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SUPREME COURT OF LOUISIANA

Docket No. 10 C 1372

CIVIL CASE

FIA CARD SERVICES, N.A., *Plaintiff-Respondent*,

v.

WILLIAM F. WEAVER, *Defendant-Applicant*

From a decision of the First Circuit Court of Appeal,
State of Louisiana, March 26, 2010
Docket No. 09-CA-1464

APPLICATION FOR WRIT OF CERTIORARI

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REJECTED
See Rule X, §3(7).

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RESUBMITTED
See Rule X, §3(7).

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BASIS FOR WRIT

This Court should grant a writ of certiorari because the decision of the First Circuit Court of Appeal below directly conflicts with the decisions of three other courts of appeal, establishing a clear circuit split that only this Court can resolve; and the First Circuit erroneously interpreted the Federal Arbitration Act ("FAA") in a way that will cause substantial injustice and significantly affect the public interest. La. Sup. Ct. Rule X § 1.

A. Conflicting Decisions

After an arbitration, the party that prevails has up to one year to seek 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. There is a direct conflict among the courts of appeal of Louisiana on the legal issue presented in this case: Under the FAA, when a court is asked to confirm an arbitration award obtained pursuant to an alleged arbitration agreement and the party opposing confirmation raises the defense that he never agreed to arbitrate, does the court have authority to deny confirmation where there is insufficient evidence that a valid arbitration agreement exists, even if the award has not been vacated? In the Second, Fourth, and Fifth Circuit Courts of Appeal, the answer to that question is "yes." In the First and Third Circuits, the answer is "no."

All but one of the cases forming the circuit split, including the case below, involved arbitration awards issued by the National Arbitration Forum ("NAF")[1] in favor of a debt collector (or credit card issuer) against a consumer. In each case, one party participated in arbitration, and the NAF issued an award in favor of that party. That party then waited until the 90-day deadline for vacatur had passed and moved to confirm the arbitration award in court. The other party opposed confirmation of the award on grounds that they had not agreed to arbitration.

1. First and Third Circuits

First Circuit: In the case below, the First Circuit held that if the 90-day statutory time limit for vacatur has passed, a trial court asked to confirm an arbitration award cannot "even consider" whether a valid arbitration agreement existed between the parties. *FIA Card Servs., N.A. v. Weaver*, 2009-CA-1464 (La. App. 1 Cir. Mar. 26, 2009), --- So.2d --- (App. I at 12–14); *see also Capital One Bank v. White*, 2007-CW-2174 (La. App. 1 Cir. 6/6/08), 2008 WL

[1] As explained in part III of this brief, the NAF agreed to stop administering consumer arbitrations after Congressional and law enforcement investigations revealed its ties to debt collectors.

2332277, *writ denied*, 2008-CC-2108 (La. 1/9/09), 998 So.2d 728 (court "simply lacked the discretion to decline to grant the order" confirming the award, despite consumer's argument that creditor failed to prove she agreed to arbitration).

Third Circuit: In *NCO Portfolio Mgmt., Inc. v. Walker*, 08-1011 (La. App. 3 Cir. 2/4/09), 3 So.3d 628, 634, the Third Circuit affirmed confirmation of an NAF award despite the consumer's argument that no valid agreement existed. The court held that the consumer had failed to rebut the debt buyer's evidence before the trial court. 3 So.3d at 635–36; *see also Chase Bank USA, N.A. v. Roach*, 07-1172 (La. App. 3 Cir. 3/5/08), 978 So.2d 1103, 1104.

2. Second, Fourth, and Fifth Circuits

Second Circuit: The Second Circuit held that a court must not confirm an arbitration award—even if the statutory time limit for vacatur has passed—unless the party seeking confirmation demonstrates that a valid arbitration agreement exists. *Chase Bank USA, N.A. v. Leggio*, 43,567 (La. App. 2 Cir. 11/19/08), 997 So.2d 887 ("*Leggio I*"). In *Leggio I*, the court reversed a trial court order confirming an NAF award against a consumer on grounds that the creditor failed to demonstrate that a valid arbitration agreement existed. The court held that the consumer's failure to seek vacatur within 90 days did not eliminate the requirement for proof of the agreement. 997 So.2d at 899; *see also Chase Bank USA, N.A. v. Leggio*, 43,751, 43,752 (La. App. 2 Cir. 12/3/08), 999 So.2d 155, 158–59 ("*Leggio II*") (adopting reasoning of *Leggio I* and holding that creditor could not confirm award without proving consumer had agreed to arbitration); *FIA Card Servs., N.A. v. Gibson*, 43,131-CA (La. App. 2 Cir. 3/19/08); 978 So.2d 1230; *but see FIA Card Servs., N.A. v. Smith*, 44,923-CA (La. App. 2 Cir. 12/22/09), 27 So.3d 1100, 1106–07, *writ denied*, 2010-C-0385 (La. 4/23/10), --- So.3d ----, 2010 WL 1978799.

