

January 20, 1999

The Honorable Ronald George, Chief Justice  
and the Honorable Associate Justices of the  
California Supreme Court  
303 Second Street  
South Tower, 8<sup>th</sup> Floor  
San Francisco, California 94107

**Re: *Badie v. Bank of America*, No. S055552 – Opposition to Request  
For Depublication**

To the Honorable Chief Justice and the Associate Justices:

The American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, MasterCard International Incorporated and Visa U.S.A. Inc. (collectively “the Bankers”), and the California Employment Law Council (“the Management Lawyers”), have asked this Court to order depublication of the California Court of Appeal’s opinion in *Badie v. Bank of America*. We are writing to ask that this request be denied. The Court of Appeal’s decision in *Badie* addresses an issue – the enforceability of mandatory, pre-dispute arbitration clauses – that is currently pending before numerous courts throughout the nation. Those courts should be permitted to know about – and consider – the Court of Appeal’s decision.

As set further in further detail below, depublication should be denied for two reasons. First, there is no serious dispute that the *Badie* decision meets the publication criteria of California Rule 976(a). Among other things, this case plainly involves “a legal issue of continuing public interest” -- *i.e.*, the enforceability of mandatory arbitration clauses that are imposed on consumers without any real knowledge and consent. This brings the decision squarely within the terms of Rule 976(a), which properly seeks to ensure that important and precedent-setting legal decisions are published for all the world to see. For that reason, the request for depublication should be denied.

Nor should publication be granted on the basis of the Bankers and Management Lawyers’ claim that the Court of Appeal’s opinion is wrong. On this point, the Bankers and Management Lawyers attack the decision on the ground that it unfairly discriminates against arbitration clauses (as opposed to other, similar contractual provisions) and would unfairly prevent their clients from imposing mandatory arbitration through clauses that are “ambiguous” and “equivocal.” This amounts to the astonishing -- and legally unsupported claim -- that their clients should be permitted to ensnare unsuspecting consumers into arbitration schemes without their true knowledge or consent. They further abuse the Court of Appeal for applying the standard contract law doctrine that waivers of constitutional rights must be voluntary, knowing and intelligent, thus the Bankers and Management Lawyers make the unusual case for waivers that are *involuntary*, *unknowing*, and *unintelligent*. Because the law decidedly does *not* enshrine a right for banks to “involuntarily” impose mandatory arbitration upon their “unknowing” customers through “ambiguous” and “equivocal” clauses, the Bankers’ and Management Lawyers’ request for depublication should be denied.

## **Interest of *Amicus Curiae***

Trial Lawyers for Public Justice (“TLPJ”) is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

Over the past year, TLPJ has been contacted by a large number of consumer attorneys around the nation who were faced with mandatory arbitration schemes that threatened to deprive their clients of their day in court. In each case, the attorney’s consumer clients wished to pursue their claims through the civil justice system, and to have their cases heard by a jury of their peers, but the corporate defendant sought to force the consumers to submit these claims to an arbitrator. As a result of our investigations and research, TLPJ has become convinced that, in many cases, mandatory arbitration poses a significant threat to both consumers and our system of justice. In this case, TLPJ is particularly concerned about the Bankers’ and Management Lawyers’ suggestion that mandatory arbitration may be imposed in circumstances where the consumers did not meaningfully consent to such arbitration. Not only is this result contrary to the U.S. Supreme Court’s jurisprudence relating to arbitration, but it is fundamentally unfair and unwise public policy. TLPJ therefore urges this Court to reject the depublication request.

### **ARGUMENT**

#### **I. *BADIE* FALLS SQUARELY WITHIN THE PUBLICATION CRITERIA OF CALIFORNIA RULE OF COURT 976(A).**

The first problem with the depublication request is that it ignores the rule actually governing publication of legal decisions in this state. California Rule of Court 976(a) sets the standards for publication of opinions by the lower courts. The Court of Appeals certified that the decision in *Badie* satisfies these standards. Neither the Bankers nor the Management Lawyers claim otherwise. That fact, alone, should preclude depublication.

