

IN THE SUPREME COURT OF OHIO

LILLIE ALEXANDER, et al.,)
)
 Plaintiffs – Appellees,) Case Nos. 2008-0905 & 2008-1009
)
 v.) On Appeal from the Cuyahoga County
) Court of Appeals, Eighth Appellate District
)
 WELLS FARGO FINANCIAL OHIO 1,)
 INC., et al.,) Court of Appeals Case Nos. CA-07-089277
) & CA-07-089311
)
 Defendants – Appellants.)
)

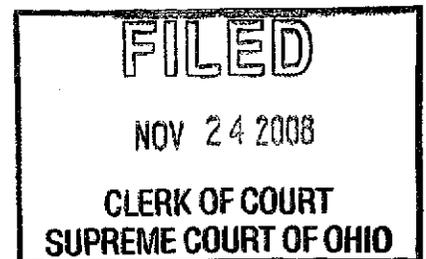
BRIEF OF AMICUS CURIAE CITIFINANCIAL, INC.
IN SUPPORT OF APPELLANTS, URGING REVERSAL

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STATEMENT OF THE INTEREST OF AMICUS CURIAE CITIFINANCIAL, INC.

CitiFinancial, Inc. ("CitiFinancial") is just one of many mortgage lenders and servicers whose ability to conduct business in Ohio will be effected by this Court's decision. Like the majority of mortgage lenders, CitiFinancial has attempted to use alternative dispute resolution to control costs and manage potential litigation contingencies. Lenders like CitiFinancial have long relied on this Court's pronouncement that arbitration is a favored method of handling disputes by negotiating arbitration provisions in their home loan agreements. Should this Court adopt the Eighth District's restrictive interpretation of the arbitration provisions at issue in this case, the decision may undermine the ability of both lenders and borrowers to rely on the alternative dispute provisions negotiated in thousands of agreements.

Moreover, CitiFinancial has a more immediate and direct interest in this Court's ruling. Specifically, CitiFinancial, like many of its peers, currently faces a nearly identical class action lawsuit brought under the same mortgage release statute at issue in this appeal. In fact, CitiFinancial's case is currently on appeal to this Court (Case Number 2008-1144) and has been stayed pending a ruling on this matter. In that case, the Eighth District Court of Appeals reversed the trial court's denial of class certification despite the fact that ninety-five percent of the prospective class members have arbitration provisions in their loan agreements, while the class representative does not.¹ Although the language of the arbitration provisions varies somewhat from lender to lender and from loan agreement to loan agreement, this Court's application of the Wells Fargo and American General arbitration provisions to the statutory claims under Ohio's Mortgage Release Statute will re-establish the predominant role of

¹ Although this Court has previously considered Ohio's Mortgage Release Statute in the class action context, none of these cases contemplated arbitration. See *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599; *Pinchot v. Charter One Bank*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105; *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556 (holding that the court of appeals should defer to the trial court's discretion on whether to grant class certification).

arbitration over the class action procedural mechanism. This Court should reverse the Court of Appeals' decisions in all of the Eighth District Mortgage Release Cases and remand them for further actions consistent with this Court's decision.

STATEMENT OF FACTS

CitiFinancial adopts the Statement of Facts presented by Appellant Wells Fargo Financial Ohio 1, Inc. ("Wells Fargo") and American General Financial Services, Inc. ("American General").²

ARGUMENT

CitiFinancial adopts the propositions of law as stated by Appellants Wells Fargo and American General.

The Eighth District Court of Appeals Has Improperly Refused to Enforce Arbitration Agreements in Clear Violation of the Federal and Ohio Arbitration Acts.

