2] *See* National Arbitration Forum, Company Fact Sheet, http://www.adrforum.com/users/naf/resources/CompanyFactSheet.pdf (last visited Nov. 28, 2010).

[3] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, Bus. Week, June 16, 2008. [hereinafter "*Banks v. Consumers (Guess Who Wins)*"].

[4] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 15, Sept. 2007, available *at* http://www.citizen.org/documents/ArbitrationTrap.pdf [hereinafter "*Arbitration Trap*].

[5] *See Arbitration Trap* 14.

amount to be awarded to the creditor already filled in.[6] Notably, the award in Mr. Weaver's case states that the arbitrator found that "the Parties"—FIA and Mr. Weaver—entered into an arbitration agreement, despite the fact that the only contract submitted was labeled "MBNA."

Meanwhile, the NAF was marketing itself to creditors and debt collectors by promising that they would obtain a "marked increase in recovery rates over existing collection methods" and that they could use procedural tricks to "tilt the arbitration in their favor" and "control the process and timeline."[7]

To make good on its promise, the NAF steered cases towards pro-business arbitrators. A analysis of NAF data by the Center for Responsible Lending revealed a direct correlation between the amount an arbitrator awarded to a creditor and the number of future cases that arbitrator was assigned.[8] The NAF's data show that although the NAF claimed to have a roster of 1,500 arbitrators in one state, 90% of its debt collection cases in the state (17,265 cases) were decided by just 28 arbitrators.[9] The data also show that a single NAF arbitrator decided 68 arbitrations in one day, giving debt collectors every cent of the $1 million they requested.[10] A former NAF arbitrator claimed, "I could sit on my back porch and do six or seven of these cases a week and make $150 a pop without raising a sweat. . . . I'd give the [credit-card companies] everything they wanted and more just to keep the business coming."[11] Another former NAF arbitrator, Harvard Law School professor Elizabeth Bartholet, testified before Congress that she had been blackballed after she awarded a consumer $48,000 in damages.[12]

On July 14, 2009, the Minnesota Attorney General revealed the results of an investigation that would finally bring NAF consumer arbitrations to a halt. The investigation showed that a New York-based hedge fund group had acquired both a governing interest in the NAF and the

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[6] *Banks v. Consumers (Guess Who Wins).*

[7] *Id.*

[8] Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009) 9, *available at* http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

[9] *Arbitration Trap* 15.

[10] *Id.* 3.

[11] Chris Serres, *Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions?*, Star Trib. (Minneapolis), May 11, 2008, at 1D.

[12] *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, S. Comm. on Judiciary, 110th Cong. (July 23, 2008) (statement of Elizabeth Bartholet). Professor Bartholet concluded from her experience that "the NAF process was systematically biased in favor of credit card companies" and that it allowed credit card companies to "purchase all the justice they want." *Id.*

assets of the three largest consumer credit debt collectors—including Wolpoff & Abramson.[13] Meetings between representatives of the hedge fund, the NAF, and Wolpoff had begun in 2006.[14] Wolpoff had merged with other large debt collectors, which then operated under the name Mann Bracken.[15] At the same time the NAF was resolving hundreds of thousands of disputes brought by its sister debt collection companies, the NAF was claiming publicly that it was "not affiliated or owned by any party who files a claim before the forum," that it was not "aligned with lenders or other business parties," and that it provided "neutral and unbiased dispute resolution."[16]

Three days after the Minnesota A.G. filed suit, the NAF settled the case and agreed to immediately stop handling all consumer arbitrations.[17] A few days later, a scathing report issued by a U.S. House subcommittee concluded that "[v]irtually all" of the NAF's consumer arbitrations were debt collection actions decided in the creditor's favor.[18] With the NAF out of the consumer debt collection business, Wolpoff successor Mann Bracken was forced to declare bankruptcy.[19]

On July 22, 2009 NAF C.E.O. Michael F. Kelly admitted to members of Congress that $42 million in profits from the debt collection hedge-fund enterprise were distributed to the NAF and its management team.[20] Kelly did not deny the truth of Minnesota lawsuit's allegations.[21]

On February 23, 2010, Bank of America, the successor in interest to FIA, agreed to settle allegations that it had conspired with several other major credit card issuers to impose arbitration

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[13] Compl., *State of Minnesota v. National Arbitration Forum*, No 27-CV-09-18550, ¶¶ 2, 32 (Minn. Dist. Ct. July 14, 2009), *available at* http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf [hereinafter "Minnesota Complaint"].

[14] *Id.* ¶ 32.

[15] *Id.* ¶¶ 2, 32, 90.

[16] *Id.* ¶ 23.

[17] Consent Decree, *State of Minnesota v. National Arbitration Forum*, No 27-CV-09-18550 (July 17, 2009), *available at* http://pubcit.typepad.com/files/nafconsentdecree.pdf .

[18] Staff of the Domestic Policy Subcomm. of the H. Comm. on Oversight and Government Reform, 111th Cong., *Arbitration Abuse: An Examination of Claims of the National Arbitration Forum* 1 (2009), available at http://oversight.house.gov/images/stories/documents/20090721154944.pdf.

[19] Nathan Koppel, *Mann Bracken, Debt Collecting Firm Extraordinaire, To Shut Down*, Wall St. J., Jan. 20, 2010.

[20] *Arbitration or 'Arbitrary': The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the H. Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. July 22, 2009 [hereinafter "*Arbitration or 'Arbitrary'*"] (testimony of Michael F. Kelly, Chief Executive Officer, NAF). A video of Kelly's testimony is available at http://oversight.house.gov/index.php?option=com_ content&task=view&id=4013&Itemid=31.

