IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 1

ANASTASIYA KOMAROVA,	)	
	)	
Plaintiff/Respondent,	)	
	)	Case No.: A121316
v.	)	
	)	San Francisco County Superior
NATIONAL CREDIT ACCEPTANCE, INC.,	)	Court Case No.: 456891
	)	
	)	
Defendant/Appellant	)	

Appeal from the Superior Court of the State of California
County of San Francisco
The Honorable Ernest Goldsmith

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT ANASTASIYA KOMAROVA

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, *amicus curiae* Public Justice, P.C., hereby states that no entity or person has an ownership interest of 10 percent or more in Public Justice, P.C., and Public Justice knows of no person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding under Rule 8.208.

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Pursuant to California Rule of Court 8.208, *amicus curiae* the National Consumer Law Center (NCLC) hereby states that no entity or person has an ownership interest of 10 percent or more in NCLC, and NCLC knows of no person or entity that has a financial or other interest in the outcome of the proceeding under Rule 8.208.

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INTERESTS OF *AMICI CURIAE*

Public Justice, P.C., is a national public interest law firm dedicated to fighting for justice through precedent-setting and socially significant individual and class action litigation designed to enhance consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, workers' rights, America's civil justice system, and the protection of the poor and powerless. Public Justice is committed to ensuring that all Americans have meaningful access to justice in their dealings with large corporations. Public Justice has particular interest in this case because of its longstanding concern about debt collectors' increasing use of arbitration proceedings before the National Arbitration Forum (NAF) to collect consumer debts.

The National Consumer Law Center is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed, and elderly consumers.

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INTRODUCTION

This case involves a question of tremendous importance to California consumers: whether debt collectors are granted immunity from liability for violations of California's Rosenthal Fair Debt Collection Practices Act (Rosenthal Act), Civil Code § 1788 *et seq.*, by the litigation privilege. A jury found that the debt collector in this case, National Credit Acceptance (NCA), had violated the Rosenthal Act by repeatedly calling Plaintiff/Respondent Anastasyia Komarova at work, for a full year, and threatening her and her husband's savings. NCA argues that it should nevertheless be immune from the Rosenthal Act because its abusive debt-collection practices were related to a "quasi-judicial" proceeding before the National Arbitration Forum (NAF). *See* Appellant's Br. 17. But the litigation privilege, to the extent that it applies to arbitrations, does so only because of arbitration's "analogy to a judicial proceeding." *Moore v. Conliffe*, 7 Cal. 4th 634, 647 (1994) (citing *Ribas v. Clark*, 38 Cal. 3d 355, 364 (1985)). The true nature of NAF's practices and proceedings, as demonstrated by a number of media reports, studies, and court cases, makes clear that NAF consumer arbitrations lack many of the basic characteristics and safeguards of judicial proceeds. As such, permitting this immunity

would eviscerate the Rosenthal Act and have disastrous consequences for consumers.

ARGUMENT

I. THE ROSENTHAL ACT IS INTENDED TO DETER ABUSES BY DEBT COLLECTORS

Debt collection is a hugely profitable business—indeed, it is one of the few "bright spots" in today's troubled economy. Phyllis Korkki, *The Count*, N.Y. Times, Nov. 30, 2008. According to one study, revenue from debt collection, which reached almost $14.3 billion in 2008, is expected to rise to nearly $17.8 billion in 2014. *Id.*

Despite state and federal laws designed to prevent abuses by debt collectors, the industry continues to engage in abusive practices. The Federal Trade Commission (FTC) "receives more complaints about the debt collection industry than any other specific industry." Federal Trade Commission, *Annual Report 2008: Fair Debt Collection Practices Act* 4, *available at* http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf. In 2007, the most recent year for which data are available, consumer complaints to the FTC about third-party debt collectors increased from 19.9% of all FTC complaints in 2006 to 20.8% of complaints.

More than thirty years ago, the California Legislature recognized that abusive debt collection practices "undermine the public confidence which is essential to the continued functioning of the banking and credit system." Civ. Code § 1788.1(a). As a result, in 1977 it enacted the Rosenthal Act for the purpose of "prohibit[ing] debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts." § 1788.1(b). Today, the Rosenthal Act stands as crucial protection for consumers against "the pernicious effect of debt collection practices." *Butler v. Resurgence Fin., LLC*, 521 F. Supp. 2d 1093, 1096 (C.D. Cal. 2007).

