Comments to the Federal Trade Commission
Regarding Debt Collection Workshop (P074805)

Collecting Consumer Debts:
The Challenges of Change

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Introduction

The National Arbitration Forum (NAF) is one of the world's largest providers of alternative dispute resolution services. For over 20 years we have offered arbitration, mediation and other alternatives to lawsuits that save disputing parties time and money. The National Arbitration Forum maintains a distinguished panel of over 1,600 former judges and seasoned attorneys who apply the substantive law when rendering legal decisions. NAF arbitrators and mediators are located throughout the United States and around the world in 35 countries. Headquartered in Minneapolis, Minnesota, we also have offices in New Jersey and Southern California.

We applaud the FTC for taking the initiative to seek comment upon recent trends in the debt collection area and upon the adequacy of the FDCPA in addressing issues that arise out of collection practices as they actually occur in the industry at the present time. We are specifically seeking out this opportunity to comment for this Workshop because certain other commentators have submitted materials containing inaccurate and misleading statements about consumer debt collection cases that are brought to arbitrations administered by the NAF.

Instead of specifically addressing each vague allegation or innuendo point-by-point, our submission seeks to address each of the major arbitration-related topics raised in previous comments[1] by presenting specific factual information based upon arbitration rules and

[1] In particular, we address the major points raised on pages 22-24 of the comments jointly submitted by the National Consumer Law Center and the National Association of Consumer Advocates (available at http://www.ftc.gov/os/comments/debtcollectionworkshop/529233-00018.pdf).

procedures, court opinions related to arbitration agreements and arbitration awards, and empirical research related to arbitration. By supplanting vague accusations with fact, our goal is to provide FTC staff and Workshop participants with an accurate picture of the role arbitration can play in fairly and efficiently resolving disputes related to consumer debt.

NAF Arbitration is Independent and Impartial

The NAF's core mission is to provide fair and unbiased dispute resolution services in an efficient manner. Every component of NAF's arbitration system—from the industry-leading *Code of Procedure* to the use of experienced attorneys and retired judges as arbitrators—is designed to ensure that arbitration decisions are impartial and that all parties are treated fairly. Irresponsible and unsupported claims that the NAF is biased in favor of lenders, or in favor of any other type of party, have no basis in fact and have been consistently and resoundingly rejected in state and federal court opinions that have examined such allegations:

- "NAF...is without question an inexpensive, efficient and convenient forum for resolving commercial disputes." *Provencher v. Dell, Inc.*, 409 F.Supp.2d 1196, 1198 (C.D. Cal. 2006).

- "[The NAF] boasts an impressive assembly of qualified arbitrators. In addition to being required to apply applicable law in an arbitration hearing, each member of the arbitration panel must take an oath to follow the NAF *Code of Procedure*, the Code of Conduct, and the prevailing ethical and professional standards…The Court is satisfied that NAF will provide a reasonable, fair, and impartial forum within which Plaintiffs may seek redress for their grievances." *Marsh v. First USA Bank*, 103 F.Supp.2d 909, 925 (N.D. Tex. 2000).

- "Plaintiffs' allegations of bias have been addressed in a number of reported decisions in which similar suggestions that the NAF or the arbitrators it provides are biased have been summarily dismissed." *Miller v. Equifirst Corp. of WV*, No. 2:00-0335, 2006 WL 2571634 (S.D.W. Va. Sep. 5, 2006).

- "Plaintiff has the same right [under the NAF *Code of Procedure*] to recover her attorney's fees as she would in this Court and the expenses associated with arbitration appear to be comparable to or less than litigating the case before this Court." *Dewberry v. Countrywide Home Loans*, No. 01-0088-CV-W-SOW-ECF, at 3 (W.D. Mo. Mar.8, 2001).

- "[N]umerous courts have found the NAF to be an adequate and fair arbitral forum and have upheld arbitration provisions requiring arbitration in the NAF…" *Hale v. First USA Bank*, No. 00CIV5406JGK, 2001 WL 687371, at *4 (S.D.N.Y. June 19, 2001).

- "Plaintiff offers no persuasive evidence that the National Arbitration Forum is anything but neutral and efficient." *Lloyd v. MBNA Bank, N.A.*, No. Civ.A. 00-109-SLR, 2001 WL 194300, at *3 (D. Del. Feb. 22, 2001).