[21] *See* Written Testimony of Michael F. Kelly at 1, *Arbitration or 'Arbitrary'*.

clauses on cardholders in violation of federal antitrust laws.[22] As part of the settlement, Bank of America agreed to remove its NAF arbitration clause from all of its U.S. credit card agreements.[23]

B. Trial Court Proceedings

The party that prevails in arbitration has up to one year to confirm the award in court. 9 U.S.C. § 9; *see also* LSA-R.S. 9:4209. However, the party against whom an arbitration award is entered has only 90 days to seek to vacate the award. 9 U.S.C. § 12; *see also* LSA-R.S. 9:4213. Mr. Weaver did not move to vacate the NAF award entered against him. On November 5, 2007—104 days after the NAF award was entered—FIA filed a petition in the 19th Judicial District Court to confirm the award. R.4.

In support of its motion to confirm, FIA submitted the NAF award. R.27. It also submitted two different versions of MBNA contracts, both of which were undated, generic, and only partially legible. R.42–48 (document entitled "Selected Sections" and bearing MBNA copyright dated 2000); R.28–35 (document entitled "Facsimile of Current Lending Agreement Terms As Presented to the Credit Customer and Reflected in the Records of the Creditor" and bearing MBNA copyright dated 2001). FIA never entered those or any other documents into evidence. FIA likewise provided no proof that Mr. Weaver had incurred a debt to MBNA or FIA; that the generic documents matched any terms that had been sent to Mr. Weaver; or that Mr. Weaver had agreed to those terms. The only document introduced into evidence was Mr. Weaver's March 31, 2008, affidavit in which he swore under oath that he had ever entered into an agreement to arbitrate and that the documents submitted by FIA did not match any contract to which he had agreed. Civ. Evidence List, Apr. 7, 2008 ("Defendant's Ex. A"); *see also* App. II at 11–13, 14.[24] There was no witness testimony.

The trial court granted FIA's motion on April 7, 2008 and entered a judgment for FIA on April 21, 2008. R.95–99, R.54 The court gave two reasons for its holding: "the debtor did not

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[22] Order Preliminarily Approving Class Action Settlement, *Ross v. Bank of America, N.A.*, No; 05-CV-7116 (WHP) (Mar. 18, 2010), *available at* http://www.arbitration.ccfsettlement.com/documents/files/2010-03-18-prelim-approval-order.pdf

[23] Stipulation and Agreement of Settlement with Bank of America, et. al., *Ross v. Bank of America, N.A.*, No. 05-CV-7116 (WHP) (Feb. 23, 2010), *available at* http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-bank-of-america.pdf.

[24] Citations to "App." refer to the appendices submitted with the Application for Writ pursuant to La. Sup. Ct. Rule X, §§ 3(5) and 3(6).

timely bring an attack on the arbitration agreement" by filing a motion to vacate the award; and "the arbitrators [sic] already reviewed and made a final determination on the validity and enforceability of the credit card agreement." R.97–98.

Mr. Weaver moved for a new trial in light of the Fifth Circuit's *en banc* decision in *Gougisha*, 985 So. 2d 731, which held that a court must not confirm an arbitration award without first determining that an underlying arbitration agreement exists. On September 22, 2009, the trial court denied that motion, affirming that it was "bound to confirm" the NAF award because the arbitrator's award itself stated that a valid arbitration agreement existed and Mr. Weaver had not filed a motion to vacate the award. R.88. The court entered judgment for FIA on March 17, 2009. R.91.

C. Court of Appeal Decision

On appeal to the First Circuit, Mr. Weaver continued to insist that he had not agreed to arbitration and that the NAF award against him should not have been confirmed because FIA had failed to demonstrate that he had entered into an arbitration agreement. *FIA Card Servs., N.A. v. Weaver*, 2009 CA 1464 (La. App. 1 Cir. 3/26/10), 36 So. 3d 950. Rather than address that question, however, the Court of Appeal affirmed, holding that the trial court was barred from "even consider[ing] Mr. Weaver's claim that a valid agreement to arbitrate did not exist between the parties," *id.* at 952, and that "because the arbitration award had not been vacated . . . as provided for in 9 U.S.C. §§ 10-11, the district court was required to confirm the award in accordance with 9 U.S.C. § 9." *Id.* at 953. Judge Pettigrew dissented and said that he would follow the reasoning of *Chase Bank USA, N.A. v. Leggio*, 43,567 (La. App. 2 Cir. 11/19/08), 997 So. 2d 887, 889 ("*Leggio I*"); *Chase Bank USA, N.A. v. Leggio*, 43,751, 43,752 (La. App. 2 Cir. 12/3/08), 999 So. 2d 155, 158 ("*Leggio II*"), and *Gougisha*, 985 So. 2d at 734. He noted: "After reviewing the record in this proceeding, I find no evidence of a signed or initialed loan application, credit agreement, or arbitration agreement by William F. Weaver." *Id.* at 953–54. On May 12, 2010, the court denied Mr. Weaver's application for rehearing, with Judge Pettigrew again in dissent. App. I at 17. This Court granted Mr. Weaver's Application for Writ of Certiorari on October 1, 2010.

ASSIGNMENT OF ERRORS

The First Circuit Court of Appeal erred by holding that when a party seeks to confirm an arbitration award allegedly obtained pursuant to an agreement to arbitrate, but no timely motion to vacate the award has been filed, a court must confirm the award even if there is no proof that a valid agreement to arbitrate exists.