Fourth Circuit: The Fourth Circuit has also held that a court must not confirm an arbitration award unless the party seeking confirmation demonstrates that a valid arbitration agreement exists. *Hurley v. Fox*, CA-7829 (La. App. 4 Cir. 2/10/1988), 520 So.2d 467. In *Hurley*, the court held that, 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 . . . ." 520 So.2d at 468. The party opposing confirmation had not participated in arbitration nor sought vacatur. *Id.*

Fifth Circuit *en banc*: In the Fifth Circuit, likewise, the existence of a valid agreement to arbitrate is a prerequisite for confirmation of an arbitration award. *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 (*en banc*), *writ denied*, 2008-C-1146 (La. 9/26/08), 992 So.2d 986. In *Gougisha*, the court affirmed the denial of MBNA's and FIA's petitions to confirm NAF awards, explaining that "the validity of the underlying arbitration award rests on whether there is a valid arbitration agreement and 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." *Id.* at 734.

B. Erroneous Interpretation or Application of Law

The First Circuit interpreted the FAA as not requiring any evidence of valid agreement to arbitrate before an award is confirmed. That was error. The FAA provides for judicial confirmation of arbitration awards only if the parties have so agreed:

> If the parties *in their agreement* have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . then at any time within one year after the award is made any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C § 9 (emphasis added). The FAA further provides that the party "moving for an order confirming . . . an award" must submit "the agreement" pursuant to which the award was made. 9 U.S.C. § 13. By writing the requirement of an agreement to arbitrate out of the FAA, the court below erroneously interpreted and applied that statute.

SUMMARY OF ARGUMENT

This application for certiorari poses a simple question, but one of great consequence to Louisiana consumers: in a judicial proceeding to confirm an arbitration award, may the party opposing confirmation raise the argument that no arbitration agreement exists—and may the court refuse to confirm the award on that basis—even if no timely motion to vacate has been filed? Under the Federal Arbitration Act ("FAA"), the answer is clearly "yes."

This case originated when Plaintiff-Respondent FIA Card Services, N.A. ("FIA") attempted to collect an alleged debt by instituting an arbitration proceeding before the National Arbitration Forum ("NAF"). The NAF entered an award for the creditor in the full amount it sought. When FIA sought judicial confirmation of the award, it submitted a generic copy of an MBNA cardholder agreement with an arbitration clause, with no evidence linking that unsigned, undated document to Defendant-Appellant William Weaver. In addition, Mr. Weaver expressly denied that he agreed to arbitrate, and introduced into evidence his affidavit specifically denying that the sample contract proffered by FIA was his agreement with MNBA. Nonetheless, the trial court granted FIA's motion to confirm. The First Circuit affirmed, holding that if a creditor seeks confirmation of an arbitration award and the award is not vacated, the trial court can do nothing but rubber-stamp the award—even if the creditor fails to show that the consumer agreed to arbitration and the consumer specifically denies it. This was error.

Arbitration is a matter of contract. To be valid, an arbitration agreement, like any other contract, requires consent, and under ordinary principles of contract law, the party relying on the existence of a contract bears the burden of proving its existence. Because an arbitrator derives the power to decide a dispute only from an agreement by the parties, a court cannot confirm an arbitration award—just as it cannot compel arbitration—unless it determines that a valid arbitration agreement exists.

This principle cannot be abandoned merely because the party opposing confirmation fails to move to vacate within the statutory time limit. Rather, because an arbitrator has no authority to enter an award unless a valid agreement to arbitrate exists, a party must be permitted to argue that no agreement exists at any point prior to confirmation of the award, and courts must be permitted to consider such an argument.

Nowhere is this judicial role more critical than in actions to confirm debt collection awards issued by the NAF. The NAF was forced to abandon the consumer arbitration business last year in the wake of Congressional and law enforcement investigations revealing that it was owned by the same hedge fund that owned Wolpoff & Abramson, the debt collector that obtained the NAF award against Mr. Weaver in this case and one of the largest debt collectors that regularly brought cases before the NAF. The NAF 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, the only check on this private proceeding is when a court is asked to put its judicial imprimatur on the creditor's award. However, debt collectors seeking to confirm NAF awards—like FIA here—often submit only generic copies of contracts, with nothing tying them to the particular consumer.

A large number of courts have recently condemned such attempts by FIA/MBNA and its debt collectors to sidestep basic rules of law in confirming arbitration awards. *See, e.g.*, *MBNA Am. Bank, N.A. v. Credit*, 132 P.3d 898, 902 (Kan. 2006) (describing a "national trend in which consumers are questioning MBNA and whether arbitration agreements exist" and remarking that "[g]iven MBNA's casual approach to this litigation, we are not surprised that the trend may be growing."); *MBNA Am. Bank, N.A. v. Cornock*, No. 03-C-0018, Slip Op. at 26 (N.H. Super. Ct. Mar. 20, 2007) ("Under MBNA's reasoning, any identity theft victim would be subject to arbitration . . ."); *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").

If the rule adopted by the court below becomes the law of Louisiana, however, courts in this State will be powerless to require the creditor to prove that the consumer agreed to arbitration whenever a consumer fails move to vacate within the very short time provided by statute. 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 a credit card account.

