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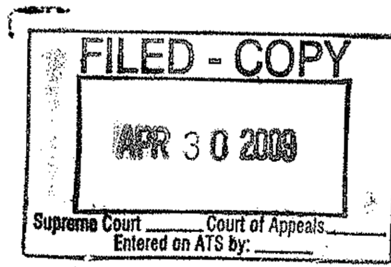
IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID F. CAPPS,)
)
Plaintiff-Appellant,) Docket No. 35891
)
vs.)
)
FIA CARD SERVICES, N.A.)
Fka MBNA AMERICA BANK, N.A.,)
)
Defendant-Respondent,)
)



APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho
In and For the County of Idaho

HONORABLE JOHN H. BRADBURY
District Judge Presiding

DAVID F. CAPPS, ***in propria persona***
Residing at 104 Jefferson Dr., Kamiah, Idaho, 83536, (208) 935-7962, Appellant

ALEC T. PECHOTA, Attorney at Law
Residing at 420 W. Washington, P.O. Box 1544, Boise, Idaho, 83701, (208) 345-9100, For Respondent

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STATEMENT OF THE CASE

NATURE OF THE CASE

This case is essentially a collection action. The Defendant, FIA Card Services, N.A. (hereinafter "FIA"), secured an award letter from the National Arbitration Forum [NAF] without proof of a valid agreement to arbitrate. When a copy of the award letter was sent to the Plaintiff, David F. Capps, (hereinafter "Capps"), Capps filed an action to vacate the award letter. FIA filed counterclaims of account stated and breach of contract to collect on the alleged delinquent credit card debt. FIA then filed for summary judgment. The district court granted FIA's Motion for Summary Judgment and Capps appealed.

COURSE OF PROCEEDINGS

Capps filed a complaint against FIA and the NAF in the Idaho County District Court on August 8th 2007 (R. Vol. I, p. 1 – 7) after receiving an award letter from the NAF (R. Vol. I, p. 33), to have the award letter vacated under Idaho Code Title 7, Chapter 9, Section 912. The Defendant, NAF removed the action to Federal District Court based on Capps' claim of violation of civil rights under Article 7 of the U.S. Constitution. Capps subsequently amended the complaint on October 12th 2007 (R. Vol. I, p. 15 – 20) and dismissed the NAF from the action, substituting a violation of the Idaho State Constitution, specifically Article 1, Section 7, for the federal claim. The action was then remanded to the State District Court for further proceedings.

FIA filed an Answer to Complaint with Counterclaims on January 30th 2008 (R. Vol. I, p. 26 – 33). The counterclaims included Application of Arbitration Award, Breach of Contract, and Account Stated.

After initial discovery requests, Capps filed a Motion to Compel Discovery on April 4th 2008 (R. Vol. IV, p. 594 – 600). The district court granted Capps' Motion to Compel on April 29th 2008 (R. Vol. IV, p. 601 - 602). FIA filed a Motion for Reconsideration of the court's order, which the court denied in its Memorandum Decision and Order on July 22nd 2008 (R. Vol. III, p. 492 – 498). FIA also filed a Motion for Summary Judgment on May 19th 2008 (R. Vol. V, p. 603 – 604) with supporting memorandum (R. Vol. V, p. 605 – 610). Capps filed his Opposition to Motion for Summary Judgment on June 10th 2008 (R. Vol. II, p. 34 – 51). The district court granted FIA's Motion for Summary Judgment on July 28th 2008 (R. Vol. III, p. 499 – 515). Capps filed a Motion for Reconsideration on August 5th 2008 (R. Vol. III, p. 516 – 525) with affidavit (R. Vol. III, p. 526 – 529) and a Motion for Continuance Under Rule 56(f) (R. Vol. III, p. 541 – 543) with affidavit (R. Vol. III, p. 544 – 546). Capps also filed a Motion to Show Cause on September 11th 2008 (R. Vol. III, p. 559 – 564), because FIA had not properly complied with the order of the court concerning discovery. The district court denied the Motion to Show Cause on October 30th 2008 (R. Vol. III, p. 565 –566). The district court granted the reconsideration for the Account Stated claim, but denied the reconsideration for the Breach of Contract claim on October 30th 2008 (R. Vol. III, p. 573 – 580), resulting in a final judgment on November 12th 2008 (R. Vol. III, p. 581 – 582). Capps timely filed his Notice of Appeal on November 18th 2008 (R. Vol. III, p. 583 – 588).