The Rosenthal Act was thus intended to protect consumers from abuses by debt collectors. Nevertheless, in this case, NCA is attempting to conjure a legal barrier to the application of the Rosenthal Act that, if the Court accepts it, would have catastrophic consequences for California consumers. Under NCA's theory of the litigation privilege, debt collectors would be utterly immune from the proscriptions of the Rosenthal Act simply by choosing to collect their debt by means of an arbitration procedure. Given the frequency with which debt collectors turn to NAF to

effect consumer debt collections,[1] this interpretation of the privilege "would effectively vitiate the Rosenthal Act and render the protections it affords meaningless." *Oei v. N. Star Capital Acquisitions, LLC*, 486 F. Supp. 2d 1089, 1101 (C.D. Cal. 2006). *See also Yates v. Allied Int'l Credit Corp.*, 578 F. Supp. 2d 1251, 1255 (S.D. Cal. 2008) ("[T]his Court will not allow the litigation privilege to defeat the protections of the Rosenthal Act."); *Butler*, 521 F. Supp. 2d at 1096-97 ("If the litigation privilege were allowed to swallow the protections of the Rosenthal Act, the Legislature's purpose could not be effectuated. Therefore, in light of these considerations, we conclude that the litigation privilege does not apply to the provisions of the Rosenthal Act."). It amounts to a dramatic reinterpretation of California law that flies in the face of the intent of the legislature as well as the reality that, especially in the current economy, consumers desperately need protection from abusive debt collection practices.

NCA's radical interpretation of the litigation privilege is particularly alarming in light of the true nature of NAF arbitration, through which NCA

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[1] Between January 1, 2003, and March 31, 2007, NAF handled more than thirty thousand collection cases in California alone, Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 5-6 (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf, including two thousand brought by NCA. *See* Public Citizen, NAF California data (2007), *available at* http://www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls.

endeavored to collect its purported debt in this case. As the following section will demonstrate, NAF arbitrations amount to a mere rubber-stamp of a debt collector's request for an award. These arbitrations therefore must not be permitted to be transmuted, via the litigation privilege, into a shield against the application of the Rosenthal Act to abusive debt-collection practices.

II. NAF OPERATES AS A RUBBER STAMP FOR DEBT COLLECTORS

A. NAF'S FINANCIAL INTERESTS ARE CLOSELY ALIGNED WITH THOSE OF DEBT COLLECTORS

The relationship between NAF and debt collectors begins with the credit card contract: credit card companies draft the contract, which includes a clause requiring consumers to arbitrate their disputes—usually before a specific arbitration provider—rather than sue in court. Most credit-card issuers include these mandatory arbitration clauses in their contracts. *See* Consumers Union, *Best and Worst Credit Cards*, Consumer Reports, Oct. 2007. *See also* Day to Day, *Marketplace Report: Credit Disputes Favor Companies* (NPR radio broadcast Sept. 28, 2007) (available at 2007 WLNR 19048094) ("[I]t's often hard to find a credit card that

doesn't make arbitration mandatory."); Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, Christian Sci. Monitor, July 16, 2007 ("[I]f you own a credit card, chances are you have a mandatory arbitration clause.").

NAF, far more so than the two other major players in the arbitration industry, the American Arbitration Association (AAA) and JAMS, has financial interests strongly aligned with credit card companies and debt collectors. Because of this association, CNN's personal finance editor called NAF "the folks who are the worst actors in this industry." Am. Morning (CNN television broadcast June 6, 2008) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0806/06/ltm.03.html). The Wall Street Journal observed that, more than other arbitration providers, NAF works with a handful of large companies, and a "significant percentage of its work includes disputes involving consumers, rather than disputes between businesses." Nathan Koppel, *Arbitration Firm Faces Questions Over Neutrality*, Wall St. J., Apr. 21, 2008. In contrast, AAA and JAMS "tend to attract employment disputes and contractual fights between companies." Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

As a result of NAF's focus on consumer debt, NAF receives "considerable fees" from its creditor and debt collector clients.[2] Consumers Union, *Consumer Rights: Give Up Your Right to Sue?* Consumer Reports, May 2000. For example, First USA Bank disclosed in court filings that it had paid NAF at least $5 million in fees between 1998 and 2000. *Id.* During that same period, First USA won 99.6% of its 50,000 collection cases before NAF. *Id*. While advocates for banks invoke the possibility that the bank could have been equally successful in court, "[m]aybe, however, the millions of dollars it paid the NAF in fees tend to produce overwhelmingly favorable results." Joseph Garrison, *Is ADR Becoming "A License to Steal"?* Conn. L. Trib., Aug. 26, 2002, at 4. In sharp contrast, it would be shocking for a public court to be so financially dependent on a litigant appearing before it.