The Louisiana Circuit Courts of Appeal are split 3-2 on the question presented by this case. While this Court has previously denied review of the issue, this appeal offers a more

appropriate vehicle for resolution of this issue than any past case. In *Gougisha*, 985 So.2d 731, the Fifth Circuit *en banc*—unlike the First Circuit below—upheld the authority of trial courts to deny confirmation of arbitration awards where there is insufficient evidence of a valid agreement. This Court wisely left that well-reasoned decision intact. 992 So.2d 986. The other two cases in which the Court denied review involved consumers who were unrepresented by counsel in the trial court. *White*, 2008 WL 2332277, *writ denied*, 998 So.2d 728; *Smith*, 27 So.2d at 1101, *writ denied*, 2010 WL 1978799. And in one of the cases, the issue was not squarely presented, because the court below had not clearly ruled that the trial court could not have considered an opposition to confirmation based on lack of a valid agreement. *See Smith*, 27 So.2d at 1106 (noting that the consumer had made "only vague, illusory conclusions that his due process rights were violated"). Here in contrast, the question is cleanly presented in a case where the consumer defendant was vigorously represented by counsel in both the trial court and the court below. Moreover, the recent developments shedding light on the NAF's practices make this Court's review more timely than ever before.

The Court should grant certiorari to clarify that in Louisiana, as in other jurisdictions, 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 that a court must not confirm an arbitration award without first determining that an underlying arbitration agreement exists.

STATEMENT OF THE CASE

A. Trial Court Proceedings

FIA, the credit card issuer formerly known as MBNA America Bank, filed a petition in the 19th Judicial District Court to confirm an arbitration award it had obtained against Mr. Weaver from the NAF on July 24, 2007, in the amount of $32,012.40. App. I at 2.[2] In support of its motion to confirm, FIA attached the NAF award and unsigned, generic, barely legible copies of MBNA credit card contracts and additional terms. App. II at 1, 2–9.[3] The form

[2] Pursuant to La. Sup. Ct. Rule X, § 3(5), Appendix I contains copies of the trial court and court of appeals decisions and reasons for judgment.

[3] Pursuant to La. Sup. Ct. Rule X, § 3(6), Appendix II contains copies of the NAF award and generic MBNA agreement submitted by FIA. Although FIA did not enter these documents (or any documents) into evidence before the trial court, Applicant believes they are essential to demonstrate why this Application should be granted. As explained in part II of this Application for Writ, *infra*, many courts that have refused to confirm NAF arbitration awards on behalf of MBNA and its successors have

language "The Parties' Arbitration Agreement is valid and enforceable" appears on the NAF award. App. II at 1. FIA never entered those or any other documents into evidence. App. II at 10. Nor did FIA provide any evidence demonstrating 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 affidavit denying that he agreed to arbitrate. App. II at 11–13, 14. 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. App. I at 1–5, 6. The court gave two reasons for its holding: (1) "the debtor did not timely bring an attack on the arbitration agreement" by filing a motion to vacate the award, App. I at 4; and "the arbitrators [sic] already reviewed and made a final determination on the validity and enforceability of the credit card agreement." App. I at 3.

Mr. Weaver moved for a new trial in light of the Fifth Circuit's *en banc* decision in *Gougisha*, 992 So.2d 986, 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.[4] App. I at 8. The court entered judgment for FIA on March 17, 2009. App. I at 9.

B. 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 with FIA. App. I at 12. Rather than address that question, however, the Court of Appeal held that the district court lacked authority to "even consider" Mr. Weaver's claim that he had not agreed to arbitration.

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emphasized the creditors' failure to submit any evidence tying the generic agreement to any particular debtor. In addition, recent investigations have revealed that NAF awards such as the one in Appendix II are pre-printed forms mailed in large batches to NAF arbitrators who routinely sign dozens per day. *See* part III, *infra.*

[4] A Business Week investigative report explained that this language is standard on all NAF arbitration awards, which are sent, pre-printed, with the amount to be awarded to the creditor already filled in, to arbitrators. *See* Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, Bus. Wk., June 16, 2008 (quoting former West Virginia Supreme Court Justice and NAF arbitrator Richard Neely) (hereinafter "*Banks v. Consumers (Guess Who Wins)*").

App. I at 12–13. Affirming the trial court order, the Court of Appeal held that because the award had not been vacated in time, the FAA required that the district court confirm the award against Mr. Weaver. App. I at 14–15. Dissenting, Judge Pettigrew said that he would follow the reasoning of *Leggio I*, 997 So.2d at 889, *Leggio II*, 999 So.2d at 158, and *Gougisha*, 985 So.2d at 734. He noted: "After reviewing the record in this proceeding, I find no evidence if a signed or initialed loan application, credit agreement, or arbitration agreement by William F. Weaver." App. I at 16. On May 12, 2010, the court denied Mr. Weaver's application for rehearing, with Judge Pettigrew again in dissent. App. I at 17.

ASSIGNMENT OF ERRORS

The First Circuit Court of Appeal erred by holding that where 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. UNDER THE FEDERAL ARBITRATION ACT AND LOUISIANA LAW, ENFORCEMENT OF AN ARBITRATION AGREEMENT REQUIRES PROOF OF THAT AGREEMENT.

Arbitration is purely a matter of contract. Therefore, as the U.S. Supreme Court made clear over two decades ago, arbitration requires an agreement:

> 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 Tech., Inc. v. Commc'ns. Workers of Am., 475 U.S. 643, 648–49 (1986) (citations and quotations omitted); *see also Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Sanford Jr. Univ.*, 489 U.S. 486, 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. Thus, until and unless a court has determined that a valid agreement to arbitrate exists under state contract law, it cannot enforce that agreement by confirming an arbitration award.

