IN THE SUPREME COURT OF OHIO

CITIFINANCIAL, INC.,	:	
	:	Case No.
Defendant-Appellant,	:	
	:	On Appeal From Cuyahoga County
v.	:	Court of Appeals, Eighth Appellate
	:	District
KAREN RIMMER,	:	
	:	Eighth District Case No. CA-07-089407
Plaintiff-Appellee.	:	

MEMORANDUM OF *AMICUS CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF JURISDICTION OF APPELLANT, CITIFINANCIAL, INC.

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THIS CASE IS OF GREAT IMPORTANCE TO AMICUS MEMBERS

The American Financial Services Association ("AFSA") was organized in 1916. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA frequently appears in litigation as *amicus curiae* where the issues raised are of widespread importance to the nation's business community and its customers.[1] AFSA submits this memorandum as *amicus curiae* in support of the request of CitiFinancial, Inc. ("defendant" or "CitiFinancial") to accept jurisdiction of the Eighth District's decision in Rimmer v. CitiFinancial, Inc. (8th Dist. March 27, 2008), App. No. CA-07-089407.

This opinion raises issues of exceptional importance to AFSA members, constituent organizations and affiliates (collectively, "*Amicus* Members"), which include banks, consumer financial services companies, credit card issuers, mortgage companies and other businesses located in Ohio and throughout the nation. Most *Amicus* Members include arbitration agreements in their business contracts because arbitration is a prompt, fair, inexpensive and effective method of resolving disputes, and it minimizes the disruption and loss of good will that often results from litigation. Based on the consistent endorsement of arbitration over the past several decades by the U.S. Supreme Court and the federal and state courts in Ohio and throughout the country, *Amicus* Members have structured millions of contractual relationships around consumer arbitration agreements.

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[1] See, e.g., Discover Bank v. Szetela (2003), 537 U.S. 1226; Salley v. Option One Mtg. Corp. (2007), 592 Pa. 323, 925 A.2d 115.

If review is not granted, the Eighth District's decision will have a serious adverse impact on the arbitration agreements used by *Amicus* Members. The arbitration agreements used by *Amicus* Members are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 et seq., which was enacted in 1925. Pursuant to Section 2 of the FAA, 9 U.S.C. §2, the statute's core provision, "[a] written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable ...." The principles of federal arbitration law embodied in the FAA are binding on state courts as well as federal courts because the FAA preempts inconsistent state law.

Nevertheless, the Eighth District threatens to permit a single plaintiff to pursue a class action on behalf of those who have waived the ability to participate in a class by agreeing to arbitrate their disputes on an individual basis. *Amicus* Members understand that 95% of the putative class members are parties to such arbitration agreements. The Eighth District flouted the arbitration agreements to which the vast majority of the putative class members are parties and elevated Ohio Civ. R. 23 over the substantive (and preemptive) federal arbitration law that governs those agreements. See Eighth Dist. Op., p. 10: "Although there may be some defenses and issues presented with regard to those members [who have agreed to individual arbitration]. they are 'subordinate ....'" The Eighth District had it backwards -- Rule 23, being a procedural rule, must yield to the policies underlying the FAA.

Indeed, it is firmly established that class action procedures are subordinate to the principles and policies underlying federal arbitration law. See, e.g., Lloyd v. MBNA America Bank, N.A. (3d Cir. Jan. 7, 2002), 27 Fed. Appx. 82, 2002 U.S. App. LEXIS 1027 (unpublished), affirming (D. Del. Feb. 22, 2001) 2001 U.S. Dist. LEXIS 8279 (holding in consumer dispute

brought against credit card issuer under the common law and federal statutes that the right to a class action is "merely procedural" and may be waived); Sanders v. Robinson Humphrey/American Express, Inc. (N.D. Ga. 1986), 634 F. Supp. 1048, 1065 (class action rule a mere "procedural device"), aff'd in part and rev'd in part on different grounds, (11th Cir. 1987) 827 F.2d 718, cert. denied, (1988) 485 U.S. 959; Dienese v. McKenzie Check Advance of Wis., LLC (E.D. Wis. Dec. 11, 2000), No. 99-C-50, 2000 U.S. Dist. LEXIS 20389, at *24 (enforcing arbitration clause barring class actions since "consumers are not signing away a substantive right"); Caudle v. American Arb. Ass'n (7th Cir. 2000), 230 F.3d 920, 921 ("[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation"); Zawikowski v. Beneficial National Bank (N.D. Ill. Jan. 11, 1999), No. 98 C 2178, 1999 WL 35304, at *2 ("[n]othing prevents the Plaintiffs from contracting away their right to a class action").