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[2] NAF arbitrations are lucrative for individual arbitrators as well as for the organization itself. One 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, and that would be a very substantial supplement to my income. . . . 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.

There is significant evidence that NAF has a symbiotic financial relationship with these companies. As part of this relationship, NAF has aggressively marketed itself to debt collectors. Additionally, NAF's procedures for the selection and retention of arbitrators rewards arbitrators who rule in favor of business and punishes those who rule for consumers. Given the cumulative evidence about NAF's relationship with credit card companies and debt collectors, it is not surprising that NAF is subject to mounting allegations of anti-consumer bias.

B. NAF'S MARKETING MATERIALS PROMISE CREDIT CARD COMPANIES AND DEBT COLLECTORS THAT COLLECTING DEBTS THROUGH NAF ARBITRATIONS WILL SAVE THEM MONEY

Among America's major arbitration providers, NAF also has the dubious distinction of most aggressively marketing itself to credit card companies and debt collectors. *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, Mar. 1, 2000, at E1 ("[A]rbitration industry experts say [that] the forum's business involves more corporate-consumer disputes, in large part because of the company's aggressive marketing."). *Cf.* Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN*

UDRP, 27 Brook. J. Int'l L. 903, 907 (2002) (in analysis of domain-name arbitration providers, noting that "[m]arketing techniques clearly illustrate one area of differentiation between providers, with the NAF adopting a far more aggressive approach than the other providers in the marketing of its services"). While NAF trumpets itself to the public as fair and neutral, "[b]ehind closed doors, NAF sells itself to lenders as an effective tool for collecting debts." Berner & Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, *supra*, June 5, 2008. *See also* Sean Reilly, *Supreme Court Looks at Arbitration in Alabama Case This Week*, Mobile Reg., Oct. 1, 2000, at A1 ("In marketing letters to potential business clients, [NAF's] executives have touted arbitration as a way of eliminating class action lawsuits, where thousands of small claims may be combined."); Ken Ward, Jr., *State Court Urged to Toss One-Sided Loan Arbitration*, Charleston Gazette & Daily Mail, Apr. 4, 2002, at 5A ("[I]n solicitations and advertisements, NAF has overtly suggested to lenders that NAF arbitration will provide them with a favorable result."); Sarah Ovaska, *3 Cases Cite Payday Lending: Consumer Groups Say Arbitration Clauses Deny People Recourse to Courts*, News & Observer, Jan. 7, 2007 ("[NAF], which in 2006 resolved $3 billion worth of claims involving debts and other disputes,

has been singled out by consumer advocates, who criticize it for advertising its services to businesses.").

BusinessWeek revealed one of the most shocking examples of NAF marketing to debt collectors when it described a September, 2007, PowerPoint presentation aimed at creditors—and labeled "confidential"—that promises "marked increase in recovery rates over existing collection methods." Berner & Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, *supra*, June 5, 2008. The presentation also "boasts that creditors may request procedural maneuvers that can tilt arbitration in their favor. 'Stays and dismissals of action requests available without fee when requested by Claimant—allows claimant to control process and timeline.'" *Id.* Speaking on condition of anonymity, an NAF arbitrator told BusinessWeek that these tactics allow creditors to file actions even if they are not prepared, in that "[i]f there is no response [from the debtor], you're golden. If you get a problematic [debtor], then you can request a stay or dismissal." *Id.* BusinessWeek also highlighted another disturbing NAF marketing tactic: NAF "tries to drum up business with the aid of law firms that represent creditors." *Id.* Neither AAA nor JAMS cooperate with debt-collection law firms in such a manner. *Id.*