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.

Courts in numerous jurisdictions have reached the same conclusion, refusing to confirm arbitration awards (or to compel arbitration) where the party seeking to enforce an arbitration clause fails to present sufficient evidence that an agreement to arbitrate was formed. The principles underlying these decisions—that arbitration is purely a matter of contract, and that no party can be forced to arbitrate without her consent—require reversal of the First Circuit's decision in this case.

A. The FAA's Provision for Confirmation of Arbitration Awards Requires an Agreement.

The rule that a valid arbitration agreement must be proven to exist before a court can enforce that agreement does not fall away simply because one party has already obtained an arbitration award against the other. The U.S. Supreme Court recently affirmed that, 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 these particular 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.

B. Under the FAA, Louisiana Contract Law Governs the Question of Whether An Agreement to Arbitrate Was Formed.

Under the Federal Arbitration Act ("FAA"), arbitration agreements are governed by generally-applicable rules of state contract law. In particular, state contract law principles govern the threshold determination of whether an arbitration agreement exists. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995).

Consistent with this, the primary substantive provision of the Federal Arbitration Act ("FAA") expressly incorporates contract law, providing in relevant part that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("[FAA] § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration provisions, under general contract law principles . . . ."). Thus, an arbitration clause, to be enforceable, must be valid as a matter of state contract law.

This Court, likewise, has recognized that an arbitration clause—like any other contract term—is not enforceable absent evidence of a valid agreement. *Aguillard v. Auction Mgmt. Corp.*, 2004-C-2804, 2004-C-2857 (La. 6/29/04), 908 So.2d 1, 8 ("the real question is whether the other party truly consented"). It follows that because arbitration is a matter of contract, and thus consent, there is no presumption that an arbitration agreement was formed, and no policy in favor of enforcing arbitration, until and unless a court finds that there is an agreement to arbitrate. Indeed, the U.S. Supreme Court explicitly rejected the argument that the FAA's pro-arbitration policy should be considered in determining whether an agreement to arbitrate exists. *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 Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2003) ("federal 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 Manufacturing 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 a court may enforce an arbitration clause by compelling arbitration or confirming an award, it must first determine that a valid agreement to arbitrate was formed under the generally-applicable contract law of the state whose law governs the question. *First Options*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). Here, the question of whether an agreement to arbitrate was formed between the parties must be determined under Louisiana law.

C. Under Louisiana Law, the Party Seeking to Enforce Arbitration Bears the Burden of Proving the Existence of An Agreement to Arbitrate.

As this Court has repeatedly emphasized, 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.").

It follows that a party claiming a right under a contract cannot prevail without first establishing, through sufficient evidence, that the contract exists. Indeed, this Court recently reversed a judgment against insurance company on grounds that the plaintiff had failed to prove the existence of the insurance contract at issue. *Arias v. Stolthaven New Orleans, L.L.C.*, 2008-C-1111 (La. 5/5/09), 9 So.3d 815, 823. The plaintiffs in *Arias* had received 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 agreement in lieu of the insurance contract. *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. Accordingly, the plaintiffs could not recover on the default because they could not show that there was an agreement with the insurance company. *Id.*; *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 (an assignee seeking to enforce an obligation "must first prove the existence of the obligation").

The same principle applies in the case at hand. It is bedrock Louisiana law that any 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. Where there is no meeting of the minds between the parties, a contract is void for lack of consent.") (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. Thus, unless FIA met its burden of proving that Mr. Weaver assented to arbitration, the trial court erred in confirming FIA's arbitration award.

D. FIA Failed to Meet Its Burden of Proving that Mr. Weaver Agreed to Arbitration.

FIA did not satisfy its burden of establishing, through sufficient admissible evidence, the existence of the alleged arbitration agreement it sought to enforce. Rather, 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 two documents: (1) a copy of the arbitration award, and (2) copies of a generic, unsigned, undated, unauthenticated credit card account document that contained an arbitration provision. App. II at 1, 2–9. 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, particularly in an uncontested proceeding, that an arbitration agreement exists is entitled to no deference by a court of law. In short, the arbitration award attached to FIA's motion indicates

merely that an award was entered against Mr. Weaver, and cannot itself constitute evidence of a valid arbitration agreement.

Nor do the generic credit card account documents suffice to establish an agreement to arbitrate. For starters, the purported contracts were not authenticated. 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. 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.

Indeed, 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 randomly-chosen individual. 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.

II. THE MAJORITY OF LOUISIANA APPELLATE COURTS, LIKE FEDERAL AND STATE COURTS NATIONWIDE, RECOGNIZE THAT COURTS SHOULD NOT CONFIRM ARBITRATION AWARDS WHERE THERE IS INSUFFICIENT EVIDENCE OF AN AGREEMENT TO ARBITRATE, REGARDLESS OF WHETHER ANY TIMELY MOTION TO VACATE WAS FILED.