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

The Court of Appeal held that the district court had no legal authority under 9 U.S.C. § 9 to verify whether a valid agreement to arbitrate existed, and that it was required to confirm the award because the award had not been vacated within the statutory time limit under 9 U.S.C. § 12. *Weaver*, 36 So. 2d at 952–53. This Court should review those legal rulings *de novo*. *See Cleco Evangeline, LLC v. Louisiana Tax Comm'n*, 2001-C-2162 (La. 4/3/02), 813 So. 2d 351, 353 ("We review the matter *de novo*, and render judgment on the record, without deference to the legal conclusions of the tribunals below."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995) ("[R]eview of . . . a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration, should proceed like review of any other district court decision finding an agreement between parties, *e.g.*, accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*."); *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 216 (5th Cir. 2006) ("This Court reviews a district court's confirmation of an arbitration award *de novo*.").

II. UNDER THE FEDERAL ARBITRATION ACT AND LOUISIANA LAW, AN ARBITRATION AWARD IS NOT ENFORCEABLE UNLESS THE PARTIES AGREED TO ARBITRATE, REGARDLESS OF WHETHER ANY MOTION TO VACATE THE AWARD WAS FILED.

It is undisputed that a court reviewing an arbitration award may not substitute its own reasoning for that of the arbitrator. As this Court has explained, "[t]he arbitrators' determination on the merits will not be reviewed by the court since the parties have in advance, by contract, agreed that their decision on issues of fact and law should be final and binding." *St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 87-C-0358 (La. 6/22/87), 509 So. 2d 424, 426. However, Mr. Weaver's argument that *there was no advance agreement of the parties* was not a request that the court re-try the merits of the arbitrator's decision. It was a challenge to the underlying authority of the arbitrator to decide the dispute *at all*. As the Fifth Circuit has explained, while a

court does not have "the authority to review the merits of these awards, *i.e.* whether the debt was owed [or] the amount of the debt," it does have "the authority and a duty" to "determine whether . . . arbitration agreement[s] exist between the creditors and alleged debtors in this case." *Gougisha*, 985 So. 2d at 735–36. This makes sense, because "binding arbitration is imposed contractually," and "the arbitrator only has the power to resolve a dispute if there is a valid arbitration agreement." *Id.* In other words, if the arbitrator had no legal power to arbitrate, then the award was invalid—and it could not be transformed into a valid, enforceable award merely by virtue of the fact that Mr. Weaver did not move to vacate it within the statutory time limit.

A. The Existence of a Valid Agreement to Arbitrate Is a Prerequisite for Confirmation of an Arbitration Award.

"Arbitration is a matter of contract." *AT&T Techs.,* 475 U.S. at 648. Therefore, "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." *Id.* at 648–49; *see also Volt Info. 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.").

Because arbitrators have no authority absent such an agreement, the threshold determination of whether an agreement to arbitrate *exists* is one that a court—not an arbitrator—must make. *Int'l River Center v. Johns-Manville Sales Corp.*, 2002-CC-3060 (La. 12/3/03) 861 So. 2d 139, 143 ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide.") (*quoting Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002)). The U.S. Supreme Court recently underscored that "[t]he issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'" *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 n.2 (2010). Thus, a court should enforce an arbitration clause "only where the court is satisfied that neither the formation of the parties arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute are at issue." *Granite Rock Co. v. Int'l B'hood of Teamsters*, 130 S.Ct. 2847, 2857 (2010). This Court, likewise, has recognized that an arbitration clause—like any other contract

term—is not enforceable absent evidence of a valid agreement. *Aguillard*, 908 So. 2d at 8 ("the real question is whether the other party truly consented").

There is no presumption that an arbitration agreement was formed, and there is no policy in favor of enforcing arbitration until and unless a court finds that there is an agreement to arbitrate. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("[W]e look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement."); *see also Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2003) ("[F]ederal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead '[o]rdinary contract principles determine who is bound.'") (citation omitted); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away.").

Thus, before the trial court could confirm the arbitration award against Mr. Weaver, it was required to first verify that the award was entered pursuant to a valid agreement to arbitrate. That determination should have been made "apply[ing] ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944.

B. The Lack of a Timely Motion to Move to Vacate Did Not Entitle FIA to Confirm the Arbitration Award Without Sufficient Evidence of a Valid Agreement.

The rule that a valid arbitration agreement must be proven to exist before a court can enforce that agreement does not disappear merely because one party has already obtained an arbitration award against the other. On the contrary, in order to confirm an arbitration award under the FAA, the parties must have agreed not only to arbitration, but also that "a judgment of the court shall be entered upon the award made pursuant to the arbitration," because the FAA requires "agreement as a condition for judicial enforcement" of an arbitration award. *Hall Street Assocs. v. Mattel*, 552 U.S. 576, 587 (2008) (quoting 9 U.S.C. § 9). Furthermore, the FAA provision governing the confirmation procedure leaves no doubt that a party may not confirm an arbitration award without proving a valid agreement to arbitrate exists:

> The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:
> (a) *The agreement* . . .

9 U.S.C. § 13 (emphasis added). It goes without saying that parties cannot satisfy this statutory requirement by submitting *any* generic document without respect to whether it constitutes the actual agreement between the parties. Instead, the statute plainly contemplates that the party seeking to confirm an arbitration award must submit "the agreement" between itself and the party against whom the award is to be confirmed—or at least sufficient evidence to establish the agreement's existence. This statutory requirement would be meaningless if a party can prevent a court from inquiring as to whether an agreement exists, simply by waiting for 90 days to pass.