NAF has an arsenal of other ways of letting potential clients know that NAF can immunize them against liability. In one oft-cited example, an NAF advertisement depicts NAF as "the alternative to the million-dollar lawsuit." Nadia Oehlsen, *Mandatory Arbitration on Trial*, Credit Card Mgmt., Jan. 1, 2006, at 38. Additionally, NAF sends marketing letters to potential clients in which it "tout[s] arbitration as a way of eliminating class action lawsuits, where thousands of small claims may be combined . . . . [Class actions] offer a means of punishing companies that profit by bilking large numbers of consumers out of comparatively small sums of money." Reilly, *Supreme Court Looks at Arbitration in Alabama Case This Week*, Mobile Reg., *supra*, Oct. 1, 2000, at A1. NAF's marketing letters also urge potential clients to contact NAF to see "how arbitration will make a positive impact on the bottom line" and tell corporate lawyers that "[t]here is no reason for your clients to be exposed to the costs and risks of the jury system." *See* Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, *supra*, Mar. 1, 2000, at E01. Finally, in an interview with a magazine for in-house corporate lawyers, NAF's managing director Anderson once boasted that NAF had a "loser pays" rule requiring non-prevailing consumers to pay the corporation's attorney's fees. *See Do*

An LRA: Implement Your Own Civil Justice Reform Program NOW, Metropolitan Corp. Counsel, Aug. 2001.

Consistently with NAF's signals to creditors and debt collectors that it is on their side, in the context of NAF's business of resolving domain-name disputes, NAF issues press releases that laud its arbitrators' rulings in favor of claimants. These press releases, which feature headlines such as "Arbitrator Delivers Internet Order for Fingerhut" and "May the Registrant of magiceightball.com Keep the Domain . . . Not Likely," "do little to engender confidence in the neutrality of the NAF." Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, *supra*, 27 Brook. J. Int'l L. at 907. The other two domain-name dispute arbitration providers do not issue such press releases. *Id.*

C. NAF FUNNELS ARBITRATIONS TO CORPORATE-FRIENDLY ARBITRATORS AND SHUNS CONSUMER-FRIENDLY ARBITRATORS

NAF has structured a system that both steers a startling percentage of its arbitrations to a handful of arbitrators who reliably rule in favor of businesses and shuts out arbitrators who have the gall to rule for consumers. Both of these methods of staffing arbitrations serve to enhance NAF's reputation as a business-friendly venue.

First, data provided by the NAF pursuant to California Code of Civil Procedure § 1281.96, which requires arbitration providers to disclose certain information about their arbitrations, reveal that a tiny number of NAF arbitrators decide a disproportionate number of cases.[3] The Christian Science Monitor analyzed one year of data and found that NAF's ten most frequently used arbitrators—who were assigned by NAF to decide nearly three out of every five cases—ruled for the consumer only 1.6% of the time. In contrast, arbitrators who decided three or fewer cases during that year found in favor of the consumer 38% of the time. Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, Christian Sci. Monitor, *supra*, July 16, 2007. Likewise, a comprehensive analysis of the data by Public Citizen found that one particular arbitrator, Joseph Nardulli, handled 1,332 arbitrations and ruled for the corporate claimant 97% of the time. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, *supra*, at 17. On a single day—January 12, 2007—Nardulli signed 68 arbitration decisions, giving debt holders and debt buyers every

[3] On its website, NAF boasts that it has a total of more than 1,500 arbitrators in all 50 states, *see* National Arbitration Forum, Locations, http://www.adrforum.com/ (mouse over "About Us" menu; select "Our Neutrals"; then click on "Locations") (last visited Jan. 30, 2009), but that statistic has little significance if the vast majority of cases are steered to a small number of persons.

cent of the nearly $1 million that they demanded. *Id.* If Nardulli worked a ten-hour day on January 12, 2007, he would have averaged one decision every 8.8 minutes. An additional 28 NAF arbitrators handled nearly 90% of consumer collection cases, and "they too decided every matter . . . in favor of business entities." Compl. ¶ 24, *People v. Nat'l Arbitration Forum, Inc.*, No. C6C-08-473569 (Cal. Super. Ct. filed Aug. 22, 2008).