A. The Reasoning of the Majority of the Louisiana Courts of Appeal is Persuasive.

The Second, Fourth, and Fifth Circuits 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. The court further held that the evidence submitted by the creditor—an "unsigned an undated generic 'Cardmember Agreement' that included a section titled 'Arbitration Agreement," without anything to tie the generic document to the consumer—had failed to prove the existence of a valid arbitration agreement. *Id.* at 890. While the court acknowledged that implied assent can be shown without a signature, the court rejected the argument that "the mere use of a credit card" was sufficient to show the consumer had agreed to arbitration:

> 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. However, the mere use of a credit card would not logically give rise to the presumption that the consumer thereby understood that he was consenting to arbitration of any dispute concerning such use, particularly when there has not been a showing that the debtor received notice of the alleged arbitration clause. Arbitration is a restriction of a party's access to the courts and should not be casually assumed.

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).

Likewise, in *Gougisha*, 992 So.2d 986, the Fifth Circuit *en banc* held that proof of an agreement to arbitrate is required even if no motion to vacate the award was brought within the 90-day statutory time limit:

> [T]he validity of the underlying arbitration award rests on whether there is a valid arbitration agreement and 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.

992 So.2d at 734. The court rejected the creditors' argument that a court is barred from reviewing the "threshold question of whether a binding arbitration agreement exists because the

arbitrator has already made that determination," explaining that a challenge to the existence of a valid agreement is entirely different from a challenge to the "merits" of an arbitration award:

> Since binding arbitration is imposed contractually, in order to confirm an arbitration award a party must prove that the procedure has been agreed to by the parties. . . .
>
> [I]n an arbitration proceeding, the arbitrator only has the power to resolve a dispute if there is a valid arbitration agreement. Absent a valid arbitration agreement, the arbitrator lacks jurisdiction over the dispute and the alleged debtor. . . . [T]his Court does not purport to have the authority to review the merits of these awards, i.e. whether the debt was owed, the amount of the debt, and other such issues related to the merits of the award. Rather, the only inquiry made by this Court . . . is whether a valid arbitration agreement exists. . . .
>
> [T]his Court has the authority and a duty to determine whether . . . arbitration agreement[s] exist between the creditors and alleged debtors in this case. Accordingly, the arbitrator's finding that there was a valid arbitration agreement is not binding on the trial court . . . .

Id. at 735–36.[5] The court was unanimous in holding that a court should not confirm an arbitration award without first ensuring that a valid agreement to arbitrate exists. *See id.* at 737 ("*Once the court is satisfied that there exists an agreement to arbitrate*, the court must confirm the award rendered unless it has been vacated, modified or corrected . . . .") (Rothschild, J.) (emphasis added).

Finally, the court held 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. If there is no such proof of an agreement, the court can and should deny confirmation.

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[5] The trial court in the present case, in contrast, held that because the NAF award stated that "the arbitrator found the arbitration agreement to be valid and enforceable," it was required to defer to that decision. App. I at 4.

B. Courts Throughout the Nation Have Held that the Time Limits for Vacatur Do Not Apply Unless the Existence of a Valid Arbitration Agreement Has Been Proven.

A myriad of state and federal courts across the country, including the U.S. Court of Appeals for the First Circuit and the supreme courts of Kansas, Idaho, Arkansas, Michigan, Connecticut, Montana, and Wisconsin, 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 First Circuit 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:

> [S]ection 12 . . . and the other enforcement provisions of the FAA[] do not come into play unless there is a written agreement to arbitrate. Thus, if there is no such agreement, the actions of the arbitrator have no legal validity. It follows that one is not required to mount a collateral challenge to such an ineffectual action, for if 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 can therefore . . . 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 an agreement. Of course, if a court later determines that an arbitration agreement was in effect, and that the non-appearing party was bound by its conditions, the FAA would then fully come into operation, including the time limitations of section 12.

Id. at 430.

Numerous state high courts have reached the same conclusion. For example, in *MBNA v. Credit*, 132 P.3d 898, 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. The court held that

where MBNA failed to demonstrate that the parties had agreed to arbitration, the trial court had correctly refused to confirm the award. *Id.* at 900–01.

In *MBNA Am. Bank, N.A. v. McGoldrick*, 218 P.3d 785, 789 (Id. 2008), the Idaho Supreme Court likewise reversed confirmation of an NAF award. Like FIA here, MBNA had submitted various copies of generic cardholder agreements and additional terms, including an arbitration clause. *Id.* at 786–89. An MBNA employee testified at trial that MBNA had added an arbitration clause to the consumer's account agreement. *Id.* at 788–89. However, the Idaho high court found that MBNA had failed to prove that it had the right to add an arbitration clause to the agreement:

> There was no evidence admitted during the trial as to what those circumstances were or as to whether MBNA complied with them. Absent that evidence, MBNA failed to prove that it amended McGoldrick's original cardholder agreement to add a provision requiring mandatory arbitration, and it therefore failed to prove that there was an agreement to arbitrate.

Id. at 789; *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) ("court cannot confirm an arbitration award unless the parties expressly have agreed to arbitrate the matter"); *Arrow Overall Supply Co. v. Peloquin Enterprises*, 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"); *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).

