No. **<case_number>**

<PLAINTIFF>, Plaintiff, VS. <DEFENDANT>, Defendant.	§ § § § § § §	<PLEADING_CAPTION_COURT> <PLEADING_CAPTION_COUNTY> <PLEADING_CAPTION_COURT_NO>

DEFENDANT'S TRIAL BRIEF

Defendant <defendant> submits the following trial brief to assist the Court in resolving the legal issues presented in this case:

Summary of Argument

Before the award can be confirmed, the Court must determine 1) there was an agreement to arbitrate between the parties, which in this case also requires proof that the Plaintiff is an assignee of any right of the original creditor to arbitrate, 2) that there was an agreement that an arbitration award could be confirmed by a court, and 3) that the Defendant had actual notice that an arbitration proceeding had been filed against <him_her_it>.

Plaintiff must prove the existence of an agreement to arbitrate in order to obtain confirmation of an award under Federal Arbitration Act.

Arbitration is a creature of contract. An arbitration award is of no effect and cannot be confirmed unless the parties agreed to arbitrate their dispute. As the First Circuit in *MCI Telecommunications Corp. v. Exalon*

Industries, Inc., 138 F.3d 426, (1st Cir. 1998) explained, "if there is no such agreement, the actions of the arbitrator have no legal validity." *Id*, 138 F.3d at 430. While the *MCI* court made this determination in the context of a motion to vacate in which the burden of proof was on the party challenging the arbitration clause, other courts have determined this to be part of the plaintiff's burden when seeking to confirm an arbitration award. *Chase Bank USA, NA. v. Leggio*, 997 So. 2d 887 , 890-891 (La. App. 2nd Cir. 2008), *NCO Portfolio Management, Inc. v. Gougisha*, 985 So.2d 731, 735-736 (La. App. 5th Cir. 2008), *Bank of America, N.A. (USA) v. Dalquist*, 152 P.3d 718, 722 (Mont. 2007).

Whether an arbitration agreement was ever made is to be determined by applying ordinary state-law principles that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *see also Perry v. Thomas*, 482 U.S. 483 (1987). While there is a federal policy in favor of arbitration, there is no federal presumption that the parties agreed to arbitrate. The federal policy in favor of arbitration puts agreements to arbitrate on the same footing as other contracts under state law and is used to determine the scope of those agreements, but cannot be used to find the existence of an agreement independent of the parties' intentions. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293-294 (2002).

Accordingly, an arbitration confirmation plaintiff must prove all of the elements necessary to the formation of a contract. Parties form a binding contract when the following elements are present: (1) an offer, (2) an

acceptance in strict compliance with the terms of the offer, (3) meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Williams v. Unifund CCR Partners Assignee Of Citibank*, 2008 WL 339855 (Tex. App.—Houston [1 Dist.] 2008) (not designated for publication), *Winchek v. American Express Travel Related Services. Co*., 232 S.W.3d 197, 202 (Tex.App.-Houston [1st Dist.] 2007, no pet.).

In this case, proof that the arbitration agreement was actually offered to the Defendant is the key to proving these elements of an enforceable contract. If a particular agreement was never offered, then it follows as a matter of simple logic that there can be no acceptance, no meeting of the minds or any of the other requirements for establishing that the agreement contains the terms of an enforceable contract. *Beverick v. Koch Power, Inc*., 186 S.W.3d 145, 152 (Tex. App.—Houston[1st Dist.] 2005, pet. denied).

Defendant is not barred by the 90 day time limit in section 12 of the Federal Arbitration Act from denying the existence of an agreement to arbitrate.

Section 12 of the Federal Arbitration Act requires that a motion to vacate an award be made within 90 days of the delivery of the award. However, this section does not apply until it has been proven that there was an agreement to arbitrate. The First Circuit Court of Appeals wrote on this issue extensively and concluded:

> A party that contends that it is not bound by an agreement to arbitrate can therefore simply abstain from participation in the proceedings, and raise the inexistence of a written contractual

> agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award, without the limitations contained in section 12, which are only applicable to those bound by a written agreement to arbitrate. *Id*. 138 F.3d at 430.

The Court, not the arbitrator, must decide whether Defendant entered into an arbitration agreement.

The determination of whether a dispute is subject to arbitration can be made by an arbitrator if the parties have clearly intended to submit the issue of arbitrability to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. .938, 942-47 (1995). However, this delegation of authority to the arbitrator extends only to the scope, not the existence of the arbitration agreement. The threshold of question of whether there was an agreement to arbitrate *anything*, which the *MCI* court called "the mother of arbitrability questions", is therefore to be decided by the court, not the arbitrator, because without that threshold agreement, all of the actions of the arbitrator are null and void. *Id*. 138 F.3d at 429.

Plaintiff must prove that it is the recipient of a valid assignment of the arbitration agreement attached to its petition.

The arbitration award attached to Plaintiff's petition is in favor of the Plaintiff and against the Defendant. The arbitration agreement the Plaintiff contends authorized the award appears to be an agreement with <card_issuer>. The Plaintiff is not a party to that agreement. In order for the Plaintiff to be entitled to enforce the arbitration agreement, it would have to be an assignee of that agreement. *See Ceramic Tile International, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.),

Delaney v. Davis, 81 S.W.3d 445, 448-49 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Accordingly, Plaintiff must prove that it is an assignee of the right to enforce <card_issuer>'s arbitration agreement.

Plaintiff must prove that Defendant agreed that the award could be confirmed in order to obtain confirmation of an award under the Federal Arbitration Act.