STATEMENT OF FACTS

Comerica Bank Bankcard Services originally created the alleged credit card account and the associated receivables. Both the account and the associated receivables were acquired by MBNA America Bank, N.A. and subsequently sold to a Master Trust in a process known as securitization. The securitization transaction took place before the alleged debt was claimed to

have become delinquent in January of 2005. Bank of America acquired MBNA America Bank on January 2nd 2006, at which time the MBNA Master Credit Card Trust II, used for securitization, officially became part of the BA Master Credit Card Trust II, with the Bank of New York as trustee. FIA Card Services became the "Servicer" of the Master Trust nine and a half months later on October 20th 2006 pursuant to the Second Amended and Restated Pooling and Servicing Agreement. Despite repeated requests from Capps, FIA has refused to provide any documents showing that the alleged debt was acquired by FIA from the Master Trust.

ISSUES PRESENTED ON APPEAL

ISSUE NO.1

DID THE DISTRICT COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT?

Capps demanded a jury trial in his Complaint. FIA filed a Motion for Summary Judgment, which the district court granted. Capps filed a Motion for Reconsideration, during which he presented evidence of a dispute of a material fact, specifically, the amount of the alleged debt. The district court recognized the dispute of a material fact on the Account Stated claim, but not on the Breach of Contract claim. In determining the amount of the judgment in the Breach of Contract claim, the district court either had to weigh the evidence, or ignore the dispute of a material fact. Because Capps had demanded a jury trial, the court was not allowed to weigh the evidence, nor was it allowed to ignore a dispute over a material fact.

ISSUE NO. 2

DID THE DISTRICT COURT ERR BY IGNORING RULE 1004(3) OF THE IDAHO RULES OF EVIDENCE?

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be. FIA did not object to the document on the grounds that it was not authentic. FIA's lack of an objection as to the authenticity of the document is a tacit admission

that the document is, in fact, authentic. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have precluded granting summary judgment by the district court.

ISSUE NO. 3

DID THE DISTRICT COURT ERR BY IGNORING RULE 1008c OF THE IDAHO RULES OF EVIDENCE?

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place. The authenticity and weight of the document was for the jury to decide, not the district court. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have precluded granting summary judgment by the district court.

ISSUE NO. 4

DID THE DISTRICT COURT ERR BY NOT ADMITTING EVIDENCE OF A DISPUTE OF A MATERIAL FACT, AND THEN USING THE EXCLUDED EVIDENCE AS THE BASIS FOR ITS DECISION?

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit Card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place. The authenticity and weight of the document was for the jury to decide, not the district court judge. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have precluded granting summary judgment by the district court.

ISSUE NO. 5

DID THE DISTRICT COURT VIOLATE DUE PROCESS BY RENDERING A DECISION BEFORE DISCOVERY WAS COMPLETE AND BEFORE THE CASE WAS RIPE?

Capps raised two affirmative defenses in his ANSWER TO COUNTERCLAIMS (R. Vol. I, p. 22), *inter alia*, that "18. The Defendant is not a real party in interest in this action and cannot maintain a counterclaim Action against the Plaintiff." And that "19. The Defendant cannot establish standing and as such cannot invoke the jurisdiction of this court for its counterclaims." Capps was pursuing FIA's financial records as proof that FIA had removed the account in question from its books as a result of the sale of the account and the associated receivables to the BA master Credit Card Trust II and was no longer owner of the alleged debt.

Capps filed a MOTION TO COMPEL DISCOVERY (R. Vol. IV, p. 594-600), which the district court granted. FIA's answers were evasive and incomplete. Capps filed a MOTION TO SHOW CAUSE regarding the evasive and incomplete answers. The district court DENIED the motion based on the fact that it had dismissed Capps' claims (R. Vol. III, p. 565).

