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Joan Claybrook, President

ERNST & YOUNG STUDY ON CONSUMER ARBITRATION IS MEANINGLESS

A 2004 study by Ernst & Young¹ claiming that binding mandatory arbitration is fair for consumers is, upon close examination, meaningless. The study is being peddled by industry lobbyists to derail B-17-50, the Arbitration Amendments Act of 2007.

Study Provides no Basis to Vote Against the Arbitration Amendments Act

The Ernst & Young study is deeply flawed. It examines only a ridiculously small number of arbitrations *brought* by consumers – just 226 – ignoring the tens of thousands of arbitrations *against* consumers that occur each year and ignoring public data that show consumers fare poorly. The American Bankers Association paid for that sham study - a group that has an indisputable financial stake in the continued ability to force consumers into mandatory binding arbitration to get access to credit or loans.

Even if the Ernst & Young study were accurate, the bill before the D.C. Council does not restrict the use of mandatory binding arbitration for most consumer contracts.

Study Uses an Insignificant and Unrepresentative Sample

The Ernst & Young Study examined a mere 226 lending cases initiated by consumers and arbitrated by the National Arbitration Forum (NAF).² The study ignored the thousands of cases initiated by lenders against consumers and failed to examine any cases involving the two other national arbitration service providers (the American Arbitration Association and JAMS), which alongside NAF, account for a large proportion of the U.S. market for arbitration services.³

The study also ignored publicly available data showing that NAF conducts thousands of arbitrations against consumers. The managing director of the NAF, Edward C. Anderson, disclosed in a 2002 deposition that NAF handles tens of thousands of arbitration cases each year.⁴ See attachment one. Also, public data examined by Public Citizen confirm that consumers fare poorly in the thousands of arbitrations NAF conducts every year.⁵ See attachment two.

Similarly, NAF data required to be disclosed under California law on the company's Website reveal that NAF conducted 33,965 arbitrations in California alone between January 2003 and March of 2007 and that consumers did not fare well.⁶ In one example, a single NAF arbitrator decided only two credit card cases in favor of consumers out of a

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total of 80 cases.⁷ A similar disclosure requirement is part of proposed D.C. law, B-17-50, and would assist District consumers greatly by ensuring that baseline data about arbitration results are available to District consumers.

Clearly, the study's broad conclusion – consumers fare well in arbitration⁸ – is baseless. The sample studied is too small to be significant. It is also unrepresentative because the study failed to analyze thousands of cases brought by lenders *against* consumers and further ignores data of arbitration results publicly available under California law.⁹

Metrics Used to Determine Consumers Success in Arbitration are Flawed

According to the study, consumers prevailed 79 percent of the time in the 226 cases examined.¹⁰ But in analyzing this set of consumer-initiated cases, it was *assumed* that a consumer “won” if the case was dismissed at the consumer’s request (or by agreement).¹¹ Yet, there may be many reasons why a consumer might end a case, for example, if arbitration were too costly to pursue, as the study found in at least one case.¹² These study results cannot be taken seriously.

The study's other conclusion - consumers prevailed 55 percent of the time in the 226 cases examined - is equally flawed. First, the authors understood that assuming consumer satisfaction based on a dismissal is a biased measure, so they included a second one. This second measure is equally rigged because it only includes cases where there was an arbitration *hearing*.¹³ Most credit card arbitrations are not decided by hearings (which impose an additional cost),¹⁴ but on the documentation submitted. This is confirmed by the fact that hearings were conducted in only 97 cases (out of the 226).¹⁵

Telephone Survey Confirms the Study is Rigged and Baseless

Finally, in an effort to bolster these baseless “conclusions,” reviewers conducted a random telephone survey of the consumers involved in the 226 cases. Only 40 consumers even were contacted, and out of those a mere 29 consumers bothered to respond.¹⁶ Thus, while 69 percent of the 29 consumers may have expressed satisfaction,¹⁷ using such a miniscule number of consumers to draw the sweeping and entirely unwarranted conclusion that *in general* consumers find arbitration beneficial, is baseless. That “conclusion” cannot withstand the least bit of honest scrutiny.

The Ernst & Young study should be disregarded. Please give consumers a fair shake in arbitrations conducted in the District by voting to approve B17-50.

Endnotes

¹ Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004) (“Ernst & Young Study”).