Section 9 of the Federal Act limits confirmation of an arbitration award to situations in which "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award." This is a separate agreement from the mere agreement to arbitrate, though it can be contained within that agreement. If a plaintiff fails to prove such agreement exists, the Court lacks jurisdiction to confirm the award. *Washington Mutual Bank v. Crest Mortgage Co.*, 418 F.Supp.2d 860, 861 (N.D.T.X. 2006), *See Place St. Charles v. J.A. Jones Construction. Co.*, 823 F.2d 120, 124 (5th Cir. 1987).

Plaintiff must prove that Defendant and Defendant's attorney signed the arbitration agreement in order to obtain confirmation of an award under the Texas General Arbitration Act.

The Texas General Arbitration Act, Chapter 171 of the Texas Civil Practice and Remedies Code, does not apply to all arbitration awards. Section 171.002 of the act excludes almost all credit card cases. The operative language of the statute provides:

(a) This chapter does not apply to:

…

(2) an agreement for the acquisition by one or more individuals of property, services, money, or credit in which the total consideration to be furnished by the individual is not more than $50,000, except as provided by Subsection (b);

…

(b) An agreement described by Subsection (a)(2) is subject to this chapter if:

(1) the parties to the agreement agree in writing to arbitrate; and

(2) the agreement is signed by each party and each party's attorney.

Section 171.002(a)(2) applies to most credit card cases, as the claims typically allege breach of a credit card contract with an individual for consideration less than the $50,000.00 threshold for the statute. In order to bring an agreement subject to § 171.002(a)(2) within the scope of the chapter, a plaintiff must therefore prove that the arbitration agreement was in writing and signed by each party and by each party's attorney. *Stewart Title Guaranty Co. v. Mack*, 945 S.W.2d 330, 332 (Tex. App.—Houston[1 Dist.] 1997, writ dismissed n.o.j.).

The arbitration award cannot be confirmed unless Defendant was given notice of the arbitration proceeding.

The evidence will show that <defendant_salutation> had no notice at all of the existence of the arbitration proceeding. That a person cannot be

deprived of property without notice is a fundamental principle of due process. *Peralta v. Heights Medical Center, Inc*., 485 U.S. 80, 86-87 (1988), *Caldwell v. Barnes*, 154 S.W.3d 93, 97 (Tex. 2004). This rule also applies to arbitration proceedings. *Casualty Indemnity Exchange v. Yother*, 439 So.2d 77, 81 (Ala. 1983). The arbitrator had no authority to act in the absence of notice of the proceeding to <defendant_salutation> and the arbitration award is therefore void. *Id*. 439 So. 2d at 81.

The arbitration award should be vacated because the arbitrator did not give Defendant notice of the arbitration hearing.

The evidence will show that <defendant_salutation> also had no notice of the arbitration hearing. While the parties to an arbitration are not entitled to all of the procedural niceties of a court proceeding, they are entitled to a fundamentally fair hearing. *Generica Ltd. v. Pharmaceutical Basics, Inc*., 125 F.3d 1123, 1129 (7th Cir. 1997), *Sunshine Min. Co. v. United Steelworkers of America, AFL-CIO, CLC*, 823 F.2d 1289, 1294 (9th Cr. 1987). Notice and an opportunity to be heard are the most basic requirements of such a hearing. *Hall v. Eastern Air Lines, Inc.*, 511 F.2d 663 (5th Cir. 1975).

Defendant's motion to vacate is timely because she did not actually receive the award until she was served with this lawsuit.

Section 12 of the Federal Arbitration Act requires that a motion to vacate an award must be made within 3 months after the award was filed or delivered. In this case, <defendant_salutation>'s motion to vacate was filed

on March 20, 2008. The evidence will show that the <defendant_salutation> did not actually receive a copy of the award until <he_she_it> was served with this lawsuit, on March 5, 2008. Although the award recites that it was mailed to <defendant_salutation> on February 1, 2007, the address on the award was not <defendant_salutation>'s address on that date.

If the court determines that <defendant_salutation> did not actually receive the award until sometime within the 3 month period before the filing of the motion to vacate, <his_her_its> motion to vacate is timely. *NCO Portfolio Mgt. v. Williams*, 2006 WL 2939712 (Ohio App. 2nd Dist. 2006). The party moving for confirmation bears the burden of proof that a motion to vacate is not timely. *MBNA America Bank, N.A. v. Barben*, 111 P.3d 663 (Table), 2005 WL 1214244 (Kan. App. 2005).

Conclusion

To be entitled to confirmation, the Plaintiff bears the burden of establishing that the Defendant agreed to arbitrate and that it was a valid assignee of the right to enforce the arbitration agreement.

The Plaintiff must also establish that the agreement provided for confirmation of the award by a court.

Due process requires that the arbitration award can only be confirmed if the Defendant was given actual notice of the arbitration proceeding.

The Defendant's motion for vacate for lack of notice of the arbitration proceeding should be granted because failure to give such notice is a

proper ground for vacation. Defendant's motion is timely because the arbitration award was first delivered less than 3 months before the motion to vacate was filed.

Respectfully Submitted,

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Certificate of Service

On September 8, 2018, I caused the foregoing instrument to be served by delivering a copy to all counsel of record in this case as indicated below:

_____ By Certified U.S. Mail, Return Receipt Requested

_____ By U.S. Mail

_____ By Telecopier Transmission Before 5:00 P.M.

_____ By Telecopier Transmission After 5:00 P.M.

_____ By Hand Delivery

Jessica Lesser