The U.S. Supreme Court itself has emphasized that class action procedures must give way to the policies underlying the FAA. The Court has instructed that contrary to class action procedures, which seek to resolve issues on a class-wide basis, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp. (1983), 460 U.S. 1, 20 (emphasis by the Court). See also Dean Witter Reynolds Inc. v. Byrd (1985), 470 U.S. 213, 221 ("[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation").

Thus, numerous courts have excluded individuals who have agreed to arbitrate from membership in a certified class, rather than simply ignoring the fact that those individuals agreed

to arbitrate as the Eighth District did in this case. See, e.g., Kirkpatrick v. J.C. Bradford & Co. (11th Cir. 1987), 827 F.2d 718, 725 n.5 ("[t]hose purchasers whose ... claims are subject to arbitration thus could not be considered members of the class"); Collins v. International Dairy Queen, Inc. (M.D. Ga. 1997), 169 F.R.D. 690, 692 ("[those] who are bound by mandatory arbitration clauses are not entitled to litigate relevant claims against the defendants in court and should not receive notification of this class action"); Bresson v. Thomson McKinnon Securities, Inc. (S.D.N.Y. 1988), 118 F.R.D. 339, 342 (recognizing that parties who agreed to arbitrate would not be included in class); Dienese, supra, 2000 U.S. Dist. LEXIS 20389, at *24-25 ("[i]n the absence of any showing that the Arbitration Agreement is unenforceable or that plaintiffs' claims are not amenable to arbitration, this court will not permit those who have signed the Agreement to participate in the class").

Review by this Court is urgently needed because this case strays far from the judicial mainstream and casts a dark cloud over the millions of arbitration agreements utilized by *Amicus* Members in Ohio and throughout the nation. *Amicus* Members will no longer be confident that their arbitration agreements will be enforced by courts pursuant to the standards mandated by federal arbitration law and decades of interpretive judicial decisions. The decision in question interjects chaos and uncertainty into arbitration issues that have long been settled. It also creates loopholes in the law of arbitration through which individuals who are parties to valid and binding arbitration agreements with class action waivers may avoid their agreements altogether through judicial fiat that the agreements may simply be ignored where class certification is concerned.

Arbitration programs substantially lower litigation costs and the cost savings are passed through to consumers, in whole or in part, in the form of lower prices for goods and services. See Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration

Agreements, 2001 J. Disp. Resol. 89, 91-93; Richard A. Posner, Economic Analysis of Law 7 (6th ed. 2003). If millions of arbitration agreements are ignored in favor of class certification procedures, ultimately it is the consumers who will suffer the consequences through higher prices caused by these increased litigation costs.

Accordingly, *Amicus* Members have a compelling interest in the issues at stake in this case and respectfully request this Court to accept jurisdiction. This is the fourth case involving an Eighth District decision in which *Amicus* Members have recently asked this Court to accept review. See Bluford v. Wells Fargo Financial Ohio 1, Inc. (Case No. 2008-0635), Alexander v. Wells Fargo Financial Ohio 1, Inc. (Case No. 2008-0905) and Coleman v. American General Financial Services (Case No. 2008-1009). In each of those cases the court went to great lengths to avoid the application of arbitration provisions in consumer transactions. In Bluford and Alexander, the Eighth District avoided the parties' arbitration provision by applying a novel and improperly narrow interpretation of standard arbitration language. In Coleman, the Eighth District managed to ignore arbitration language that explicitly stated that it survived the parties' agreement and applied to statutory claims.

Now, in the present case, the Eighth District has gone yet another step further and essentially cleared the way for certification of a class where the overwhelming majority of putative class members have agreed to arbitrate their claims on an individual basis rather than participate in a class action. In doing so, the Eighth District has elevated a procedural rule over the statutory right to arbitrate and allowed a single plaintiff, whose agreement does not have an arbitration clause, to set the path for a host of others who do. With the Bluford, Alexander, Coleman and now Rimmer opinions, the right to arbitration has been severely limited in Cuyahoga County. Because, as a practical matter, venue over Ohio class actions so often lies in

Cuyahoga County, the Eighth District Court of Appeals has effectively determined the law in Ohio and severely limited the right to arbitration statewide. *Amicus* Members urge this Court to accept review so that this serious situation can be rectified.