ISSUE NO. 6

DID THE DISTRICT COURT IMPROPERLY DISMISS THE PLAINTIFF'S MOTION TO SHOW CAUSE?

Capps raised two affirmative defenses in his ANSWER TO COUNTERCLAIMS (R. Vol. I, p. 22), *inter alia*, that "18. The Defendant is not a real party in interest in this action and cannot maintain a counterclaim Action against the Plaintiff." And that "19. The Defendant cannot establish standing and as such cannot invoke the jurisdiction of this court for its counterclaims." Capps was pursuing FIA's financial records as proof that FIA had removed the account in question from its books as a result of the sale of the account and the associated receivables to the BA master Credit Card Trust II and was no longer owner of the alleged debt. Capps filed a MOTION TO COMPEL DISCOVERY (R. Vol. IV, p. 594-600), which the district court granted. FIA's answers were evasive and incomplete. Capps filed a MOTION TO SHOW CAUSE regarding the evasive and incomplete answers. The district court DENIED the motion based on the fact that it had dismissed Capps' claims (R. Vol. III, p. 565).

ISSUE NO. 7

DID THE DISTRICT COURT ERR BY RELYING ON AN UNSETTLED CASE AS THE BASIS FOR ITS DECISION?

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place. The authenticity and weight of the document was for the jury to decide, not the district court. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have prevented granting summary judgment by the district court.

ARGUMENT - ISSUE NO. 1

DID THE DISTRICT COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT?

A. INTRODUCTION

Capps demanded a jury trial in his Complaint. FIA filed a Motion for Summary Judgment, which the district court granted. Capps filed a Motion for Reconsideration, during which he presented additional evidence of a dispute of a material fact, specifically, the amount of the alleged debt. The district court recognized the dispute of a material fact on the Account Stated claim, but not on the Breach of Contract claim. In determining the amount of the judgment in the Breach of Contract claim, the district court either had to weigh the evidence, or ignore the material dispute. Because Capps had demanded a jury trial, the district court was not allowed to weigh the evidence, nor was it allowed to ignore a dispute over a material fact.

B. STANDARD OF REVIEW

On a motion for summary judgment we will review "the pleadings, depositions, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Ray v. Nampa School Dist. No. 131*, 120 Idaho 117, 814 P.2d 17 (1991).

Where, as here, a jury has been requested, the non-moving party also is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *See Anderson v. Ethington*, 103 Idaho 658, 660, 651 P.2d 923, 925 (1982).

C. THERE WAS A GENUINE DISPUTE OVER A MATERIAL FACT.

On a motion for summary judgment there must be no dispute over the material facts of the case and the party moving for summary judgment must be entitled to the judgment as a matter of law. In this case, Capps presented two dispute letters that were sent, the first to Comerica Bank Bankcard Services (R. Vol. III, p. 530), and the second to MBNA America Bank, N.A. (R. Vol. III, p. 531).

The district court, in its MEMORAMDUM DECISION AND ORDER filed October 30 2008 (R. Vol. III, p. 573 – 580), stated, "Mr. Capps is correct with respect to his argument that FIA's claim of an account stated fails. I conclude, on reconsideration, that the accounting was disputed by Mr. Capps." (R. Vol. III, p. 577, L. 16 – 18). Yet the district court failed to recognize the same dispute of a material fact in FIA's Breach of Contract claim. The same dispute letters disputed the amount FIA claimed in its breach of contract claim just as the account stated claim was disputed.

Capps also provided a copy of the Prospectus dated October 11, 2005 (R. Vol. II, p. 71-272) and a copy of the Second Amended and Restated Pooling and Servicing Agreement dated October 20, 2006 (R. Vol. II, p. 273-414) as part of his OPPOSITION TO MOTION FOR SUMMARY JUDGMENT filed June 10, 2008 (R. Vol. II, p. 34-51) based on Rule 17(a) of the Idaho Rules of Civil Procedure. FIA's sole objection was that the Prospectus and the Pooling and Servicing Agreement are not based on Capps' personal knowledge (R. Vol. V, p. 640, L. 3-4). FIA claims that nothing in the Capps affidavit "establishes that Plaintiff has any personal knowledge regarding the preparation, maintenance and/or subject matter of the proposed Exhibits" (R. Vol. V, p. 640, L. 6-7). While Capps may not have personal knowledge of the preparation and maintenance of the documents, he certainly has personal knowledge of the