Rule 976(a) provides that Courts of Appeal decisions should be published when any one of four specific disjunctive criteria are met:

- (1) the opinion sets forth a new rule of law or applies an existing rule to new facts;
- (2) the opinion creates an apparent conflict with a decision by another Court of Appeal;
- (3) the opinion involves a legal issue of continuing public interest; or
- (4) the opinion makes a contribution to legal literature by reviewing development of common law rule.

Rule 979, providing for the depublication of certain Court of Appeals decisions, by contrast, sets forth no criteria for the depublication of those decisions. Thus, the clear implication of Rule 976(a) is that decisions of the Courts of Appeal should only be depublished when **none** of these four publication criteria are met.

The Bankers and the Management Lawyers effectively concede that the Court of Appeal's decision meets the publication criteria of Rule 976(a). The Bankers and the Management Lawyers make no effort to deny, for example, that the Court of Appeal's opinion in *Badie* involves a "legal issue of continuing public interest;" to the contrary, they explicitly state that the decision "raises issues of exceptional importance . . . ." Letter of American Bankers Association, *et al.*, at 2. Nor is there any suggestion (as there could not seriously be) that the centrality of the consent requirement to the imposition of mandatory arbitration is a crucial legal issue of continuing public interest. (Indeed, the United States Supreme Court decided an important decision on this topic just a few months ago. *See Wright v. Universal Maritime Service Corp.* (1998) \_\_ U.S. \_\_, 119 S. Ct. 391.) Similarly, the Bankers and the Management Lawyers make no effort to deny that the *Badie* opinion makes a contribution to the legal literature by reviewing the development of the common law rule. Indeed, the Court of Appeal's decision includes a careful and thorough discussion of California precedents relating to these issues. And there is no serious effort to dispute that *Badie* is the first California decision to apply the rule prohibiting imposition of mandatory arbitration absent voluntary consent of both parties to the specific but very important field of credit card agreements.

Instead of basing their arguments on the actual California rule governing depublication, the Bankers and the Management Lawyers contend solely that *Badie* is wrong. They do not deny that it deals with an important area of law, or applies that law in a new area; rather, they merely stress that they disagree with its conclusion. Even if this Court were inclined to accept that contention, *Badie* should not be depublished. Courts and counsel in other cases should be free to rely on *Badie* to the extent they find it persuasive – and the Bankers and the Management Lawyers should be free to attack *Badie*'s analysis in legal briefs to other courts, as they do in their letters to this Court. The solution to controversial speech is more speech, not mandated secrecy.

## **II. THE COURT OF APPEAL'S DECISION IS IN ACCORD WITH THE WEIGHT OF AUTHORITY.**

Putting aside the publication criteria of Rule 976(a), there is an even more basic flaw in the Banker's and the Management Lawyers' position: *Badie* is right. This Court, numerous California Courts of Appeal, the United States Supreme Court and other courts throughout the United States have repeatedly held that arbitration may not be imposed upon any party unless that party has meaningfully consented to it. In addition, California's general law of contracts holds that *any* contract obligating one party to waive a constitutional right (whether involving free speech, the right to notice and a hearing, or, as here, the right to a jury trial) is only valid if the waiver is voluntary, knowing and intelligent.

### **A. BADIE IS FULLY CONSISTENT WITH MYRIAD LEGAL DECISIONS HOLDING THAT MANDATORY ARBITRATION MAY NOT BE IMPOSED WITHOUT THE MEANINGFUL CONSENT OF BOTH PARTIES.**

The United States Supreme Court has repeatedly stressed that "arbitration under the [Federal Arbitration Act ("F.A.A.")] is a matter of consent, not coercion." *Allied-Bruce Terminex Co. v. Dobson* (1995) 513 U.S. 265, 270; *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944; *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 55-56; *Volt Info. Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468, 478. *See also AT&T Tech., Inc. v.*

*Communications Workers* (1986) 475 U.S. 643, 648 (“[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit....”) (citation omitted).