- "[T]o safeguard fairness, [the NAF *Code of Procedure*] provides that each of the parties may exercise one peremptory strike of a proposed arbitrator and each has unlimited challenges for cause. All legal remedies and injunctive relief are available to the parties. Any party may request a written opinion of the arbitrator's ruling (citations omitted)." *Bank One v. Coates*, 125 F.Supp.2d 819, 836 (S.D. Miss. 2001) (quoting *Marsh*, 103 F.Supp.2d at 925).

The most important feature of NAF arbitration – and one that ensures impartiality – is the section of the NAF *Code of Procedure* providing that Arbitrators "shall follow the applicable substantive law" in deciding a claim.[2] Mandating that cases be decided based upon the applicable rules of law is the best guarantor of fairness for all arbitrating parties. Justice, as defined by former Supreme Court Justice Oliver Wendell Holmes, is "known rules, applied consistently." NAF arbitration does not require parties to settle for anything less.

Independence and impartiality also depend upon the qualifications and experience of the decision-maker. The vast majority of NAF arbitrators are retired judges or attorneys with at least fifteen years of legal experience. Any accusation that NAF arbitration is anything less than neutral and unbiased is an affront to the professional reputations of these legal professionals.

Canon One of the NAF *Arbitrator Code of Conduct* further ensures neutrality by providing that "an arbitrator should uphold the integrity and fairness of the dispute resolution process" and "treat all parties equally and conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamor, by fear of criticism or by self-interest." Similarly, the NAF *Code of Procedure* requires that "[a]rbitrators … shall take an oath prescribed by the Director and shall be neutral and independent."[3]

Outcomes in Arbitration Mirror Outcomes in Court

The NAF aspires to provide disputing parties with the same substantive outcome in arbitration that they would have received had they taken their dispute to court. Contrary to unfounded assertions that arbitrators "nearly always rule for lenders," the available empirical evidence demonstrates that arbitration outcomes substantially mirror court outcomes for similar types of cases, while arbitration cases are resolved in a significantly shorter amount of time than court cases.

[2] Rule 20D (*available at* http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3).
[3] Rule 20B.

For example, a study published in the *Dispute Resolution Journal* compared 125 employment discrimination lawsuits filed in the Southern District of New York with 186 arbitration claims involving employment disputes in the securities industry.[4] The data showed that employee claimants prevailed 46% of the time in arbitration compared to 34% in federal court. The median monetary award amount was slightly higher in arbitration, and the median time from filing to judgment was 16.5 months in arbitration compared to 25 months in litigation.

Also, a 1998 comparison of arbitration and litigation published in the *Columbia Human Rights Law Review* noted that employees prevailed over employers in 63% of employment arbitration cases filed with the American Arbitration Association between 1993 and 1995.[5] By comparison, employees prevailed in only 14.95% of the cases brought to federal district court in 1994. The average duration of an arbitrated claim was 8.6 months, compared with 2.5 years in litigation.

Analysis of outcomes in NAF arbitration – using data disclosures required by California law – illustrates that NAF arbitration produces outcomes that are substantially similar to court outcomes for comparable case types. The California data shows that when consumers bring arbitration claims against businesses, the consumers prevail in 65.5% of cases that reach a decision. By comparison, buyer plaintiffs litigating contract claims in the 75 largest American counties prevailed 61.5% of the time overall, and 60.9% of the time in cases decided by bench trials.[6]

When businesses bring arbitration claims against California consumers, the businesses prevail in 77.7% of cases that reach a decision. By comparison, seller plaintiffs litigating contract cases in the largest 75 counties prevail 76.8% of the time overall and 78.9% of the time in cases decided by bench trial.[7]

This NAF arbitration data shows that the win rates for consumers and businesses bringing claims in arbitration is within a few percentage points of the win rates of individuals and businesses bringing contract claims in court. These percentages confirm previous research indicating that parties obtain the same substantive result in arbitration as they do in court. Most importantly, these results flatly contradict the speculative and unfounded assertion that business parties achieve better results in arbitration than they do in court litigation.

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[4] Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISPUTE RESOLUTION JOURNAL 56, 57-58 (2004).
[5] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45-48 (1998).
[6] Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 14 METROPOLITAN CORPORATE COUNSEL 32 (2006) (comparing consumer arbitration data available on the National Arbitration Forum's website (www.adrforum.com) with contract trials data published by the Bureau of Justice Statistics).
[7] *Id.*

Efficient Procedures, Low Costs and Access to Justice

The National Arbitration Forum prides itself on the competence of its experienced Case Coordinators, who function roughly analogously to court clerks, and on the efficient way in which the NAF administers arbitration cases. These efficiencies enable NAF to offer parties the lowest arbitration fees of any major arbitration administrator. For example, consumer claimants can file a claim seeking $2,500 in damages by paying a $25 filing fee. Consumer respondents pay no fee at all to defend claims that go to a document hearing. In addition, the availability of document hearings means that consumers who elect that option need not miss work or incur travel expenses in order to assert or defend against claims.