existence of the documents, and based on the briefing involved, he also has personal knowledge regarding the subject matter of the documents. The contents of the affidavit certainly establish that there is a Prospectus and a Pooling and Servicing Agreement (R. Vol. II, p. 53-55) and that the contents of those documents are essential to Capps' defense against the Motion for Summary Judgment (R. Vol. III, p. 545-546).

An affidavit submitted in the process of summary judgment may establish certain facts based on personal knowledge that satisfies the requirements of Rule 56(e). In Smith v. Board of Corrections, 133 Idaho 519, 988 P.2d 1193 (1999), the court noted, "Despite the shortcomings of the affidavits noted by the district court, portions of the affidavits are based on personal knowledge and do satisfy the requirements of Rule 56(e)." The Capps affidavits establish that Capps has personal knowledge that a Prospectus has been issued by MBNA, and subsequently by Bank of America, relating to the securitization process used by both MBNA and Bank of America for the credit card receivables and the associated accounts. The affidavits also establish that Capps has personal knowledge that a Pooling and Servicing Agreement exists between MBNA, Bank of America, and the associated Master Trust for the securitization of credit card receivables and their associated accounts, the accuracy and authenticity of which is not contested by FIA.

The documents themselves are relevant to Capps' affirmative defense that FIA is not a real party in interest and that FIA has no damages, and as such cannot establish standing, thus failing to invoke the jurisdiction of the court. Whether a party is a real party in interest is a recognized dispute of a material fact, which would preclude summary judgment, see Tolmie Farms v. J.R. Simplot Co., 124 Idaho 613, 862 P.2d 305 (1992).

In the district court's MEMORANDUM DECISION AND ORDER dated July 28 2008, the

district court judge stated, "Without a proper foundation being laid to establish Mr. Capps' personal knowledge and without qualifying for an exemption to the hearsay rule, the affidavit of Walker F. Todd, the Pooling and Servicing Agreement, and the Trust Prospectus may not be considered." (R. Vol. III, p. 507, L. 4-7). The district court then went on to say, "Despite my decision that they are not admissible, I have reviewed in full the Second Amended and Restated Pooling and Servicing Agreement attached as Exhibit 2 as well as the MBNA Credit Card Master Note Trust Prospectus attached as Exhibit 1 to Mr. Capps' affidavit as a basis for deciding FIA's standing and qualification as the real party in interest." (Emphasis added) (R. Vol. III, p. 508, L. 17-21). Obviously the district court recognized that there was a genuine dispute over the material fact regarding standing, otherwise, it would not have seen any need to weigh the evidence and render a decision. Because the district court judge used the Pooling and Servicing Agreement and the Prospectus as the basis for his decision, the documents have been tacitly and impliedly admitted and are therefore "on the record". The district court cannot deny Capps the right to use the disputed evidence, and then use that same evidence as the basis for deciding against him.

Capps had demanded a jury trial making the jury the trier of fact, not the district court judge. FIA's standing and qualification as the real party in interest was for the jury to decide. Because the district court judge had tacitly and impliedly admitted the Pooling and Servicing Agreement and the Prospectus as evidence, the weight of the evidence, and the decision regarding standing and the real party in interest was clearly for the jury to decide.

In the district court's MEMORANDUM DECISION AND ORDER dated July 28 2008, the district court judge also stated, "Even assuming that the affidavits and documents should be considered, Mr. Capps still fails to meet his burden of coming forward with evidence by way of

affidavit, deposition, or otherwise, which contradicts the evidence submitted by the moving party and which establishes a material issue of disputed fact. The Pooling and Servicing Agreement and the Trust Prospectus documents attached as exhibits to Mr. Capps' Affidavit are cited by Mr. Capps in support of his affirmative defense that FIA Card Services lacks standing and is not a real party in interest. These exhibits do not relate directly to whether or not there was a contract formed and breached or whether an account stated agreement was reached – the two bases of FIA's motion for summary judgment. *See Opposition to Motion for Summary Judgment* at 2-8."