Ohio has long favored arbitration as a means for settling disputes because it avoids needless and expensive litigation and relieves court congestion. *Brennan v. Brennan* (1955), 164 Ohio St. 29, 128 N.E.2d 89, syllabus; *Dayton Classroom Teachers Assn. v. Dayton Bd. of Edn.* (1975), 41 Ohio St.2d 127, 132, 323 N.E.2d 714, *superseded on other grounds*; *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 500, 1998-Ohio-612, 692 N.E.2d 574. Ohio's General Assembly codified this preference for arbitration in Ohio's Arbitration Act (the "OAA"). *ABM Farms, Inc.*, 81 Ohio St.3d at 500. Likewise, federal law recognizes an equally strong policy in favor of arbitration. *Southland Corp. v. Keating* (1984), 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1. Accordingly, Congress enacted the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16,

² American General's appeal, Supreme Court Case Number 2008-1009, has been consolidated with that of Wells Fargo for purposes of this appeal.

which "embodies the national policy favoring arbitration * * * ." *Buckeye Check Cashing, Inc. v. Cardegna* (2006), 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038.

Given this strong policy favoring arbitration, courts are not only encouraged, but required, to "rigorously enforce" arbitration agreements. *Dean Witter Reynolds Inc. v. Byrd* (1985), 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158. Any doubts regarding the applicability of an arbitration clause should be resolved in favor of arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.* (1983), 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765.³ In fact, the mere presence of an arbitration clause in a contract gives rise to a presumption that grievances are arbitrable, except those expressly excluded or for which there is the most forceful evidence of intent to exclude the claim from arbitration. *Internatl. Bhd. of Teamsters, Chauffers, Warehousemen and Helpers of Am., Local Union 20 v. City of Toledo* (6th Dist. 1988), 48 Ohio App.3d 11, 13, 548 N.E.2d 257. This presumption in favor of arbitration applies equally to contractual disputes and claims that arise under statutes. *Stout v. J.D. By-Rider* (C.A. 6 2000), 228 F.3d 709, 715. As a result, courts regularly recognize the right to arbitrate disputes brought under a variety of consumer protection statutes. *Anderson v. Delta Funding Corp.* (N.D.Ohio 2004), 316 F.Supp.2d 554 (compelling arbitration in action brought under the Home Ownership and Equity Protection Act of 1994 and the Truth in Lending Act); *Heiges v. JP Morgan Chase Bank, N.A.* (N.D.Ohio 2007), 521 F.Supp.2d 641 (staying proceedings pending arbitration in action brought under the Fair Credit Billing Act, the Fair Credit Reporting Act, and state common law claims); *Green Tree Financial Corp. v. Randolph* (2000), 531 U.S. 79, 121

³ Federal "arbitration law applies in state as well as federal courts[,]" *Buckeye Check Cashing, Inc.*, 546 U.S. at 446, and "preempts inconsistent state law." *Stout*, 228 F.3d at 716. Therefore, it is appropriate to look to federal law on this issue.

S.Ct. 513, 148 L.Ed.2d 373 (upholding arbitration agreement in consumer loan transaction where plaintiff sought to litigate statutory claims).

The Eighth District, however, has taken the opposite view and effectively reversed the presumption in favor of arbitration. Remarkably, despite the fact that there could be no statutory claims without the underlying loan agreements, the court found the claims were unrelated to the agreements and were therefore not arbitrable. Other courts, however, regularly find that arbitration agreements with language similar to those at issue here encompass claims brought under a variety of statutory provisions. *See e.g. Marshall v. United States Home Corp.*, 9th Dist. No. 20573, 2002-Ohio-821, 2002 Ohio App. LEXIS 791 (compelling arbitration for claim brought under Magnuson-Moss Warranty Act); *Howard v. Wells Fargo* (Sept. 21, 2007), N.D. Ohio Case No. 1:06CV2821, 2007 U.S. Dist LEXIS 70099 (compelling arbitration for claim brought under Ohio's mortgage release statute); *Stehli v. Action Custom Homes, Inc.* (Sept. 24, 1999), 11th Dist. No. 98-G-2189, 1999 Ohio App. LEXIS 4464 (compelling arbitration for claim brought under Ohio's Consumer Sales Practices Act).