Further evidence of NAF's propensity for steering arbitrations to those arbitrators who will rule in favor of its clients comes from law professor Michael Geist's study of domain-name arbitration providers. Professor Geist observed that NAF's "case allocation appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists. Most troubling is data which suggests that, despite claims of impartial random case allocation as well as a large roster of 131 panelists, the majority of NAF single panel cases are actually assigned to little more than a handful of panelists."[4] Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, *supra*, 27 Brook. J. Int'l L. at 912. Professor Geist went on to note

[4] "Single-panel" cases are those in which the NAF controls which arbitrator decides a case, in contrast to three-member panels, where the parties have more control over arbitrator selection. Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, *supra*, 27 Brook. J. Int'l L. at 911.

that "an astonishing 53% of all NAF single panel cases . . . were decided by only six people," and the "complainant winning percentage in those cases was an astounding 94%." *Id.* Importantly, neither of the other two domain-name arbitration services had such a skewed caseload. *Id.* Like aggressive advertising to potential clients, this method of attracting business is unique to NAF.

The second component of NAF's business-friendly system of arbitrator selection is its documented blackballing of arbitrators who dared to rule in favor of consumers. Harvard law professor Elizabeth Bartholet went public with her concerns that, after she awarded a consumer $48,000 in damages, NAF removed her from 11 other cases, all of which involved the same credit card company. As Bartholet described her experience to BusinessWeek, "NAF ran a process that systematically serviced the interests of credit card companies." Berner & Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, *supra*, June 5, 2008. Bartholet told the Minneapolis Star-Tribune that "[t]here's something fundamentally wrong when one side has all the information to knock off the person who has ever ruled against it, and the little guy on the other side doesn't have that information. . . .That's systemic bias." 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. Similarly, former West Virginia Supreme Court Justice Richard Neely stopped receiving NAF assignments after he published an article accusing the firm of favoring creditors. Berner & Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, *supra*, June 5, 2008. In that article, Justice Neely lamented that NAF "looks like a collection agency" that depends on "banks and other professional litigants" for its revenue; he described NAF as a "system set up to squeeze small sums of money out of desperately poor people." *Id.*

D. NAF FREQUENTLY ENTERS AWARDS AGAINST CONSUMERS UNDER TROUBLING CIRCUMSTANCES

A powerful example of NAF's bias in favor of creditors and debt collectors is its widely observed habit of proceeding with arbitrations—and entering awards against consumers—based on non-existent evidence and under dubious circumstances. For example, NAF has blithely entered awards against individuals who were documented victims of identity theft, consumers who were never properly served with a notice of arbitration, and consumers who never agreed to arbitrate their dispute. Numerous courts have taken note of the monumental flaws in NAF's procedures that permit

these types of arbitrations to go forward. *See, e.g.*, *Sprague v. Household Int'l*, 473 F. Supp. 2d 966, 976 n.8 (W.D. Mo. 2005) ("The fact that NAF was willing to state that only a document review is necessary in a case involving fraud and misrepresentation is further support for Plaintiffs' allegation that NAF is biased in favor of financial institutions."); *CACV of Colo., LLC v. Corda*, No. NNHCV054016053, 2005 WL 3664087 (Conn. Super. Ct. Dec. 16, 2005) (denying debt collector's motion to confirm NAF award for lack of evidence, and noting that NAF rules provide "no procedure by which the arbitrator makes any determination of whether the defendant has received actual notice of the demand for arbitration . . . . and if the defendant does not respond in writing to the demand for arbitration, NAF simply decides the case 'on the papers.' This certainly results in a high likelihood that the outcome of the arbitration will be in the defendant's favor."); *Asset Acceptance, LLC v. Wheeler*, --- S.E.2d ----, 2009 WL 71504, at *1 (Ga. Ct. App. Jan. 13, 2009) (affirming vacatur of NAF arbitration award where consumer had not received proper notice); *MBNA Am. Bank v. Barben, N.A.*, No. 92,085, 2005 WL 1214244, at *2 (Kan. Ct. App. May 20, 2005) (affirming vacatur of arbitration award issued by NAF and noting trial court's finding that delivery date on face of NAF award was "patently . . . shown to be untrue," given that neither NAF's director of

arbitration nor the alleged debtor were present on the date on which the award was purportedly delivered by the director to the debtor).

NAF's willingness to enter arbitration awards against individuals who are the victim of identity theft is perhaps the most egregious example of the extent to which NAF's practices diverge from that of a court: the briefest impartial review would reveal that awards should not be entered against these individuals. *See* Sheryl Harris, *Consumers Should Be Suspicious of Arbitration Clause*, Plain Dealer (Cleveland), Feb. 17, 2005, at C5. ("Even victims of identity theft have been wrestled into arbitration [with NAF] and held responsible for charges racked up by thieves."). The following individuals represent just a few instances of NAF's entering awards against identity theft victims.