Numerous lower state courts have similarly rejected attempts to confirm arbitration awards without proof of an agreement. In *Yates v. CACV of Colorado, LLC*, --- S.E.2d ---, 2010 WL 1293805 (Ga. Ct. App. Apr. 6, 2010), 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. 2010 WL 1293805, at *1. CACV had purchased the defendant's alleged debt from MBNA and received a sizable arbitration award from the NAF without the defendant's participation. *Id.* at *2. Like FIA here, CACV provided only a generic copy of MBNA's contract terms in support of its application to confirm the NAF arbitration

award. *Id.* at *4. The trial court confirmed the award, stressing that the defendant had waived her right to object by missing the deadline. *Id.* at *6. 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 *5. The court rejected CACV's argument that, by missing the statutory deadline, the consumer had waived any defense to the confirmation of the arbitration award because the FAA's temporal limitation applied only to motions to vacate, modify or correct an award, not defenses to confirmation. *Id.* at *6–7. The court reinforced this distinction by affirming the trial court's implicit denial of the defendant's motion to vacate but refusing to confirm the arbitration award because the plaintiff could not support the existence of an arbitration agreement. *Id.*

In a recent New Hampshire case, likewise, MBNA attempted to confirm an award that the NAF had entered against a man whose ex-wife had opened an MBNA 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 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. Cornock, No. 03-C-0018 (N.H. Super. Ct. March 20, 2007).

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 a timely motion to vacate:

> In support of [its claim for confirmation] the 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. The signature of the defendant appears nowhere in any of the supporting documents as having entered into any contract of any kind with MBNA or as having made or authorized any charges to a credit card in the defendant's name. Under these circumstances the court cannot make a finding that the defendant agreed to arbitrate this billing dispute.

2005 WL 3664087, at *1. *See also Toal v. Tardif*, 178 Cal.App.4th 1208, 1220 (Cal. Ct. App. 2009) ("Absent an enforceable agreement, an arbitration award is invalid. . . . [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)."); *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); *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); *MBNA Am. Bank, N.A. v. Berlin*, No. 05CA0058-M, 2005 WL 3193850 (Ohio Ct. App. Sept. 30, 2005) (denying confirmation where MBNA failed to include sufficient documentation); *Creech v. MBNA Am. Bank, N.A.*, 250 S.W.3d 715 (Mo. Ct. App. 2008) (same); *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); *FIA Card Servs., N.A. v. Thompson*, No. 42749107, 2008 WL 624904, at *6 (N.Y. Dist. Ct. Mar. 10, 2008) (generic arbitration clause, along with "counsel's bald conclusory statements," were not sufficient proof of an arbitration agreement); *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).

Like that of Louisiana's Second, Fourth, and Fifth Circuit Courts of Appeal, the reasoning of these cases demonstrates that the First Circuit below erred in holding that FIA was entitled to confirm the award against Mr. Weaver without proving he had agreed to arbitration.

III. THE REQUIREMENT THAT A COURT DETERMINE THAT A VALID ARBITRATION EXISTS BEFORE CONFIRMING AN ARBITRATION AWARD IS EVEN MORE IMPERATIVE WHEN THE AWARD WAS OBTAINED FROM THE NATIONAL ARBITRATION FORUM.

The NAF—the arbitration provider that entered the award for FIA against Mr. Weaver—is a private, for-profit firm headquartered in Minneapolis.[6] Until recently, the NAF was the nation's largest provider of consumer arbitrations. Conducting over 200,000 arbitrations per year, the NAF "dominated the credit card arbitration market." Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, Bus. Wk., June 16, 2008. (hereinafter "*Banks v. Consumers (Guess Who Wins)*"). No statistical data is available about NAF debt collection arbitrations in Louisiana. However, an analysis of the NAF's consumer arbitrations in California shows that debt collection arbitrations against MBNA/FIA cardholders accounted for over 50% of NAF arbitrations in the state.[7] *See* Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, Sept. 2007, available *at* http://www.citizen.org/documents/ArbitrationTrap.pdf (hereinafter "*Arbitration Trap*") at 14. The vast majority are "default" proceedings in which the arbitrator rules based only on information provided by one side: the creditor. In these "default" cases, creditors win 99.9% of cases. *Arbitration Trap* at 15. MBNA/FIA and its affiliates brought nearly 1 in every 4 NAF arbitrations during the quarter in which Mr. Weaver's arbitration took place.[8]

Recent Congressional and law enforcement investigations revealed that NAF operated under a major conflict of interest, sharing the same parent company as the debt collector responsible for over half its annual caseload. Even before that conflict was exposed, the NAF marketed itself to corporate clients by virtually guaranteeing those clients successful results in arbitration. Consistent with its marketing, the NAF steered cases towards pro-business arbitrators and blackballed arbitrators that decided in favor of consumers. For all these reasons, it is imperative that courts not abandon their duty of ensuring that a consumer actually agreed to arbitration before an NAF award against a consumer is turned into an enforceable judgment.

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[6] *See* National Arbitration Forum, Company Fact Sheet, *at* http://www.arb-forum.com/resource.aspx?id=568.

[7] The NAF unsuccessfully fought to avoid having to comply with the California statute requiring it to publish this information. *See* Pam Smith, *Arbitrators Attack State Disclosure Law*, The Recorder, Oct. 18, 2005.