The Eighth District held that once the consumers pay the loans in full, the arbitration agreements no longer apply and therefore cannot encompass claims that the mortgage had not been timely released. This ruling not only ignores prevailing case law to the contrary but severely undermines the right to arbitrate any type of claim in Ohio. The law is clear that the application of an arbitration clause must be considered separately from the validity of the underlying contract. *ABM Farms, Inc.*, 81 Ohio St.3d at 501; *Buckeye Check Cashing, Inc.*, 546 U.S. at 445. Thus, the fact that an "arbitration clause may reach conduct that occurs after termination of the contract in which the arbitration clause was embedded, [has become] a well established proposition." *Berkery v. Cross Country Bank* (E.D.Pa. April 11, 2003), 256

F.Supp.2d 359, 368, fn. 8. In fact, "the presumption in favor of arbitration is so strong that 'the failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement,' usually 'affords a basis for concluding that [the parties] intended to arbitrate all grievances arising out of the contractual relationship.'" *Bowden v. Delta T Corp.* (Nov. 27, 2006), E.D. Ky. No. 06-345-JBC, 2006 U.S. Dist. LEXIS 85724, at * 17, quoting *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionary Workers Union* (1977), 430 U.S. 243, 255, 97 S.Ct. 1067, 5 L.Ed.2d 300.

Unfortunately, the Court of Appeals appears to have rejected this case law and charted a new course down which arbitration agreements are strictly construed against lenders. If taken to its illogical conclusion, the Eighth District's new rule would mean that no arbitration provision in a services or sales agreement would be binding once the services have been rendered or the purchases finalized. Such a rule would have disastrous results. Nearly every dispute regarding a sales contract arises *after* the sale is complete. Until now, courts have enforced arbitration provisions in these agreements regularly.

It is no secret that there have been a flood of these mortgage release cases filed in Cuyahoga County. Even without the numerous cases brought under the similar UCC provision that is at issue in American General's case, the county's courts have seen no less than ten of these mortgage-release class actions. *Rimmer v. CitiFinancial*, Ohio Supreme Ct. No. 2008-1144; *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599; *Pinchot v. Charter One Bank*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105; *Radatz v. Fannie Mae*, 176 Ohio App.3d 319, 2008-Ohio-1937, 891 N.E.2d 1236; *Piro v. Natl. City Bank*, 8th Dist. App. Nos. 82885 & 82999, 2004-Ohio-501, 2004 Ohio App. LEXIS 466; *Jenkins v. Fidelity Fin. Servs.* (Dec. 2, 1999), 8th Dist. No. 75439, 1999 Ohio App. LEXIS 5696;

Pittman v. Chase Home Fin., LLC, Cuyahoga Co. CP Case No. CV-05-571902; *Brandow v. Washington Mut. Bank*, Cuyahoga Co. CP Case No. CV-05-555273; *Nagel v. Huntington Natl. Bank*, 8th Dist. No. 90662, 2008-Ohio-5741, 2008 WL 4811470. This forum appears to have become the preferred forum for these types of class actions. This is undoubtedly due the Court's recent rulings on class certification and the arbitrability of these types of claims.

What the Eighth District has done is to effectively elevate the civil rule governing class actions over the right to arbitrate. The arbitration acts, however, were 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." *Stout*, 228 F.3d at 714. Thus, the Court of Appeals has not only misconstrued the law, but has lost sight of the stated public policy behind the arbitration acts. This result should not be allowed to stand.

CONCLUSION

If these decisions are left intact, Ohio will stand alone in saying that arbitration is no longer favored, that procedural mechanisms are to be elevated over arbitration, and that companies may no longer rely on alternative dispute resolution to control litigation expenses. Until now, arbitration provisions have been routinely enforced after services have been provided or sales finalized. Indeed, almost every dispute regarding a sales contract occurs after the sale is complete. Arbitration is favored and arbitration clauses are enforced throughout the country. This should continue to be the law of Ohio. Therefore, this Court should reverse the decisions of the Eighth District.

Respectfully submitted,

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I certify that I served a copy of this *Brief of Amicus Curiae CitiFinancial, Inc. in Support of Appellant, Urging Reversal* by regular U.S. mail, postage prepaid, this 24th day of November, 2008 upon the following:

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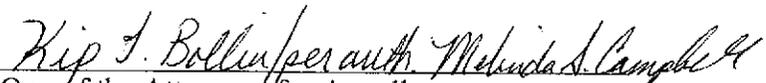
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