- Six months after Beth Plowman used her MBNA card to pay a hotel bill while on a business trip to Nigeria in 2000, MBNA called her to collect more than $26,000 spent at sporting goods stores in Europe. Plowman had received no credit card statements during those six months; MBNA told her that "her sister"—Plowman has no sisters—had changed the address on the account to an address in London. Plowman filed an identity theft report with the police and heard nothing more

from MBNA. But two years later, a debt collection agency that had purchased the debt from MBNA got an arbitration award against her from NAF. Eileen Ambrose, *Read the Fine Print: Arbitration Clause Can Sting You*, Fort Wayne J. Gazette, Mar. 15, 2005, at 8.

- Troy Cornock received a letter from NAF claiming that he owed money on an MBNA credit card, but he had never signed a credit card agreement or made any charges on the account, which had been opened by his ex-wife. NAF ruled against him anyway. Gary Weiss, *Credit Card Arbitration* (Oct. 11, 2007), Forbes.com, http://www.forbes.com/2007/ 10/10/gary-weiss-credit- oped-cx_gw_1011weiss.html. But when MBNA attempted to enforce the NAF award in court, the court granted Cornock's motion for summary judgment, stating that "in the absence of a signed credit card application or signed purchase receipts demonstrating that the defendant used and retained the benefits of the card, the defendant's name on the account, without more, is insufficient evidence that the defendant manifested assent. . . . 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." *MBNA Am. Bank, N.A. v. Cornock*, No. O3-C-0018, slip. op. at 25 (N.H. Super Ct. Mar. 20, 2007) (emphasis added).

- Irene Lieber, who lives on $759 a month in Social Security disability payments, was hounded by a debt collection agency after her MBNA credit card was stolen. Lieber later received a notice of arbitration from NAF. With the help of a legal services attorney, she asked to see the case against her or for the claim to be dismissed. But Lieber heard nothing until another notice arrived, stating that NAF had issued a $46,000 award against her. Laura Rowley, *Stacking the Deck Against Consumers* (Oct. 17, 2007), Yahoo! Finance, http://finance.yahoo.com/ expert/article/moneyhappy/48748.

NAF is also notorious for failing to ensure that consumers actually agreed to arbitrate their disputes. In one such case, the Kansas Supreme Court chided MBNA for its "casual approach to this litigation." *MBNA Am. Bank, N.A. v. Credit*, 132 P.3d 898, 902 (Kan. 2006) (vacating NAF arbitration award where MBNA failed to prove alleged debtor had agreed to arbitration). That MBNA would have such a "casual approach" is not

surprising in light of MBNA's usual proceedings before NAF: it was accustomed to being able to get arbitration awards from NAF arbitrators notwithstanding its failure to produce arbitration agreements. *See id*. at 899 (noting that NAF arbitrator entered award in the amount of $21,094.74 in favor of MBNA). Another example is *MBNA America Bank, N.A. v. Christanson*, 659 S.E.2d 209, 210, 213 (S.C. Ct. App. 2008), where the South Carolina Court of Appeals refused to confirm an NAF arbitration award in favor of MBNA that had been entered despite the consumer's repeated assertions that he never agreed to arbitrate.[5]

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[5] Numerous other courts have refused to confirm NAF awards for similar reasons. *See, e.g.*, *MBNA Am. Bank, N.A. v. Boata*, 893 A.2d 479 (Conn. App. Ct. 2006) (permitting consumer to challenge NAF award where consumer asserted that he had never consented to arbitration agreement); *Barbera v. AIS Services, LLC*, 897 N.E.2d 485 (Ind. Ct. App. 2008) (reversing trial court's refusal to vacate NAF award where consumer did not receive adequate service of process of the notice of claim and the notice of arbitration); *FIA Card Services, N.A. v. Richards*, No. 07-1513, 2008 WL 2200101 (Iowa Ct. App. May 29, 2008) (affirming vacatur of NAF arbitration award where consumer did not receive notice of arbitration and did not receive the participatory hearing he requested); *MBNA Am. Bank, N.A. v. Barben*, No. 92,085, 2005 WL 1214244 (Kan. Ct. App. May 20, 2005) (affirming vacatur of arbitration award issued by NAF and noting trial court's finding that delivery date on face of NAF award was "patently . . . shown to be untrue," given that neither NAF's director of arbitration nor the alleged debtor were present on the date on which the award was purportedly delivered by the director to the debtor); *Chase Bank USA, N.A. v. Leggio*, --- So. 2d ----, 2008 WL 5076449 (La. Ct. App. Dec. 13, 2008) (affirming trial court's denial of bank's petition to affirm NAF award where "Chase has not demonstrated that Leggio ever consented to arbitration"); *MBNA Am. Bank, N.A. v. Pacheco*, No. 1621-06, 2006 WL 2337964 (N.Y.