STATEMENT OF THE CASE AND FACTS AND PROPOSITIONS OF LAW

AFSA incorporates herein by reference CitiFinancial's Statement of the Case and Facts and Propositions of Law set forth in its memorandum of law.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: The Eighth District decision seriously undermines bedrock principles of federal arbitration law upon which *Amicus* Members have relied for many years in implementing consumer arbitration programs

Although the Eighth District did not expressly rule on the enforceability of defendant's arbitration agreements, it indirectly did so by ignoring the agreements to which 95% of the putative class members are parties and by permitting plaintiff, who is not even a party to an arbitration agreement, to waive the rights of the supermajority of putative class members who agreed to resolve their disputes through individual arbitration. However, the rights of those who have agreed to arbitrate cannot be tossed aside. On the contrary, there are compelling legal and public policy reasons why their rights should be scrupulously protected and respected.

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.'" EEOC v. Waffle House, Inc. (2002), 534 U.S. 279, 288 (citation omitted). The FAA embodies a liberal federal policy favoring arbitration agreements. Howsam v. Dean Witter Reynolds, Inc. (2002), 537 U.S. 79. See also Stout v. J.D. Byrider (6th Cir. 2000), 228 F.3d 709, 714 ("[t]he FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve

court congestion, and to provide parties with a speedier and less costly alternative to litigation"), cert. denied, (2001) 531 U.S. 1148.

Section 2 of the FAA, quoted above, creates a body of federal substantive law of arbitrability that is binding on state courts as well as federal courts. As the U.S. Supreme Court instructed in Buckeye Check Cashing, Inc. v. Cardegna (2006), 546 U.S. 440, 445:

> [I]n Southland Corp. [v. Keating, 465 U.S. 1(1984)], we held that the FAA "created a body of federal substantive law," which was "applicable in state and federal courts" .... We rejected the view that state law could bar enforcement of §2, even in the context of state-law claims brought in state court.

The U.S. Supreme Court has also emphasized that arbitration benefits consumers and that Congress intended the FAA to apply to consumer transactions:

> We agree that Congress, when enacting this law [the FAA] had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike ..., corporate interests [and] ... individuals"). Indeed, arbitration's advantages often would seem helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation. See, e.g., H.R. Rep. No. 97-542, p. 13 (1982).

Allied-Bruce Terminix Cos. v. Dobson (1995), 513 U.S. 265, 290. Arbitration is highly favored for its "simplicity, informality, and expedition." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985), 473 U.S. 614, 628.

Amicus Members have relied upon these and countless other opinions which hold that the FAA is fully applicable to consumer contracts.[2] By contrast, the Eighth District's opinion at

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[2] See, e.g., Cardegna, supra (enforcing arbitration clause in dispute between borrower and payday lender); Green Tree Fin. Corp.-Ala. v. Randolph (2000), 531 U.S. 79, 91-92 (enforcing arbitration clause between consumer and subprime lender); Stout v. J.D. Byrider, supra (Sixth Circuit enforced arbitration agreement between consumer and used car dealership); Jenkins v. First Am. Cash Advance of Ga., Inc. (11th Cir. 2005), 400 F.3d 868, cert. denied, (2006) 126 S. Ct. 1457 (enforcing arbitration agreement in contract between consumer and payday lender); Harris v. Green Tree Fin. Corp. (3d Cir. 1999), 183 F.3d 173 (enforcing arbitration agreement between borrower and subprime lender).

least implicitly reflects a suspicion of consumer arbitration that is not compatible with the FAA. As the Supreme Court admonished in Gilmer v. Interstate/Johnson Lane Corp. (1991), 500 U.S. 20, 30:

> Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration .... Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." (Citation omitted).

Numerous empirical studies confirm that arbitration benefits consumers. To cite only a few:

- Earlier this year, on April 2, 2008, the U.S. Chamber of Commerce announced the results of a poll of 800 persons showing that 82% of likely voters prefer arbitration to litigation as a means to resolve a serious dispute with a company.