The Bankers and the Management Lawyers both tout the general policy favoring the use of arbitration. But the Court of Appeal was plainly correct in *Badie* when it held that the F.A.A. does *not* establish a presumption that a valid arbitration agreement exists – it only favors arbitration *after* that fact has been established. See *First Options of Chicago v. Kaplan* (1995) 514 U.S. at 943-44 (“arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.”) In fact, the party seeking to compel arbitration bears the burden of showing that the other party waived their right to go to court. See *Gibson v. Neighborhood Health Clinics, Inc.* (7<sup>th</sup> Cir. 1997) 121 F.3d 1126, 1126 (applying Indiana law).

The courts of California have also forcefully rejected efforts to compel the arbitration of disputes that parties have not agreed to arbitrate. See *Victoria v. Superior Court* (1985) 40 Cal. 3d 734, 744 [222 Cal. Rptr. 1, 6, 710 P.2d 833, 838] (“there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate...” (citations omitted). Federal and state policies favoring arbitration cannot supplant the requisite agreement of the parties to arbitrate disputes. *Victoria*, 40 Cal. 3d at 739 (“the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate”) (citations omitted). In particular, where consent is lacking, an agreement to arbitrate does not exist. *El Camino Community College v. Superior Court* (1985) 173 Cal. App. 3d 606, 617 [219 Cal. Rptr. 236, 242] (holding that one party’s “addition of an arbitration clause to the terms of a contract...is a significant alteration of the rights of each party to the contract, and goes to the heart of the parties’ agreement” requiring consent of the other contracting party).

**B. BADIE IS IN ACCORD WITH THE GENERAL LAW OF CONTRACTS FOR ANY CONTRACT REQUIRING THE WAIVER OF A CONSTITUTIONAL RIGHT.**

The Bankers and the Management Lawyers effectively disregard the consent requirement by attacking the Court of Appeal’s holding that “a contractual waiver of the right to a jury trial ‘must be clearly apparent in the context and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties.’” This amounts to a claim that this Court should depublish the Court of Appeals’ decision in *Badie* to insure that *ambiguous* and *unequivocal* arbitration agreements may be imposed upon consumers in adhesive contracts.

The Bankers and Management Lawyers support this remarkable plea by arguing that the Court of Appeals’ decision supposedly discriminates against arbitration agreements by treating them differently from other types of contracts. In fact, however, the Court of Appeal’s holding treats arbitration contracts precisely as all courts treat other contracts of their type. It is the Bankers and Management Lawyers who propose unusual treatment for arbitration contracts, asking this Court to prefer them and favor them over all other *similar* contracts.

As the Court of Appeals recognized – and the Bankers and Management Lawyers do not dispute – *any contract* that purports to waive a constitutional right (such as the right to trial by jury) must be unambiguous and unequivocal, and must provide for a voluntary, knowing and intelligent waiver. See *In re Hannie* (1970) 3 Cal. 3d 520, 526 [90 Cal. Rptr. 742, , 476 P.2d 110, 113] (“A trial by jury may be waived . . . . Waivers of constitutional and statutory rights must be voluntary . . . , and ‘knowing, intelligent acts done with sufficient awareness of the relevant

circumstances and likely consequences”) (citations omitted); *In re Laura H.* (1992) 8 Cal. App. 4th 1689, 1695 [11 Cal. Rptr. 2d 285, 288] (“While any constitutional right can be waived, mere acquiescence is not a waiver; a waiver must be knowing and intelligent.”); *Trizec Properties v. Superior Court* (1991) 229 Cal. App. 3d 1616, 1619 [280 Cal. Rptr. 885, 887] (“The right to trial by jury in a civil case is a substantial one not lightly to be deemed waived. . . . Of course, to be enforceable, the waiver provision must be clearly apparent in the contract and its language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties.”); *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.* (1985) 164 Cal. App. 3d 1122, 1129 [211 Cal. Rptr. 62, 66] (“In light of the importance of the jury trial in our system of jurisprudence, any waiver thereof should appear in clear and unmistakable form”); *In re Thomas S.* (1981) 124 Cal. App. 3d 934, 939 [177 Cal. Rptr. 742, 744] (“It is firmly established that the first requirement of any waiver of a statutory, constitutional, or here, a hybrid, judicially promulgated contractual right is that it be knowingly and intelligently made....”).