Louisiana's Second, Fourth, and Fifth Circuit Courts of Appeal have all concluded that a court must first determine that a valid arbitration agreement exists before it confirms an arbitration award. In *Leggio I*, the Second Circuit reversed a trial court order confirming an NAF arbitration award against a consumer on grounds that the creditor had failed to demonstrate that a valid arbitration agreement existed between the parties. The court rejected the creditor's argument that the consumer was barred from raising the defense that he had never agreed to arbitrate because he had failed to seek vacatur within the 90-day statutory time limit:

> The determination of whether there is a valid written agreement to arbitrate the controversy is a first and crucial step in any confirmation proceeding. . . . The time limitation imposed by [FAA] Section 12 is not at issue unless there is a valid written agreement to arbitrate. Thus, contrary to the plaintiffs' contention, the defendant was entitled to raise the lack of a valid contractual agreement to arbitrate as a defense to the proceeding to confirm the arbitration award.

997 So. 2d at 899. Likewise, in *Gougisha*, the Fifth Circuit *en banc* held that "the validity of the underlying arbitration award rests on whether there is a valid arbitration agreement," and that "the time limit imposed in the FAA for the debtor to modify the arbitration award does not come into play unless there is a valid written agreement to arbitrate." 985 So. 2d at 734; *see also Hurley v. Fox*, CA-7829 (La. App. 4 Cir. 2/10/1988), 520 So. 2d 467, 468 (under Louisiana law, "*if there is a valid agreement to arbitrate*, upon timely application for confirmation the court is mandated to confirm the arbitrator's award absent a motion to vacate") (emphasis added).

Like the Second, Fourth, and Fifth Circuits, a host of state and federal courts across the country have held that the 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. In *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, 428 (1st Cir. 1998), MCI obtained an arbitration award against Exalon without Exalon's participation. When

MCI moved to confirm the award, Exalon objected, arguing that no agreement to arbitrate existed between the parties. *Id.* The district court confirmed the award, but the Court of Appeals reversed. The court explained that "the need for an agreement" is a "condition to gaining access" to the FAA's enforcement provisions. *Id.* at 429. The court rejected the argument that a party could become bound by an arbitration award issued without any arbitration agreement, merely by failing to challenge the award. *Id.* at 429–30. The court explained that the FAA's time limits "do not come into play unless there is a written agreement to arbitrate," because without an agreement, the award has "no legal validity" and need not be challenged. *Id.* at 430. "A party that contends that it is not bound by an agreement can therefore . . . raise the inexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award." *Id.*

The supreme courts of Arkansas, Connecticut, Kansas, Michigan, Montana, and Wisconsin have all held that a court cannot turn an arbitration award into an enforceable judgment unless a valid arbitration agreement exists, regardless of whether a timely motion to vacate is filed. For example, in *MBNA Am. Bank, N.A. v. Credit*, 132 P.3d 898 (Kan. 2006), the Kansas Supreme Court refused to confirm an NAF arbitration award, despite MBNA's argument that it was entitled to confirmation simply because the defendant had not filed a timely motion to vacate. The court explained: "MBNA cannot rely on Credit's tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award. An agreement to arbitrate bestows such jurisdiction." *Id.* at 900; *see also Danner v. MBNA Am. Bank, N.A.*, 255 S.W.3d 863 (Ark. 2008) (court need not confirm NAF arbitration award simply because alleged debtor failed to timely challenge award); *MBNA Am. Bank, N.A. v. Boata*, 926 A.2d 1035, 1044–45 (Conn. 2007) (in case where alleged debtor did not file timely motion to vacate, "court cannot confirm an arbitration award unless the parties expressly have agreed to arbitrate the matter"); *Arrow Overall Supply Co. v. Peloquin Enters.*, 323 N.W.2d 1, 2 (Mich. 1982) ("defense of 'no valid agreement to arbitrate' may be raised in an action to confirm or enforce an arbitration award" and need not be raised within time limit for motion to vacate); *Bank of Am. v. Dahlquist*, 152 P.3d 718 (Mont. 2007) (party is not required to challenge award issued by arbitrator who lacked jurisdiction within time limitation, 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).

Many lower courts have reached the same conclusion. In *MBNA Am. Bank, N.A. v. Christianson*, 659 S.E.2d 209, 212 (S.C. Ct. App. 2008), the South Carolina Court of Appeals affirmed the vacatur of an NAF arbitration award that MBNA had obtained over a consumer's argument that he had never agreed to arbitration. The court explained that, even if a motion to vacate was untimely, "[b]efore a circuit court confirms an arbitration award subject to the Federal Arbitration Act, there must be evidence of an arbitration agreement." *Id.* at 215–16.

Likewise, in *CACV of Colorado, LLC v. Corda*, No. NNHCV054016053, 2005 WL 3664087 (Conn. Super. Ct. Dec. 16, 2005), the court refused to confirm an NAF arbitration award despite the lack of a timely motion to vacate:

> [T]he plaintiff has appended to its papers what appears to be a copy (and a poor quality copy at that) of a brochure containing an arbitration clause, with no dates and no signatures. The plaintiff alleges that the arbitration clause in this brochure is one to which the defendant consented. But there is no evidence, aside from the plaintiff's assertion, that the defendant ever agreed to any such thing, orally or in writing or by conduct. . . . Under these circumstances the court cannot make a finding that the defendant agreed to arbitrate this billing dispute.