- A synopsis of independent studies and surveys concerning the benefits of pre-dispute consumer arbitration was published by the National Arbitration Forum ("NAF") in 2004. See "Effective and Affordable Access to Justice by Consumers -- Empirical Studies & Survey Results." The results showed that: (a) 78% of trial attorneys find arbitration faster than lawsuits; (b) 86% of trial attorneys find arbitration costs are equal to or less expensive than lawsuits; (c) 78% of business attorneys find that arbitration provides faster recovery than lawsuits; (d) 83% of business attorneys find arbitration to be equally or more fair than lawsuits; (e) individuals prevail at least slightly more often in arbitration than through lawsuits; (f) monetary relief for individuals is slightly higher in arbitration than in lawsuits; (g) arbitration is approximately 36% faster than a lawsuit; (h) individuals receive a greater percentage of the relief they ask for in arbitration versus lawsuits; (i) 93% of consumers using arbitration find it to be fair; (j) consumers prevail 20% more often in arbitration than in court; (k) in securities actions, consumers prevail in arbitration

16% more than they do in court; and (l) 64% of American consumers would choose arbitration over a lawsuit for monetary damages.

- In December 2004, Ernst & Young issued a study ("Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases") examining the outcomes of contractual arbitration in lending-related, consumer-initiated cases. The study, based on consumer arbitration data from January 2000 to January 2004 from the NAF, observed that: (a) consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer, the exact same win-rate for consumers as exists in state court; (b) consumers obtained favorable results in 79% of the cases that were reviewed (favorable results include results from arbitration decisions, as well as settlements satisfactory to the consumer and cases that were dismissed at the claimant's request); (c) 40% of consumers who brought claims actually got their "day in court" to tell their stories, while only 2.8% of cases in state court ever reach trial; and (d) 69% of consumers surveyed indicated that they were very satisfied with the arbitration process.

- In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the Institute for Legal Reform at the U.S. Chamber of Commerce. The survey was conducted online among 609 adults who participated in a binding arbitration case (voluntarily, due to contract language or with strong urging by the Court, but not a court order) that reached a decision. The major findings were: (a) arbitration is widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court; (b) two-thirds (66%) of participants say they would be likely to use arbitration again with nearly half (48%) saying they are extremely likely; (c) even among those who lost, one-third say they are at least somewhat likely to use arbitration again; (d) most participants are very satisfied with the arbitrator's

performance, the confidentiality of the process and its length; (e) predictably, winners found the process and outcome very fair and the losers found the outcome much less fair, but 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome; (f) while one in five of the participants were required by contract to go to arbitration, the remainder were voluntary – suggested by one of the parties, one of the lawyers, or the court; and (g) two-thirds of the participants were represented by lawyers.

- A 2003 Roper survey concluded that 64% of individuals would choose arbitration over court litigation, 67% believe court litigation takes too long and 32% believe court litigation costs too much.

Thus, there are cogent reasons why 95% of the putative class members agreed to arbitrate their disputes on an individual basis. Arbitration is a "less expensive alternative to litigation," Allied-Bruce Terminix Cos. v. Dobson, supra, 513 U.S. at 280, in part because of its very informality. "[A]rbitration saves time, saves trouble, saves money." Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 7 (1924). As Congress again found in 1982, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing ... dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). By contrast, class actions are not prompt, inexpensive or streamlined. They subject individuals to costly and time-consuming judicial process that individual arbitration was designed to avoid.

Accordingly, the decisions made by 95% of the putative class members to arbitrate their claims on an individual basis should not have been ignored. As discussed above, that is

particularly so given (a) the well-established law that class action procedures must yield to the principles and policies underlying federal arbitration law and (b) the numerous court decisions which have excluded individuals who have agreed to arbitrate from membership in a certified class, rather than simply ignoring the fact that those individuals agreed to arbitrate as the Eighth District did in this case.

CONCLUSION

The Eighth District decision contravenes fundamental principles that lie at the core of the FAA. For that reason, it is particularly unsettling to *Amicus* Members, who rely heavily on consumer arbitration programs for the economic, efficient and expeditious resolution of disputes with their customers. If review is not granted, this decision will threaten to undermine millions of arbitration agreements currently in place in Ohio and across the nation. Respect for the primacy of federal law -- the FAA -- and for the rights of consumers and businesses throughout Ohio, weighs heavily in favor of review. Therefore, *Amicus* Members respectfully urge this Court to accept jurisdiction of the Eighth District's decision.

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