What the district court ignores is that a motion for summary judgment has two basic requirements: "if the pleading, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." I.R.C.P 56(c). (Emphasis added). Whether FIA has standing, and whether FIA is a real party in interest, are jurisdictional questions and relate directly to whether FIA is entitled to a judgment as a matter of law. In *Tolmie Farms*, supra, the court stated,

> Courts must take extreme care not to take *genuine* issues of fact from the jury. *See Wilson v. Westinghouse Electric Corp.*, 838 F.2d 286, 289 (8th Cir.1988); *see also Lowry v. Ireland Bank*, 116 Idaho 708, 779 P.2d 22 (Ct.App.1989) (a determination of credibility should not be made on summary judgment if credibility can be tested in court before the trier of fact). (Emphasis in original).

In Tolmie, there was conflicting evidence as to who was actually the real party in interest. The court stated,

> "Although Simplot complains of the dearth of any official documentation to support the alleged assignment of rights to the Tolmies, such argument goes to the weight of the evidence and presents a genuine question of fact for the jury."

In this case there is no dearth of documentation. Here the Pooling and Servicing Agreement clearly states (R. Vol. II, p. 298),

"Section 2.01. Conveyance of Receivables. The Transferor hereby transfers, assigns, sets over, and otherwise conveys to the Trustee, without recourse, all of the Transferor's right, title and interest in, to and under the Receivables existing at the close of business on the Amendment Closing Date, in the case of Receivables arising in the Initial Accounts (including all related Transferred Accounts), and at the close of business on the related Addition Date, in the case of Receivables arising in the Additional Accounts (including all related Transferred Accounts), and in each case thereafter created from time to time in such Accounts until the termination of the Trust, all monies due or to become due with respect to such Receivables (including all Finance Charge Receivables), all Interchange allocable to the Trust as provided herein, all proceeds of such Receivables, Insurance Proceeds and Recoveries relating to such Receivables and the proceeds thereof." The Transferor is identified as, "BA Credit Card Funding, LLC, a Delaware limited liability company" (R. Vol. II, p. 279) and is the company used by Bank of America to transfer assets into the BA Master Credit Card Trust II (hereinafter "the Master Trust").

The Pooling and Servicing Agreement also states (R. Vol. II, p. 298), "In connection with such transfer, assignment, set-over and conveyance, the Transferor agrees to record and file, at its own expense, all financing statements (including any amendments of financing statements and continuation statements when applicable) with respect to the Receivables now existing and hereafter created for the transfer of accounts (as defined in the Delaware UCC) meeting the requirements of applicable state law in such manner and in such jurisdictions as are necessary to perfect and to maintain the perfection of the assignment of the Receivables to the Trustee,..." (Emphasis added). The same Pooling and Servicing Agreement in section 2.05 states (R. Vol. II, p. 306), "Covenants of the Transferor. The Transferor hereby covenants that: (a) Receivables to be Accounts. ... The Transferor will take no action to cause any Receivable to be anything other

than an account (as defined in the Delaware UCC)." In Section 2.09 the Pooling and Servicing Agreement states (R. Vol. II, p. 315), "Additional Representations and Warranties of the Transferor. ...(b) The Collateral constitutes "accounts" within the meaning of the Delaware UCC." "Account" as defined in the Delaware UCC is, "§ 9-102. Definitions and Index of Definitions. (a) Article 9 definitions. (2) "Account", except as used in "account for" means (i) a right to payment of a monetary obligation whether or not earned by performance, (G) arising out of the use of a credit or charge card or information contained on or for use with the card." All rights, including the right to payment of the alleged monetary obligation, were assigned to the BA Master Credit Card Trust II, without recourse. No rights were retained. While FIA argues that the Receivables and the Account are two different things, the Pooling and Servicing Agreement explicitly defines account as defined in the Delaware UCC (R. Vol. II, p. 289), which defines "account" as being identical to the Receivables that were assigned to the Master Trust.