Indeed, the principal that waivers of fundamental rights must be unambiguous and unequivocal has been recognized not only in California, but in a large body of judicial decisions around the United States. This is a standard rule of contract law, and is not some sort of “discrimination” against arbitration clauses. *See Erie Telecommunications, Inc. v. City of Erie* (3<sup>rd</sup> Cir. 1988) 853 F.2d 1084, 1096 (“constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver.”); *K.M.C. Co. v. Irving Trust Co.* (6<sup>th</sup> Cir. 1985) 757 F.2d 752, 756 (“Those cases in which the validity of a contractual waiver of jury trial has been in issue have overwhelmingly applied the knowing and voluntary standard.”)

This rule is particularly pronounced in all cases involving contracts of adhesion, such as the credit card agreements in this case. *See Isbell v. County of Sonoma* (1978) 21 Cal. 3d 61,69 [145 Cal. Rptr. 368, , 577 P.2d 188, 193] (“the debtor’s assent to a contract of adhesion with a cognovit clause, or to a confession of judgment form presented by the creditor, cannot operate as a valid waiver of constitutional rights.”), *cert. denied*, 439 U.S. 996 (1978); *Commercial National Bank of Peoria v. Kermeen* (1990) 225 Cal. App. 3d 396, 401 [275 Cal. Rptr. 122, 125] (finding that preprinted form note used by bank “suggests overreaching rather than free waiver of rights, and we cannot conclude that the waiver was voluntary”). The Supreme Court has also highlighted this factor. In *D.H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, the Supreme Court held that a company had lost its due process right to a notice and a hearing to dispute a debt by voluntarily, intelligently and knowingly entering into a contract to waive those rights. But the Court went on to state:

Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

*Overmyer*, 405 U.S. at 188.

A simple hypothetical helps illustrate the universal nature of these contractual rules. The law in California, as elsewhere, is that an individual can waive her or his constitutional right to free speech. *E.g., ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal. App. 3d 307, 319 [262 Cal. Rptr. 773, 780]. And indeed, individuals often contract away certain speech rights, such as

in settlement agreements where one or both parties agree not to publicly criticize the other party. Imagine if Bank of America's form contract here had not provided for the waiver of cardholder's rights to a jury trial, but had instead provided that all cardholders were contractually bound never to publicly criticize Bank of America or banks generally. Before any court would enforce such a provision, the general law of contracts and constitutional law (as amply set forth above) would require that this provision be unambiguous and unequivocal, and that such a waiver must be voluntary, intelligent and knowing on the part of the cardholders.

There be no serious question that these principles are squarely applicable to mandatory arbitration clauses. First, neither the Bankers nor the Management Lawyers deny (as they could not) that all arbitration contracts represent a waiver of a fundamental right – the right to trial by jury. Indeed, the whole point of arbitration is to displace the civil justice system, in favor of a privately-managed system. The Bankers and Management Lawyers want to ensure that their clients' disputes with their customers and employees *not* be brought before judges or juries, under the rules of evidence, in a system where decisions are made public and are published. Instead, the Bankers and Management Lawyers and their clients want these decisions to be made by hired arbitrators. This is all fair enough and legal, **if** the customers and employees meaningfully consent to this change. But it cannot be denied that such consent constitutes a waiver of the right to trial by jury.