Id. at *1. In *Yates v. CACV of Colorado, LLC*, 693 S.E.2d 629 (Ga. Ct. App. 2010), similarly, the Georgia Court of Appeals refused to confirm an NAF arbitration award because the plaintiff did not produce any evidence to establish the existence of an arbitration agreement. Like FIA here, CACV provided only a generic copy of "Selected Sections" of an MBNA contract in support of its application to confirm the NAF arbitration award. *Id.* at 633–34. The trial court confirmed the award, noting that the defendant had missed the deadline for vacatur. *Id.* at 636. The court of appeals reversed the confirmation, holding that the plaintiff failed to meet its "burden of proving the existence of a . . . valid and enforceable agreement" because it could not show that the arbitration agreement actually applied to the defendant. *Id.* at 635; *see also Fischer v. MBNA Am. Bank, N.A.*, 248 S.W.3d 567 (Ky. Ct. App. 2007) (consumer's response to petition to confirm not untimely where consumer argued no agreement existed).

The reasoning of all these courts is unassailable. The trial court did not lose its authority to deny FIA's motion to confirm the arbitration award merely because no motion to vacate had been filed. It should not have confirmed the award without ensuring that it was valid.

C. FIA's Arbitration Award Is Unenforceable Because the Arbitrator Lacked Jurisdiction to Decide the Dispute.

Notwithstanding Mr. Weaver's failure to file a timely motion to vacate the arbitration award, well-established law makes clear that an arbitration award is void for lack of subject matter jurisdiction in the absence of a valid agreement to arbitrate. For that reason, a court still has authority to determine whether the parties agreed to arbitrate even after the period for filing a motion to vacate has passed.

"Subject matter jurisdiction" is defined in the Code as "the legal power and authority of a court to hear and determine a particular class of actions or proceedings." La. Code Civ. Proc. Art. § 2. It is undisputed that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs.*, 475 U.S. at 648–49; *see also Gougisha*, 985 So. 2d at 736 ("Absent a valid arbitration agreement, the arbitrator lacks jurisdiction over the dispute and the alleged debtor."); *Prasad v. Bullard*, 10-CA-291 (La. App. 5 Cir. 10/12/10), --- So. 3d ----, 2010 WL 3989696, at *3) ("[I]n order to be subject to arbitral jurisdiction, the party must be a signatory to a contract containing an arbitration clause."). As a result, the arbitrator lacks subject matter jurisdiction—its "legal power and authority" to hear the case—if the parties did not agree to arbitrate. Notably, because lack of subject matter jurisdiction is a "vic[e] of form that sound[s] of due process violations," judgments that are void for lack of subject matter jurisdiction "can be attacked at any time." *Knox v. West Baton Rouge Credit, Inc.*, 08-CA-1818 (La. App. 5 Cir. 3/26/09), 9 So. 3d 1020, 1024. The *Gougisha* court compared a petition to confirm an arbitration award to an attempt to make a foreign judgment executory: "[T]he judgment debtor does not have the right to attack the merits of the judgment; however, the judgment debtor does not lose the right to contest the foreign court's lack of jurisdiction." 985 So. 2d at 735–36.

Courts in other jurisdictions have reached the same common-sense conclusion that an arbitration award is void in the absence of an arbitration agreement that confers jurisdiction on the arbitrator. The Kansas Supreme Court, for example, plainly stated that a lender seeking to enforce an arbitration award "cannot rely on [the borrower's] tardiness in challenging the award if the arbitrator never had jurisdiction to arbitrate and enter an award. An agreement to arbitrate bestows such jurisdiction." *Credit*, 132 P.3d at 900. Similarly, the Georgia Court of Appeals concluded that "a claim that a contract dispute is not subject to arbitration constitutes an attack

on the subject matter jurisdiction of the arbitrator" and may accordingly be raised outside the 90-day period to vacate, modify, or correct an award. *Yates*, 693 S.E.2d at 636. These decisions are not outliers. *See also, e.g.*, *Christianson*, 659 S.E.2d at 212 (arbitration forum "did not have jurisdiction to enter an arbitration award" when one party disputed the existence of an arbitration agreement); *MBNA Am. Bank, N.A. v. Berlin*, No. 05CA0058-M, 2005 WL 3193850, at *2 (Ohio Ct. App. Nov. 30, 2005) (trial court correctly dismissed application to confirm arbitration award based on lack of subject matter jurisdiction where creditor failed to prove existence of agreement to arbitrate); *cf. FIA Card Servs., N.A. v. Thompson*, No. 42749/07, 2008 WL 624904, at *6 (N.Y. Dist. Ct. Mar. 10, 2008) (in the absence of proof of an agreement to arbitrate, "Petitioner has not adequately demonstrated that this court is possessed of the necessary subject matter jurisdiction" to confirm an arbitration award).[25]

Consistent with these cases, this Court has held that "[a] party can move in district court to vacate an arbitration award (*or, alternatively, can contest a motion to confirm an award*) on certain enumerated grounds, including that ground that the arbitrators have 'exceeded their powers.'" *Collins.*, 752 So. 2d at 829–30 (emphasis added); *see also id.* at 830 n. 11 (an arbitrator who "arbitrat[es] a matter that the parties did not contractually agree to arbitrate" has exceeded her powers); *KeyClick Outsourcing, Inc. v. Ochsner Health Plan, Inc.*, 06-CA-359 (La. App. 5 Cir. 10/31/06) 946 So. 2d 174, 178 ("The agreement that provides for arbitration is the source of the arbitrator's powers.").