² “Our study reviews and reports on the outcomes in consumer lending arbitration from an analysis of 226 lending-related, consumer- initiated cases filed with the National Arbitration Forum [NAF].” Ernst & Young Study at 6. The study covers the time period from January 2000 through January 2004. *Id.* at 7.

³ *Id.*

⁴ That deposition testimony was given in a California suit. *See May Ebarle v. Household Retail Services, Inc.*, Case No. CGC-02-403708, Superior Court of California and County of San Francisco. *See* attachment one.

⁵ Public Citizen examined a 2000 court filing where data were provided by First USA Bank, a bank with a national presence operating in the District, regarding its arbitration disputes conducted by NAF. *See Michael A. Bownes v. First USA Bank, N.A.*, Court No. 99-2479-PR (Circuit Court of Montgomery County, ALA) (answers to interrogatories); attachment two. During a two year period, First USA Bank initiated more than 50,000 cases against consumers. *Id.* NAF ruled in approximately 20,000 of those cases, in which First USA Bank won 99.6 percent of the cases. This is the inconvenient truth that is uncovered when data cannot be manipulated.

⁶ Of those cases, 18,088 involved a single lender, MBNA. *See also* Letter from Public Citizen to Chairman Phil Mendelson at 2-3 (Apr. 5, 2007). Public Citizen explained the reporting requirements under California law and provided an analysis of reported NAF data.

⁷ Letter from Public Citizen to Chairman Phil Mendelson at 3 (April 5, 2007).

⁸ Ernst & Young Study at 10 (concluding that arbitration process appears to favor consumers).

⁹ Once the California law took effect in January 2003, large arbitration service providers, like the American Arbitration Association and JAMS, were required to publicly post the results of their California arbitrations. NAF initially refused and filed suit, but was defeated and posted its data retroactively.

¹⁰ Ernst & Young Study at 9-10.

¹¹ *Id.* at 9. If there were any doubt as to the outcome, study reviewers used “their judgment in classifying the outcome of the case.” *Id.*

¹² The Ernst & Young study revealed that in one case the consumer ended the arbitration precisely because he “could not afford to continue.” *Id.* at 9, nt. 11.

¹³ *Id.* at 10.

¹⁴ This private arbitration system is a pay-to-play, *a la carte* system. Thus, a hearing would have to be paid for separately (in advance), as would a hearing room.

¹⁵ Ernst & Young Study at 10.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 11.

Attachment One

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

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MAY EBARLE, Case No.: CGC-02-403708

Plaintiff,

vs.

HOUSEHOLD RETAIL SERVICES,
INC., dba "HRSUSA/Best Buy" and
"BNBUSA/Best Buy," and DOES 1
through 10, inclusive,

Defendants.

VIDEOTAPE DEPOSITION of EDWARD C.

ANDERSON, taken on the 27th day of November, 2002,
commencing at approximately 9:58 a.m., at the law
offices of Maslon, Edelman, Borman & Brand, 3300
Wells Fargo Center, 90 South Seventh Street,
Minneapolis, Minnesota 55402-4140, before Diane D.
Wicht, Notary Public, in and for the County of
Anoka, State of Minnesota.

* * *

APS International, Ltd.

(612) 831-7776

1 APPEARANCES:

2

3 CAROL McLEAN BREWER, Attorney at Law,
4 KEMNITZER, ANDERSON, BARRON & OGILVIE, L.L.P.,
5 Pacific States Building, 445 Bush Street, Sixth
6 Floor, San Francisco, California 94108, appeared
7 on behalf of the Plaintiff.

8

9 AARON M. ARMSTRONG, Attorney at Law,
10 HELLER, EHRMAN, WHITE & McAULIFFE, L.L.P., 333
11 Bush Street, San Francisco, California 94104-2878,
12 appeared on behalf of the Defendants.

13

14 MICHAEL C. McCARTHY, Attorney at Law,
15 MASLON, EDELMAN, BORMAN & BRAND, 3300 Wells Fargo
16 Center, 90 South Seventh Street, Minneapolis,
17 Minnesota 55402-4140, appeared on behalf of the
18 Deponent and the National Arbitration Forum.

19

20 ALSO PRESENT: PETER SIMON, Videographer
21 Marketing By Video
(952) 944-3323

22

* * *

23

24

25

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1 the other in cases that are filed. We've
2 disclosed to you the number of cases that have
3 been filed for or against Household and -- and
4 it's not a number that would rise to even one
5 one-hundredth of 1 percent of the caseload
6 over the period of time that you're talking
7 about, so -- .