The availability of document hearings means much more to consumers than efficiency and convenience. Document hearings can serve to level the playing field between business and consumer parties by eliminating situations where consumers are questioned in person by opposing attorneys. In this way, document hearings can provide consumers with a lower pressure environment within which they can more effectively advocate for their interests against a business party represented by counsel.

A recent and compelling series of articles in the Boston Globe titled *Debtors' Hell* documents the experiences of consumer borrowers who are sued in Massachusetts small claims and district courts. These borrowers are routinely rushed through the system without an understanding of what is happening, and are often actively intimidated by lenders' attorneys, court staff, and even judges. Some are even threatened with jail time:

> *More commonly, the threat of jail is a scare tactic, another way to force quick results in this rubber-stamp system, where the supreme priority in many courts is to move the flood of collection cases along - with little regard for the merits, or the dignity of individual defendants.*[8]

Even compared to court systems that are not so overtly hostile to consumer borrowers, NAF's optional document hearing procedures give consumers a chance to assert their claims and defenses without the requirement of meeting the lender's attorney in person on a playing field where the attorney may have a home court advantage.

Numerous courts have lauded the increased access to justice for consumers that is made possible by FORUM arbitration's efficient procedures and low fees:

- "[O]ther national arbitration organizations [e.g., the National Arbitration Forum] have developed similar models for fair cost and fee allocation." *Green Tree Financial v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsberg, J., concurring) (specifically citing the NAF fee schedule in the accompanying footnote).

[8] Beth Healy, *Dignity Faces a Steamroller*, Boston Globe, July 31, 2006, http://www.boston.com/news/special/spotlight_debt/part2/page1.html.

- "[NAF] provisions respecting payment of fees and costs foreclose not only the plaintiffs' contention that the agreement does not provide them an adequate arbitral forum as an alternative to a judicial forum; the fees provisions do not foreclose plaintiffs' access to an arbitral forum that compares favorably to a judicial forum." *Smith v. EquiFirst Corporation*, 117 F.Supp.2d 557, 564(S.D. Miss. 2000).

- "Further, plaintiff has attached the NAF fee schedule which caps expenses and provides reduced fees to consumer claimants . . . . Plaintiff's Exhibit B specifically states that the consumer claimant will pay a filing fee ($60 for a claim between $15,001 and $30,000) and $250 for the participatory hearing. This is certainly not prohibitive. . . . Therefore, we will uphold the arbitration provision." *Walton v. Experian*, 2003 WL 22110788, at *3 (N.D. Ill. Sept. 9, 2003).

- "The NAF fee schedule states that consumer claimants must pay a filing fee of $60 and another $250 for the participatory hearing [for an amount in controversy of $30,000]. Reyes has not submitted any evidence that he cannot afford $310 or that such an amount is prohibitive. Courts have declined to enforce arbitration provisions due to the cost, but each of these cases involved expenses significantly greater than those presented here." *Reyes v. Equifax*, 2003 WL 22922190, at *5 (N.D. Ill. Dec. 10, 2003) (internal citations omitted).

Arbitration's low costs benefit consumers in at least three distinct ways. First, lower fees mean that consumers are able to resolve disputes less expensively and afford to vindicate even smaller value claims which for which attorneys would be very unlikely to accept representation. Second, the competitive landscape of the consumer lending industry means that lenders' dispute resolution cost savings will be passed on to consumer borrowers. Any lender who did not pass on the savings would lose ground to their competitors. Finally, when cases that would otherwise be litigated in court are arbitrated instead, consumers benefit in their role as taxpayers. As an example, according to 2006 New Jersey budget figures, the average cost to the state of resolving a civil case in court is $3,112.36. Arbitration frees crowded court dockets and reduces the burden on taxpayers.