In sum, absent proof of a valid agreement to arbitrate, the NAF arbitrator in this case lacked jurisdiction—the legal power and authority—to enter an award against Mr. Weaver. Therefore, the trial court erred in holding that it was required to confirm the award regardless of whether there was a valid arbitration agreement. Rather, the court should have held that FIA was

[25] The conclusion that an arbitrator lacks jurisdiction to hear a dispute in the absence of an agreement to arbitrate is also bolstered by the facts underlying the decision of the United States Supreme Court in *First Options*, 514 U.S. 938. An arbitration award was entered in favor of First Options against Manuel and Carol Kaplan, who had never signed an arbitration agreement. *Id.* at 941. When First Options sought judicial confirmation of the award, the Kaplans—precisely like Mr. Weaver in this case—defended against confirmation on the grounds that because they had never agreed to arbitrate, the arbitrator "lacked jurisdiction over them." *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1510–11 (3d Cir. 1994). The U.S. Court of Appeals for the Third Circuit agreed and reversed the district court's order confirming the arbitration award. *Id.* at 1523. When the case came before the United States Supreme Court (on a legal question unrelated to Mr. Weaver's case), the Court affirmed, noting that "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute." 514 U.S. at 942.

required to demonstrate that such an agreement existed as a prerequisite to confirming the award. If FIA failed to meet that burden, the court should have denied FIA's petition to confirm.

III. FIA FAILED TO MEET ITS BURDEN OF PROOF THAT MR. WEAVER AGREED TO ARBITRATION.

Under the FAA, the threshold question of whether an arbitration agreement was validly formed is determined under state contract-law principles. *First Options*, 514 U.S. at 944. And under ordinary principles of Louisiana contract law, the party asserting a contractual right bears the burden of proving that the contract exists. Therefore, unless FIA presented sufficient evidence to prove that a valid arbitration agreement existed between it and Mr. Weaver, it was not entitled to confirm its arbitration award in court. La. Civ. Code art. 1927; *Leggio I*, 997 So. 2d at 890; *Gougisha*, 985 So. 2d at 734.

FIA did not satisfy its burden of establishing, through sufficient admissible evidence, the existence of the alleged arbitration agreement it sought to enforce. As a threshold matter, FIA's failure to enter into evidence any documents supporting its claim that it was entitled to confirm an arbitration award against Mr. Weaver constitutes an independent ground for reversal of the decision below. *See* La. Code Civ. Proc. art. 2164 (appellate court must render judgment based on the record on appeal); *Denoux v. Vessel Mgmt. Sys.*, 2007-C-2143 (La. 5/21/08) 983 So. 2d 84, 88 ("Evidence not properly admitted and officially offered and introduced cannot be considered, even if physically placed in the record. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. . . . Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence.").

Even if this Court considers the generic MBNA contract and NAF arbitration award in the record as if they had been entered into evidence, however, they are wholly insufficient to satisfy FIA's burden of proof that Mr. Weaver had agreed to arbitration.

A. FIA Bore the Burden of Proving the Existence of the Arbitration Agreement It Sought to Enforce.

Under Louisiana law, "[t]he party demanding performance of a contract has the burden of proving its existence." *State v. Givens*, 99-K-3518 (La. 1/17/01), 776 So. 2d 443, 455; *see also Pennington Const., Inc. v. R.A. Eagle Corp.*, 94 CA 0575 (La. App. 1 Cir. 3/5/95), 652 So. 2d 637, 639 ("A party claiming the existence of a contract has the burden of proving that the

contract was perfected between himself and his opponent"); La. Civ. Code art. 1831 ("A party who demands performance of an obligation must prove the existence of the obligation.").

This Court recently held that a party claiming a right under a contract cannot prevail without first establishing through sufficient evidence that the contract exists. In *Arias v. Stolthaven New Orleans, L.L.C.*, 2008-C-1111 (La. 5/5/09), 9 So. 3d 815, the trial court had rendered a default judgment against an insurance company based on two "memoranda of insurance" and cover letters from the insurance company. *Id.* at 821. The plaintiffs argued that these documents were sufficient to show their claim was valid, even though they had not submitted the insurance policy itself into evidence. *Id.* at 823. This Court disagreed, finding that the plaintiffs had failed to "overcome their mandatory burden to produce the contract of insurance at issue." *Id.* at 824. The Court explained that the documentary evidence submitted by the plaintiffs was deficient:

> There is no indication on the memorandum of insurance of its connection to any party or on whose authority the document was issued. . . . Our jurisprudence holds that when an obligation is based on a writing, prima facie proof of the obligation requires introduction of the writing into evidence.

Id. at 821–22; *see also Alvis v. CIT Group/Equipment Financing*, 05-0563 (La. App. 3 Cir. 12/30/05), 918 So. 2d 1177, 1184, *writ denied*, 2006-0226 (La. 4/24/06), 926 So. 2d 552 (assignee seeking to enforce an obligation "must first prove the existence of the obligation"). The same principle applies here.

It is bedrock Louisiana law that a contract "is formed by the consent of the parties." La. Civ. Code art. 1927; *see also Aaron & Turner, L.L.C. v. Perret*, 2007-CA-1701 (La. App. 1 Cir. 5/4/09), 22 So. 3d 910, 917 ("Consent of the parties is necessary to form a valid contract.") (citation omitted). As with any other kind of contract, the party seeking to enforce an arbitration agreement bears the burden of proving that the other party assented to arbitration. *Montelepre v. Waring Architects*, 2000-CA-0671, 2000-CA-0672 (La. App. 4 Cir. 5/16/01), 787 So. 2d 1127, 1130 ("The parties must agree to arbitration."); *see also O'Neal v. Total Car Franchising Corp.*, 44,793-CA (La. App. 1 Cir. 12/16/09), 27 So. 3d 317, 319 ("Even in light of the strong public policy in favor of arbitration, we will not authorize arbitration where a contract does not evidence a mutual consent between the parties to arbitrate."). FIA bore that burden here. And unless FIA met its burden of proving that Mr. Weaver assented to arbitration, the trial court erred in confirming FIA's arbitration award.