The circumstances of the instant case provide yet another example of NAF's shoddy and untrustworthy procedures. Because Respondent Anastasiya Komarova was not actually a party to the NAF arbitration in this case, the full extent of the deficiencies in the NAF process cannot be known. Nevertheless, the record plainly reflects NAF's bias and lack of care. The debt at issue, which NCA had purchased from MBNA, arose from a credit card account that had been opened by Christopher Propper, who was at one point engaged to a woman named Anastasia—not Anastasiya—Komarova. Resp't's Br. 6. Propper listed his fiancée as an "authorized user" on the account, but she never signed the application and therefore, according to MBNA, was never legally responsible for any charges on the account. *Id.* Notwithstanding the fact that Anastasia Komarova *bore no responsibility for the debt*, NAF entered an arbitration award against her as well as against Propper. *Id.* at 13.

City Ct. Aug. 11, 2006) (denying MBNA's motion to confirm arbitration award that NAF had entered against alleged debtor because the alleged debtor had never been served with the notice of arbitration).

E. NAF IS WIDELY REGARDED AS DEEPLY BIASED AGAINST CONSUMERS

Because of the above facts, NAF is widely regarded as intractably biased against consumers. As Professor Bartholet phrased it, "bias in favor of the big corporate player and against the employee and consumer . . . is inherent in this form of arbitration." *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Prof. Elizabeth Bartholet, Harvard Law School) *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=3485 (select "Elizabeth Bartholet" from "Witness Testimony" menu). Consumers around the country have alleged that NAF's "profile is oriented toward the business and financial community and antagonistic to the rights of individual claimants and consumers." Mark Brunswick, *First Lady Leaves Job at Private Firm*, Star Trib. (Minneapolis), Apr. 13, 2007, at 1B. *See also* Ovaska, *3 Cases Cite Payday Lending: Consumer Groups Say Arbitration Clauses Deny People Recourse to Courts*, *supra*, News & Observer, Jan. 7, 2007 (noting lawsuit challenging arbitration on grounds that NAF "is a biased organization that caters to business"); Reilly, *Supreme Court Looks at Arbitration in Alabama Case This Week*, Mobile Reg., *supra*, Oct. 1, 2000, at A1 ("High on arbitration critics' watch list is

the Minneapolis-based National Arbitration Forum."); Ward, *State Court Urged to Toss One-Sided Loan Arbitration*, Charleston Gazette & Daily Mail, *supra*, Apr. 4, 2002, at 5A ("Hedges alleges that the forum, a private company, almost always favors lenders because its business is dependent on being chosen by lenders to arbitrate loan cases.").

This bias is evidenced by nearly a decade of data about outcomes in NAF arbitration. These data demonstrate that NAF's system works as intended—that is, to speedily produce the judgment-ready awards requested by credit card companies and debt collectors. Before 2002, the only data about outcomes in NAF arbitration came from an Alabama case against credit card issuer First USA. Those data revealed that, out of nearly 20,000 cases where NAF reached a decision between 1998 and 2000, First USA prevailed in 99.6% of cases. *See* Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, *supra*, Mar. 1, 2000, at E01. While First USA filed more than 50,000 cases against consumers, consumers filed only four against First USA. *Id.* These stark numbers led commentators to note that "[e]very indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies." Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. Chi. L. Rev. 157, 173 (2006).