[8] *See* National Arbitration Forum, California Consumer Arbitrations, 2007 Third Quarter, *at* http://www.adrforum.com/rcontrol/documents/FocusAreas/CAConsumerArbitrations2007Q3.pdf.

A. The NAF's Corporate Ownership Directly Profited When It Ruled Against Consumers.

In a methodically detailed complaint filed by the Minnesota Attorney General against the NAF, the State alleged that unbeknownst to consumers, a New York based hedge fund owned both a governing interest in the NAF and the assets of the three large collectors of consumer credit card debt, including Wolpoff & Abramson.[9] Complaint, *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"). According to the lawsuit and Minnesota Attorney General Lori Swanson's testimony to Congress, those debt collectors in turn brought hundreds of thousands of debt collection arbitrations before the NAF. *Id.* ¶ 3; *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, at 2–4 (hereinafter "*Arbitration or 'Arbitrary'*") (testimony of the Honorable Lori Swanson, Minn. Atty. Gen.). Consistent with the allegations in Minnesota's lawsuit, the C.E.O. of the NAF admitted at the congressional hearing that $42 million in profits from this debt collection enterprise were distributed to the NAF and its management team. *Arbitration or 'Arbitrary'*, *supra* (statement of Michael Kelly, Chief Executive Officer, NAF).[10] At the same time the NAF was resolving hundreds of thousands of disputes brought by its sister company, the NAF represented that it was "not affiliated or owned by any party who files a claim before the forum" and that, "far from being aligned with lenders or other business parties," it provided "neutral and unbiased dispute resolution." Minnesota Complaint, ¶ 23.

The profit stream that debt collection arbitration generated for the NAF was directly tied to the success rate of debt collectors in the NAF arbitrations. For example, First USA Bank disclosed in court filings that it paid the NAF $5 million in fees in just two years. Consumers Union, *Consumer Rights: Give Up Your Right to Sue?*, Consumer Reports, May 2000. During that period, First USA won 99.6% of the 50,000 collection cases that it brought before the NAF. *Id.*; *see also* Joseph Garrison, *Is ADR Becoming "A License to Steal"*? Conn. L. Trib., Aug. 26,

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[9] Wolpoff & Abramson was the debt collector that obtained the $32,0112.40 award from NAF on behalf of FIA against Mr. Weaver. App. I at 1; App. II at 1.

[10] Video Webcast available at: http://oversight.house.gov/index.php?option=com_content&task=view&id=4013&Itemid=31.

2002, at. 4 (suggesting that "the millions of dollars [First USA] paid the NAF in fees tend to produce overwhelmingly favorable results").

According to the NAF's own data, First USA's overwhelmingly high success rate was hardly unusual. The NAF handled 33,933 debt collection arbitrations in California from January, 2003, through March, 2007. *Banks v. Consumers (Guess Who Wins)*, *supra*. Of the 18,075 arbitrations that were not dropped by creditors, dismissed, or settled, consumers won just 30 cases, or 0.2%. *Id.*

Only three days after its financial ties to debt collection were exposed by the State of Minnesota, the NAF agreed to immediately cease its consumer arbitration business. Consent Decree, State of Minnesota v. National Arbitration Forum, et. al., No 27-CV-09-18550 (July 17, 2009), *available at* http://pubcit.typepad.com/files/nafconsentdecree.pdf.[11] With the NAF no longer handling consumer debt collection cases, Mann Bracken was forced to declare bankruptcy. Nathan Koppel, *Mann Bracken, Debt Collecting Firm Extraordinaire, To Shut Down*, Wall St. J., Jan. 20, 2010. A complaint on behalf of the State of California alleging that the NAF systematically violated California's unfair business practices law remains pending.[12]

B. The NAF Marketed Itself to Creditors.

The Business Week investigation also documented that while the NAF publicly hailed itself as a fair and neutral forum, "behind closed doors, the NAF was selling itself to lenders as an effective tool for collecting debts." *Banks v. Consumers (Guess Who Wins)*, *supra*. Business Week published a confidential NAF PowerPoint presentation in which the NAF promised that its creditor clients would obtain a "marked increase in recovery rates over existing collection methods" and boasted that creditors could "request arbitration maneuvers that can tilt the arbitration in their favor" by using "stays and dismissals that are free to the Claimant—to control the process and timeline." *Id.*

The Minnesota complaint likewise documented NAF marketing materials boasting to companies that consumers facing arbitration would "just hand over the money" because they would be "totally intimidated by the arbitration process." Minnesota Complaint, ¶ 96.

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[11] Notably, when NAF CEO Michael F. Kelly testified to Congress just five days after the consent decree was signed, he did not deny the truth of Minnesota lawsuit's allegations. *See* Written Testimony of Michael F. Kelly at 1, *Arbitration or 'Arbitrary'*, *supra*.

[12] Nathan Koppel, *Arbitration Firm Faces Questions Over Neutrality*, Wall St. J., Apr. 21, 2008, at A3.

According to the complaint, the NAF stressed that "you [the creditor] have all the leverage and the customer has no choice but to take care of the account," and that "the customer does not know what to expect from arbitration and is more willing to pay." *Id.* In short, the NAF marketed itself to creditor and debt collectors by telling them that they would be more successful in front of the NAF than in any other venue.