The access to justice implications are real. The NAF regularly surveys consumer parties who have participated in NAF arbitrations. Over 80% of respondents find NAF arbitration favorable in terms of cost savings, speed, staff efficiency and courtesy and procedural fairness. Consumers consistently comment on the procedural fairness and simplicity of NAF arbitration, as well as the reasonable costs. The following is a small sample of recent consumer comments that the NAF has been authorized to share:

- "An excellent method for an individual to be able to compete against a large corporation at a reasonable cost." -- Ruth Terrill

- "It is clear. There are rules and are easy to understand by ordinary people. It is affordable for the average population. It is available for everyone who feels his rights are being damaged. Thank you for your fairness." -- Rosario Ramirez

- "My overall experience in dealing with [NAF] was great. It gave me new hope that the little people (consumers) can win." -- Stacie Chavez

- "Process allowed me to argue my claim in my own words. While applicable law was still critical, process was less formal than court proceedings which allowed for more common sense communication rather [than] legalese mumbo jumbo." -- Alan E. Pavlik

- "This is a fair procedure unencumbered by fine legal points. The participants can state their case in a plain, concise manner." -- John and Joyce Berkowitz

- "The arbitrator treated us with respect and allowed us to ask questions and also tell our side." -- Peter and Alana Luyk

NAF Procedural Fairness

Contrary to inaccurate assertions made in other Workshop comments, NAF arbitrators do not receive "pre-printed orders" from case coordinators. Actually, NAF arbitrators draft their arbitration awards on structured forms that are roughly analogous to verdict forms. These forms in no way prejudge the decision to be made by the arbitrator. In fact, these forms serve to encourage independent judgment much more than do proposed orders prepared by the moving party in a default case in court.

In NAF arbitration there are no default awards because even uncontested cases are decided upon the merits. The NAF *Code of Procedure* permits arbitrators to "grant any legal, equitable or other remedy or relief provided by law."[9] Any insinuation that NAF arbitrators do not render independent decisions is insulting to the legal professionals who serve as arbitrators and simply belies the facts.

As a matter of simple fairness, the NAF *Code of Procedure* permits any arbitrating party to remove an arbitrator candidate without needing to provide a reason. Such removal is analogous to removing a candidate juror in a jury trial. A similar procedure is used by all of the other major arbitration administrators and by at least twelve state court systems for removal of a judge. The NAF has been lauded by courts for providing parties with this option to strike an undesired arbitrator: "[T]o safeguard fairness, [the NAF *Code of Procedure*] provides that each of the parties may exercise one peremptory strike of a proposed arbitrator and each has unlimited challenges for cause." *Bank One*, 125 F.Supp.2d at 836 (quoting *Marsh*, 103 F.Supp.2d at 925).

[9] Rule 20D (*available at* http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID =162&news=3).

One commenter has inaccurately stated that business parties regularly use this removal right in order to "blackball" arbitrators who have issued previous undesired awards. In fact, the right to remove an arbitrator without cause is exercised only in a minute percentage of arbitration cases at the NAF. There is no way that such exceedingly rare use of the removal right could ever result in the functional "blackballing" of any arbitrator. And even if a particular arbitrator was regularly removed, the arbitrator that was ultimately selected would be similarly qualified and also required by the *Code of Procedure* to decide cases based upon the applicable law. Blackballing of arbitrators is simply a myth.

Conclusions

The NAF again applauds the FTC for endeavoring to examine recent trends in consumer debt collection and for considering the need to made amendments to the FDCPA. We also thank the FTC for the opportunity to rebut unsupported assertions with factual information about how contractual arbitration is actually conducted. Far from being aligned with lenders and other business parties, the NAF and its affiliated arbitrators provide neutral and unbiased dispute resolution services. The *NAF Code of Procedure* requires fairness and neutrality, and the experienced jurists who serve as arbitrators ensure that justice is served for all parties.

Arbitration is simply a choice of forum, and the NAF strives to provide parties with the same substantive outcome that they would have received in court. Despite baseless accusations that NAF arbitrators tend to decide cases in favor of lenders, evidence shows that NAF arbitration outcomes closely track court outcomes for similar types of cases. All the available empirical evidence demonstrates that arbitration does not favor business parties or any other particular type of party.

The NAF's efficient procedures and low costs increase access to justice for all parties, and especially consumers. With consumer filing fees as low as $25 and easy-to-understand procedural rules, consumers are able to vindicate small claims in arbitration much more effectively than in court. Finally, the fairness of NAF's procedural rules has been consistently and repeatedly lauded by state and federal courts throughout the United States.

The critics of contractual arbitration weave tales of woe that are completely unsupported by facts. What the facts do show is that arbitration provides all parties with a fair, accessible and efficient forum for the resolution of their disputes. Debt collection disputes are simply one type of matter that can be efficiently resolved through arbitration. Far from being a cause for concern, any increase in the use of arbitration for debt collection disputes should be encouraged rather than condemned.