B. The Generic NAF and MBNA Documentation Submitted to the Trial Court Failed to Demonstrate an Agreement to Arbitrate Between FIA and Mr. Weaver.

In support of its claim that it was entitled to a judgment of over $32,000 against Mr. Weaver, FIA provided the trial court with a copy of the arbitration award and copies of generic, unsigned, undated, unauthenticated contract documents. These documents were wholly insufficient to demonstrate that Mr. Weaver was bound by an arbitration agreement.

First, an arbitration award is not evidence of a contract. The mere fact that an arbitration award has been entered against a person cannot suffice to establish that the person agreed to arbitration. As explained above, the threshold question of whether an agreement to arbitrate exists is a question for the court, not an arbitrator. It follows that an arbitrator's determination that an arbitration agreement exists is entitled to no deference by a court of law. As the Michigan Court of Appeals put it, to permit an arbitrator to make the final determination of whether an arbitration agreement exists—when the arbitrator has no jurisdiction *unless* an arbitration agreement exists—would be a "circular proposition." *Offerdahl v. Silverstein*, 569 N.W.2d 834, 836 (Mich. Ct. App. 1997).

Given what is now known about the NAF's conflict of interest, the legitimacy of an NAF arbitration award in a debt collection case is highly suspect, particularly if it was issued in favor of the NAF's sister company Wolpoff. *See, e.g.*, *FIA Card Servs., N.A. v. Escobar*, No. 18132/2009, 2010 WL 3143631 (N.Y. City Civ. Ct. May 21, 2010) ("The Court finds that the subject arbitration award must be vacated as a matter of public policy and in the interests of justice. Respondent has submitted evidence, unrebutted by petitioners, that NAF is not a neutral party in that it is affiliated with the debt collection industry and, apparently, stops sending cases to arbitrators who rule in favor of alleged debtors. . . . NAF's recent agreement to cease adjudicating debt collection cases is . . . further evidence of institutional bias.").

Even before the NAF's debt collection ties were exposed, courts recognized the risks to consumers posed by the NAF robo-signing debt mill system. *See, e.g.*, *MBNA Am. Bank, N.A. v. McGoldrick*, 218 P.3d 785, 789 (Idaho 2008) (reversing confirmation of an NAF award where, as here, the creditor submitted only various copies of generic cardholder agreements and failed to prove that it had lawfully added an arbitration clause to the applicable agreement); *Corda*, 2005 WL 3664087, at *1 (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 Am. Bank, N.A. v. Barben*, 111 P.3d 663, 2005 WL 1214244, at *2 (Kan. Ct. App. 2005) (noting that NAF award contained "patently . . . untrue" information). It is imperative that courts not abandon their duty of ensuring that a valid arbitration agreement exists before giving debt collectors the right to enforce an NAF award against a Louisiana consumer.

Nor do generic credit card account documents suffice to establish an agreement to arbitrate. For starters, in this case, the purported contracts were not authenticated. An unauthenticated document is not admissible to show the truth of matters asserted therein. *See State v. Tillman*, 60580 (La. 3/6/1987), 356 So. 2d 1376, 1379; *Foundation Materials, Inc. v. Carrollton Mid-City Investors, L.L.C.*, 2009-CA-0414 (La. App. 4 Cir. 8/26/2009), 17 So. 3d 513, 516 ("In order to establish its prima facie case, FMI was required to introduce the contract documents upon which its claim for $70,475.00 was based. The unsworn, unauthenticated documents attached to the petition were not properly before the trial court for consideration."); La. Code Evid. art. 901. Furthermore, even if FIA had properly introduced the generic MBNA contracts on which it relied into evidence and authenticated them, neither document makes any mention of either FIA or Mr. Weaver, and FIA put no evidence or testimony into the record to demonstrate that the documents it attached to its motion actually set forth the terms of Mr. Weaver's account.[26]

In *Leggio I*, Chase submitted virtually the same documentation FIA submitted here: an "unsigned and undated generic 'Cardmember Agreement' that included a section titled 'Arbitration Agreement," without anything to tie it to the consumer. 997 So. 2d at 890. The court reasoned that "[a] consumer who uses a credit card could reasonably be presumed to understand that he will be responsible to pay for the goods purchased with credit, even though he has not signed a contract providing for such liability." The court noted, however, that "the mere use of a credit card" is not sufficient to show that a consumer understood he was consenting to arbitration, "particularly when there has not been a showing that the debtor received notice of the

[26] Notably, despite the fact that the MBNA contracts mention neither FIA nor Mr. Weaver, the NAF award still contained the stock language "On or before [date] the Parties entered into a written agreement to arbitrate their dispute." R.27.

alleged arbitration clause." *Id.*; *see also Leggio II*, 999 So. 2d at 158–59 (trial court had properly refused to confirm award where evidence submitted by the creditor—"generic" copies of an agreement "in such tiny, closely-spaced print as to be practically unreadable"—failed to show the consumer was bound by an arbitration clause).

The *Gougisha* court, likewise, found that the creditors had failed to submit sufficient evidence of a valid arbitration agreement:

> Simply supplying the trial court with a difficult to read, in and some cases illegible, form that purports to evidence an agreement to arbitrate with no supporting evidence is insufficient. No evidence was provided to the court that linked the arbitration terms included in the supplemental terms and conditions to these credit card holders. No evidence that the credit card holders were put on notice of and agreed to the arbitration agreement was provided . . .