C. The NAF Selected Arbitrators with Proven Track Records of Ruling for Creditors Against Consumers.

Several studies of NAF arbitrations have found that the NAF rewarded arbitrators who ruled for creditors by assigning them more cases. *See, e.g.*, Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, Christian Sci. Monitor, July 16, 2007; *Arbitration Trap*, *supra*. A study by the Center for Responsible Lending revealed a linear relationship between the amount the arbitrator awarded to a creditor and the number of future cases that arbitrator was assigned. Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009) at 9, *available at* http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf (hereinafter "*Stacked Deck*"). Similarly, companies who appeared more often before the NAF received a higher percentage of the amount requested in their arbitrations than did companies who appeared less often. *Id.* at 8.

Consistent with those studies, the NAF's own California data shows that although the NAF claims to have a roster of 1,500 arbitrators, ninety percent of its debt collection cases (17,265 cases) were decided by just 28 arbitrators. *Arbitration Trap*, *supra*, at 15. Similarly, the Christian Science Monitor found that the NAF's ten most frequently used arbitrators were assigned almost 60% of the NAF's collections cases. Baribeau, *supra*. Those ten arbitrators, not surprisingly, ruled for the consumer only 1.6% of the time. *Id.* By contrast, arbitrators who got three cases or fewer during the same time period found in favor of the consumer 38% of the time. *Id.* *See also* Michael Geist, *Fair.com?: An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP*, 27 Brook. J. Int'l Law 903, 912 (2002) (statistical analysis showed the NAF funneled cases to arbitrators who most often ruled for its clients).

The NAF did not even stop at blackballing arbitrators who ruled in favor of consumers. Harvard Law School professor Elizabeth Bartholet testified before the Senate Judiciary Committee that the NAF shut her out of future arbitrations after she awarded a consumer

$48,000 in damages in one case. *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).[13] Professor Bartholet explained that when she ruled for creditors as she did in 19 of her first 20 cases (one was dismissed), she continued to get more assignments. *Id.* As soon as she awarded damages to a consumer a single time, however, the NAF removed her from 11 other cases she had pending involving the same credit card company. *Id.* Professor Bartholet concluded from her experience that "the NAF process was systematically biased in favor of credit card companies" and was one that allowed credit card companies to "purchase all the justice they want." *Id.*[14]

One NAF arbitrator, Joseph Nardulli, once decided 68 arbitrations in a single day, giving debt collectors every cent of the $1 million they demanded. *Arbitration Trap*, *supra*, at 3. Assuming Nardulli worked a 10-hour day, he would have issued one decision every 8.8 minutes. *Id.* As another former NAF arbitrator noted, "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." 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.

D. The NAF Entered Arbitration Awards Without Proof of a Valid Arbitration Agreement.

Among numerous other abuses, instances have been reported of NAF arbitrators entering awards against individuals who never agreed to arbitration, including victims of identity theft and mistaken identity. *Banks vs. Consumers (Guess Who Wins)*, *supra*. These problems have been documented by the courts. *See, e.g.*, *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,

[13] Video of this testimony is available at:
http://judiciary.senate.gov/hearings/testimony.cfm?id=3485&wit_id=7313

[14] *See also* Baribeau, *supra*, at 13 ("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.").

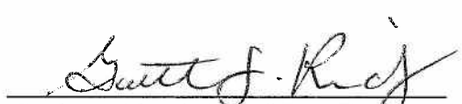
2005 WL 1214244, at *2 (Kan. Ct. App. 2005) (noting that NAF award contained "patently . . . untrue" information); *cf. Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 976 n. 8 (W.D. Mo. 2005) (criticizing the NAF's position in the case as providing "further support for Plaintiffs' allegation that the NAF is biased in favor of financial institutions"); *Mercuro v. Super. Ct.*, 116 Cal. Rptr. 2d 671 (Ct. App. 2002) (finding repeat-player bias by the NAF).

Given these widely-documented abuses in the use of NAF arbitration to collect consumer debts, courts must be vigilant in requiring creditors and debt collectors to prove that each arbitration award is indeed enforceable. Creditors like FIA should not be permitted to obtain enforceable judgments against Louisiana consumers simply by submitting a photocopy of a generic, unsigned, undated, 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 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. *See, e.g.*, *Nelson*, 2007 WL 1704618, at *8 (noting that "the credit card issuer is the party in the best position to maintain records"); *id.* at *5–*9 (describing evidence that would be sufficient to prove that parties had agreed to arbitration). The *only* arbitration awards that cannot be confirmed will be those issued without evidence that the consumer consented to arbitration. Surely FIA cannot plausibly argue that it is entitled to collect money from such individuals without any proof.

CONCLUSION

The application for a writ of certiorari should be granted.

Respectfully submitted this 18th day of June, 2010.



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

I, Garth J. Ridge, hereby verify all allegations of the Application for Writ of Certiorari and certify that I have placed copies of the same in the U.S. Mail, first class postage prepaid and properly addressed, this 18th day of June, 2010, to:

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Court of Appeal, First Circuit
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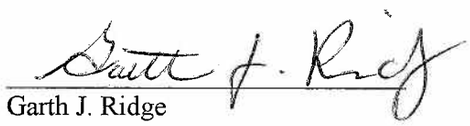

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