In McClusky v. Galland, 95 Idaho 472, 511 P.2d 289 (Idaho 1973), the Supreme Court of Idaho held, "Where open account and notes payable to individual were assigned to corporation prior to commencement of action to recover on the notes and the open account, the individual assignor was not real party in interest and had no standing to prosecute an action to recover on the notes and the open account and was not entitled to recover judgment thereon. Rules of Civil Procedure, Rule 17(a), I.C. §§ 5-301, 5-302, 27-104."

In addition, Delaware statute (Delaware is the "home" state of FIA Card Services), Title 6, Chapter 27A, § 2703A(1) clearly states, "Any property, assets or rights purported to be transferred, in whole or in part, in the securitization transaction shall be deemed to no longer be the property, assets or rights of the transferor." Clearly, the inference of the above information, taken in a light most favorable to the non-moving party (Capps in this case) in a motion for

summary judgment, establishes a genuine issue of fact for the jury.

FIA had the burden of showing that there were no genuine issues over the material facts in its motion for summary judgment. Simply stating that there are no genuine issues of the material facts is insufficient. Capps had raised two genuine issues of material fact in his affirmative defenses and had presented evidence in support of FIA not being a real party in interest, not having any damages, and as a result, did not have standing and could not invoke the jurisdiction of the court. The burden fell to FIA to prove that it was in fact the real party in interest and that it had experienced actual financial damages and in fact had standing in the district court. FIA presented no evidence of ownership of the receivables or the account, no evidence of damages, and no evidence that FIA had the right to invoke the jurisdiction of the district court. FIA failed to prove there were no genuine issues of material fact to support its motion for summary judgment as required under Rule 56(c) of the Idaho Rules of Civil Procedure.

The district court judge committed reversible error in weighing the evidence and rendering a decision when it was for the jury to decide. The district court judge also committed reversible error in deciding FIA had met its burden of establishing that there were no genuine issues of material fact in its motion for summary judgment when no evidence was presented opposing Capps' evidence of FIA's lack of standing. Capps therefore requests that this court VACATE the summary judgment against him, VACATE the district court's decision that FIA has standing and is a real party in interest, and REMAND the case for a jury trial.

ARGUMENT - ISSUE NO. 2

DID THE DISTRICT COURT ERR BY IGNORING RULE 1004(3) OF THE IDAHO RULES OF EVIDENCE?

A. INTRODUCTION

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be. FIA did not object to the document on the grounds that it was not authentic. FIA's lack of an objection as to the authenticity of the document is a tacit admission that the document is, in fact, authentic. FIA has thus waived any objection as to authenticity of the Pooling and Servicing Agreement. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have precluded summary judgment.

B. STANDARD OF REVIEW

When questions of law are presented, the Supreme Court exercises free review and is not bound by findings of the trial court, but is free to draw its own conclusions from the evidence presented. Accomazzo v. CEDU Educational Services, Inc., 135 Idaho 145, 15 P.3d 1153.

The construction and application of a statute or statutes present pure questions of law, which are freely reviewed on appeal. Wilder v. Miller, 135 Idaho 382, 17 P.3d 883.

C. THE EVIDENCE WAS ADMISSIBLE

While case law is lacking in the State of Idaho on Rule 1004(3) of the Idaho Rules of Evidence, the rule itself was drawn from the Federal Rules of Evidence, retaining the same numbering system and the same wording. The same basic issue also appears in the Idaho Code, Title 9, Chapter 4, Section 9-403. This court may find the cited cases in federal courts regarding Rule 1004(3) persuasive.

Rule 1004 of the Idaho Rules of Evidence reads as follows:

Rule 1004. Admissibility of other evidence of contents.
The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or,
(2) **Originals not obtainable.** No original can be obtained by any reasonably practicable, available judicial process or procedure; or,
(3) **Original in possession of opponent.** At a time when an original was under control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and the party does not produce the original at the hearing; or
(4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue. (Adopted January 8, 1985, effective July 1, 1985.)