Id. at 736–37; *see also Hurley*, 520 So. 2d. at 468 (court should confirm arbitration award only "if there is a valid agreement to arbitrate"). The reasoning of these courts is straightforward and unimpeachable: if a valid agreement to arbitrate exists and there are no grounds for vacatur, the court should confirm the award. But if there is no such proof of an agreement, the court should deny confirmation.

Courts in other jurisdictions have likewise rejected attempts to confirm arbitration awards without proof of an agreement. *See, e.g.*, *Toal v. Tardif*, 178 Cal.App.4th 1208, 1220 (Cal. Ct. App. 2009) ("[T]he party seeking to enforce an award must prove by a preponderance of the evidence that a valid arbitration contract exists. The court may not confirm an award without first finding the parties agreed in writing to arbitrate their dispute, unless a judicial determination of the issue has already been made (*e.g.*, by a court considering a petition to compel arbitration)."); *Yates*, 693 S.E.2d at 636 (refusing to confirm award where MBNA provided only generic contract); *MBNA Am. Bank, N.A. v. Kay*, 888 N.E.2d 288 (Ind. Ct. App. 2008) (refusing to confirm arbitration award where debtor had not agreed to arbitration); *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715 (Mo. Ct. App. 2008) (denying confirmation where MBNA failed to include sufficient documentation); *MBNA Am. Bank, N.A. v. Cornock*, No. 03-C-0018 (N.H. Super. Ct. March 20, 2007) (refusing to confirm award that NAF had entered against man whose wife had opened MBNA account without his consent and which he had never used and noting that "[t]o 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 victim would be subject to arbitration simply because the perpetrator

used the fraudulently obtained credit card after the arbitration provisions became effective."); *MBNA Am. Bank, N.A. v. Straub*, 815 N.Y.S.2d 450, 453 (N.Y. Civ. Ct. 2006) (refusing to confirm NAF award where MBNA failed to submit sufficient evidence that the unsigned terms were binding on the particular cardholder); *Thompson*, 2008 WL 624904 at *6 (generic arbitration clause, along with "counsel's bald conclusory statements," were not sufficient proof of an arbitration agreement); *MBNA Am. Bank, N.A. v. Nelson*, 841 N.Y.S.2d 826 (Table), 2007 WL 1704618, at *7 (N.Y. Civ. Ct. May 24, 2007) (denying MBNA's motion to confirm award for insufficient proof of agreement, and noting that MBNA "appear[s] to have attached the exact same photocopy, which as noted is not specific to any particular consumer, to many of its confirmation petitions"); *Berlin*, 2005 WL 3193850, at *2 (denying confirmation where MBNA failed to include sufficient documentation); *Gruber v. CACV of Colo.*, No. 05-07-00379-CV, 2008 WL 867459 (Tex. Ct. App. Apr. 2, 2008) (insufficient admissible evidence to confirm award); *MBNA Am. Bank, N.A. v. Engen*, No. 54768-8-I, 128 Wash. App. 1050, 2005 WL 1754169 (Wash. Ct. App. July 25, 2007) (reversing dismissal of consumer's motion to vacate, where MBNA had obtained NAF award despite lack of agreement to arbitrate).

Here, the documents submitted to the trial court by FIA no more prove the existence of an agreement to arbitrate between FIA and Mr. Weaver than they prove the existence of an agreement to arbitrate between FIA and any Louisiana resident whose name was pulled from the phone book. Even if FIA had properly introduced the unsworn, unauthenticated MBNA cardholder agreements into evidence—which it did not—there is no evidence to show that any of these agreements were binding on Mr. Weaver, let alone *how* they supposedly became binding on him. As such, FIA failed to meet its burden of proving that a valid agreement to arbitrate existed. To confirm an arbitration award based on such generic evidence is a miscarriage of justice and an invitation to identity theft. It was error for the trial court to confirm FIA's arbitration award, and it was error for the First Circuit to affirm that decision.[27]

Creditors like FIA should not be permitted to obtain enforceable judgments against Louisiana consumers simply by submitting a photocopy of a generic, unsigned, undated,

[27] Given that FIA failed to meet its burden of proof despite ample opportunity to put forth evidence before the trial court, this Court should not give FIA a second bite at the apple by remanding the case for further evidentiary development. *Cf. Green Tree v. Randolph*, 531 U.S. 79, 92 (2000) (holding that consumer had failed to establish through evidence in the record that the costs of arbitration would preclude her from vindicating her statutory rights in arbitration, and declining to remand for further factual development).

unauthenticated credit card account document. Rather, FIA should have been required to demonstrate with competent evidence that there is a valid agreement to arbitrate between it and Mr. Weaver. Such a rule is perfectly fair: creditors, "the party in the best position to maintain records," *Nelson*, 2007 WL 1704618, at *8, will be able to confirm awards to their hearts' content as long as they submit the basic documentation sufficient to demonstrate that the award was issued pursuant to an agreement between the parties.

CONCLUSION

The decision of the First Circuit should be reversed.

Respectfully submitted this 29th day of November, 2010.

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RULE X(2)(d) VERIFICATION AND CERTIFICATE OF SERVICE

I, Garth J. Ridge, hereby verify all allegations of the APPELLANT'S ORIGINAL BRIEF ON THE MERITS and certify that I have placed copies of the same in the U.S. Mail, first class postage prepaid and properly addressed, this 29th day of November, 2010, to:

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