More data became available in 2002, when California passed Code of Civil Procedure § 1281.96, which requires that private companies administering consumer arbitrations provide certain information to the public.[6] The analyses of these data are similarly stark. The San Francisco City Attorney noted that, of 18,075 consumer arbitrations that went to a hearing in California between January 1, 2003 and March 31, 2007, only 30—less than 0.2% of the total—yielded a victory of the consumer. Compl. ¶ 22, *People v. Nat'l Arbitration Forum, Inc.*, No. C6C-08-473569 (Cal. Super. Ct. filed Aug. 22, 2008). Even more strikingly, in "*each and every* case where a business entity brought a claim against a consumer and the matter was disposed of by hearing, the NAF arbitrator ruled in favor of the business entity—a 100% success rate that any litigant would be overjoyed to have." *Id.* Similarly, Public Citizen found that all but 15 of NAF's

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[6] NAF strongly resisted complying with this law, which was designed to "level the information playing ground" so that consumers, as well as the powerful corporations that impose arbitration clauses in their consumer contracts, would have access to information about arbitrators' track records. *See* Pam Smith, *Arbitrators Attack Calif. Disclosure Law*, The Recorder, Oct. 18, 2005. As stated by the California Court of Appeal in *Mercuro v. Superior Court*, 116 Cal. Rptr. 2d 671 (Ct. App. 2002), the fact that a company "repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual [consumer]. These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like and the arbitrators' cultivation of further business by taking a 'split the difference' approach to damages." *Id.* at 678-79.

33,948 reported cases were labeled "collection cases," and 53% of those cases involved MBNA credit card accounts. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, *supra*, at 14.

Recently, two major lawsuits have been filed that attest to NAF's pervasive bias against consumers. In the first suit, the City of San Francisco, on behalf of the People of California, charged NAF with being "in the business of operating an arbitration mill, churning out arbitration awards in favor of debt collectors and against California consumers." Compl. ¶ 1, *People v. Nat'l Arbitration Forum*, No. C6C-08-473569 (Cal. Super. Ct. filed Aug. 22, 2008). City Attorney Dennis Herrera said in a statement that "[t]he lengths to which the [defendants] have gone to ensure that California consumers lose in arbitrations against debt collectors is shocking." Sam Zuckerman, *Suit Accuses Credit Card Service Firm*, S.F. Chron., Apr. 8, 2008, at D1.

The second lawsuit, *Ross v. Bank of America, N.A.*, alleged that a large number of banks—including Bank of America, Capital One, Chase Bank, Citibank, Discover Bank, HSBC Finance Corporation, and MBNA America Bank—"illegally colluded to force cardholders to accept mandatory arbitration clauses in their cardholder agreements." 524 F.3d 217, 220 (2d Cir. 2008). The complaint also challenged NAF's neutrality; it

noted that NAF is used by "nearly every defendant" and that NAF "markets its services to companies in several industries as a way to lower potential costs from disputes with consumers." Oehlsen, *Mandatory Arbitration on Trial*, Credit Card Mgmt., *supra*, Jan. 1, 2006, at 38. The trial court had dismissed the plaintiffs' claims for lack of standing, but the Court of Appeals for the Second Circuit reversed, holding that the injury inflicted upon the market "from the banks' alleged collusion to impose a mandatory term in cardholder agreements," including the "reduction in choice and diminished quality of credit services," was sufficient to constitute an injury in fact. *Ross*, 524 F.3d at 223-24.

CONCLUSION

As a business, NAF depends on the creditors that choose it in their consumer contracts. Numerous articles, studies, and court decisions show that, to obtain and maintain its corporate clients, NAF routinely enters arbitration awards in favor of creditors and debt collectors and against consumers, even when those consumers never owed the debt or never agreed to arbitration. In light of this unique and troubling relationship, this Court must not permit debt collectors such as NCA to further benefit from

this skewed system by leveraging arbitrations before NAF to immunize themselves from liability for violations of the Rosenthal Act.

Respectfully submitted this the ___ day of February, 2009,

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CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.204(c)(1))

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CERTIFICATE OF SERVICE

I, Paula Athey, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to the within action. My business address is 1825 K Street NW, Suite 200, Washington, DC, 20006.

On February 5, 2009, I served the following document(s) on the parties in the within action:

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENT ANASTASIYA KOMAROVA

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF RESPONDENT ANASTASIYA KOMAROVA

XXX BY OVERNIGHT SERVICE: The above-described document(s) will be delivered by overnight mail, to the following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement. This certificate was executed at Washington, D.C., on February 5, 2009.

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