8 Q We'll -- we'll talk about what cases the NAF
9 has handled for Household a little later, but
10 I'm curious as to how many cases the NAF
11 routinely handles in a year.

12 MR. McCARTHY: I'll object to the
13 form of the question to the extent that
14 was a question.

15 THE WITNESS: Tens of thousands.

16 BY MS. BREWER:

17 Q Is there a number that you keep track of?

18 A I don't keep, no. I mean, we can do a look
19 back and see what that -- that number is, but
20 I don't keep track of it on a -- on a
21 year-to-year basis.

22 Q One of the documents that we've asked for
23 today is any documents reflecting the NAF's
24 solicitation of business to Household. And
25 included in this stack of documents are a

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Attachment Two

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

MICHAEL A. BOWNES,

Plaintiff,

v.

FIRST USA BANK, N.A.; VISA U.S.A.,
INC.; et al.,

Defendants.

Civil Action No. 99-2479-PR

ANSWERS AND OBJECTIONS OF FIRST USA BANK, N.A. TO
PLAINTIFF'S SECOND SET OF INTERROGATORIES

COMES NOW the Defendant, First USA Bank, N.A. ("Bank") and for answer and objection to the Plaintiff's Second Set of Interrogatories, states as follows:

GENERAL OBJECTIONS APPLICABLE TO ALL INTERROGATORIES

1. The Bank objects generally to the interrogatories in their entirety on the grounds that the Plaintiff is required to arbitrate his claims against the Bank and discovery is unnecessary with respect to the arbitration issues. However, because the trial court has expressly authorized discovery on the arbitration issues, the Bank shall furnish its answers without waiver of its objection to discovery and without waiver of its motion to compel the Plaintiff to pursue his claims against the Bank in arbitration.

2. The Bank objects to responding to certain of the discovery requests that seek information related to the merits of this case. Discovery on the merits is improper because (1) this case must be arbitrated and (2) even if this litigation is allowed to go forward in

- (b) In whose favor the claim was resolved and the amount;
- (c) The name and address of the arbitrator; and
- (d) The name and address of the arbitration association.

Answer/Objection: All arbitrations have been conducted by the National Arbitration Forum ("NAF"). The Bank objects to furnishing the additional information requested on the grounds that it is irrelevant and immaterial to the arbitration issues pending before the Court and the furnishing of this information will not lead to the discovery of admissible evidence. The Bank further objects to providing the information requested because the rules of the NAF, which is the entity to conduct arbitrations between the Bank and cardmembers, specifically provide that the arbitration proceedings are confidential unless the parties agree otherwise. Without waiver of this objection, please see Exhibit 1 which depicts on a summary basis the number of arbitrations to which the Bank was a party and the outcome.

13. State the number of disputes in which you have invoked arbitration.



Answer/Objection: Approximately 51,000.

14. Fully describe each and every document or thing which this Defendant will rely upon or seek to introduce in defense of Plaintiff's claims with regard to the arbitration clause.

Answer/Objection: The attorneys for the Bank will decide which documents the Bank will rely upon or seek to introduce in defense of the Plaintiff's claims with regard to the arbitration provision.

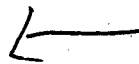
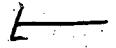
15. State with particularity each and every document which discloses to

Arbitrations Filed By First USA Bank

<u>Status</u>	<u>Total</u>
Desk Hearing Award-No Response	17293
Desk Hearing Pending Filed by Cardmember	1
Dismissed Per Agreement Settlement	4823
Dismissed-Arbitrator Paid by First USA	59
Dismissed-No Service In 90 Days	23425
Dismissed-Per Request of First USA	25
Dismissed-Without Prejudice	3
Doc Hearing Pending-Arbitrator Appointed	5
Document Hearing Pending	7
Document Hearing-Need Information	1
Document Hearing-Pending Mailing	21
Document Hearing Award	2542
Exception-Extension Granted	1
Exception-Pending Information	1
Participatory Hearing Award	8
Pending Response	391
Pending Service	2905
Stay-Bankruptcy	<u>111</u>
Total Claims	51622

Outcome of Arbitrations

Cardmember prevailed	87
First USA Prevailed	19618
Pending Claims	3066
Expired Claims	<u>28248</u>
Total	51622



Arbitrations Filed Against First USA Bank

<u>Status</u>	<u>Total</u>
Settled	1
Pending	1
Award Against First USA	<u>2</u>
Total	4