Second, neither the Bankers nor the Management Lawyers deny that the right to trial by jury is fundamental. Not only is this right enshrined in the Seventh Amendment to the United States Constitution, but it is also recognized as fundamental by the California Constitution. Cal. Const. art. I, § 16. The courts of California have recognized that the right to jury trial is basic and fundamental. See *Titan Group, Inc.* (1985) 164 Cal. App. 3d at 1127-28; *Ramirez v. Superior Court of Santa Clara County* (1980) 103 Cal. App. 3d 746, 756 [163 Cal. Rptr. 223, 228] (“The right to have a trial by jury is a fundamental right in our democratic judicial system.... It is a right which is justly dear...[and] should be jealously guarded by the courts. Any seeming curtailment of this right should be scrutinized with the utmost care.”); *Byram v. Superior Court* (1977) 74 Cal. App. 3d 648, 654 [141 Cal. Rptr. 604, 607] (“right to trial by jury is a basic and fundamental part of our system of jurisprudence...doubt [regarding procedural waiver of that right] should be resolved in favor of preserving a litigant's right to trial by jury”).

Thus, far from being aberrant, the Court of Appeals' insistence that arbitration clauses cannot be enforced against parties who did not voluntarily, knowingly and intelligently agree to waive their rights is in keeping with a broad body of law from around the nation. See, e.g., *Hooters of America, Inc. v. Phillips* (D.S.C. March 12, 1998) 1998 U.S. Dist. LEXIS 3962, \*83 (“Here, enforcement of the [arbitration agreement] effects a drastic change to several of Phillips' substantive statutory rights, and therefore, assuming Phillips could waive such rights, at a minimum Hooters had the burden of proving [the employee's] knowing and voluntary agreement to each of those terms.”); *Sosa v. Paulos* (Utah 1996) 924 P. 2d 357, 363 (“Under these circumstances, we cannot conclude that the arbitration agreement was negotiated in a fair manner and that the parties had a real and voluntary meeting of the minds. Nor can we conclude that Ms. Sosa had a meaningful choice with respect to signing the agreement . . . .”); *Broemer v. Abortion Services of Phoenix, Ltd.* (Ariz. 1992) 840 P.2d 1013, 1017 (arbitration clause was not enforced where “[T]here was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived.”); *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal. App. 3d 1501, 1507 [256 Cal. Rptr. 6, 9]

("The law ought not to decree a forfeiture of such a valuable right where the [client] has not been made aware of the existence of an arbitration provision or its implications. Absent notification and at least some explanation, the [client] cannot be said to have exercised a 'real choice' in selecting arbitration over litigation."), *review denied*, 1989 Cal. LEXIS 4710 (May 17, 1989); *Obstetrics and Gynecologists Wixted, Flanagan and Robinson v. Pepper* (Nev. 1985) 693 P.2d 1259, 1261 (an arbitration clause was not enforced where the plaintiff had not given "informed consent to the agreement and . . . no meeting of the minds occurred." The plaintiff "did not remember receiving any information regarding the terms of the arbitration agreement," and that since the defendant only explained those terms if a question was asked, it appeared that "the agreement was never explained to respondent."); *Sanchez v. Sirmons* (N.Y. Sup. Ct. 1983) 467 N.Y.S.2d 757, 759-60 (an arbitration clause was not enforced where "it has not been demonstrated that the petitioner made an informed and knowledgeable waiver of her constitutional right to trial by jury. . . . Absent notification and at least some explanation, the patient cannot be said to have exercised a 'real choice' in selecting arbitration over litigation." (citations omitted).)

### **Conclusion**

For the foregoing reasons, the request for depublication should be denied.

Respectfully submitted,

F. Paul Bland, Jr.  
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Trial Lawyers for Public Justice

### **PROOF OF SERVICE BY MAIL**

I, Paula Athey, declare as follows:

I am employed with the law firm of Trial Lawyers for Public Justice, 1717 Massachusetts Avenue, Suite 800, Washington, D.C. 20036. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen years and not a party to this action.

On January 20, 1999, I served the following:

### **LETTER OF THE TRIAL LAWYERS FOR PUBLIC JUSTICE IN OPPOSITION TO THE REQUEST FOR DEPUBLICATION**

on the below parties in this action by placing true copies thereof in sealed envelopes, addressed as shown, for collection and mailing pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business:

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I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct.

Executed at Washington, D.C. on January 20, 1999.

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Paula Athey