In Capps' AFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, Capps put FIA on notice regarding the SECOND AMENDED AND RESTATED POOLING AND SERVICING AGREEMENT as follows (R. Vol. II, P. 54, L. 21–23 and p. 55, L. 1-5):

"33. That I received the document "SECOND AMENDED AND RESTATED POOLING AND SERVICING AGREEMENT dated as of October 20, 2006" in the process of discovery from MBNA in a previous case.

"34. That the document has not been modified or altered in any manner.

"35. That a true and correct copy of the document is presented as EXHIBIT 2.

"36. That to the best of my knowledge the documents presented are true and correct copies of authentic documents.

"37. That the documents are intended as evidence and are presented as such."

EXHIBIT 2 appears in the record on appeal (R. Vol. II, p. 273-414).

Regarding Rule 1004(3), the Second Amended and Restated Pooling and Servicing Agreement (PSA) was an internal document to MBNA and subsequently, through the sale of MBNA to Bank of America, is in the possession of Bank of America. As of the date of the restated agreement, the document was in continuous possession of Bank of America. The above sworn affidavit provided *prima facie* evidence to the district court that the document was what it was purported to be. Since the original document was in possession of the other party (FIA via Bank of America), the only valid objection from FIA would have been that the document was not authentic. No such objection was made. The authenticity of the document was therefore uncontested, and was admissible under Rule 1004(3) as urged by Capps in his Motion for Reconsideration (R. Vol. III, p. 553) as follows:

> "The original document is in possession of the opponent and Capps has no other opportunity to obtain a certified copy of the document with affidavits suitable to have the document entered as evidence. Capps submitted the document with his opposition to summary judgment, putting FIA on notice that the contents would be a subject of proof at the hearing. FIA did not produce the original or a certified copy at the hearing and has refused to provide the document in discovery. FIA has also had sufficient time to object to the accuracy and authenticity of the document and has not done so. The document previously submitted is thus admissible under Rule 1004(3) of the Idaho Rules of Evidence."

The book, **Federal Rules of Evidence**, in the section on writings, recordings, and photographs, page 630, under **HISTORY; ANCILLARY LAWS AND DIRECTIVES**, Rule 1004(3) has the following explanation:

> "Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to

> be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203."

In Mack v. Markel, 241 F.R.D. 534; 2007 U.S. Dist. LEXIS 33020; 73 Fed. R. Evid. Serv. (Callaghan) 446, the court stated,

> **[**172]** Additionally, [HN78] Rule 1004 permits proof of the contents of a writing, recording or photograph by secondary evidence when the proponent of the evidence is unable to obtain an original through use of legal process, or when the original is in possession or control of an adverse party that has actual or inquiry notice of the contents that the proponent intends to introduce the evidence. In the later circumstance, as the advisory committee's note to Rule 1004(3) points out, "[a] party who has an original in his control has no need for the protection of the [original writing] rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original."

Capps provided both actual and inquiry notice to FIA. Actual notice was provided in Capps' affidavit, supra, "37. That the documents are intended as evidence and are presented as such." Capps also provided inquiry notice to FIA during discovery, specifically, "**INTERROGATORY NO. 4:** Please identify the Pooling and Servicing Agreement in effect as of July 15th 2005." and "**REQUEST FOR PRODUCTION OF DOCUMENT NO. 22:** Please provide or make available for copying a certified copy of the Pooling and Servicing Agreement identified in Interrogatory No. 4, with proper authentication and foundation from a custodian of records sufficient to allow the document to be admitted as evidence in this case."

FIA refused to provide the requested document. Capps submitted a Motion to Compel Discovery regarding the Pooling and Servicing Agreement in his SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) (R. Vol. III, p. 552), which the district court ignored. Capps' copy of the Pooling and Servicing Agreement, the authenticity of which is uncontested, constitutes proof of the sale of the Receivables and the associated account to the Master Trust, making the Trustee, The Bank of New York, the real party in interest, not FIA.

Capps fulfilled the requirements of Rule 1004(3) of the Idaho Rules of Evidence making the documents admissible. The district court committed reversible error in not admitting the documents. Capps therefore requests that this court deem the Second Amended and Restated Pooling and Servicing Agreement dated October 20 2006 and the Prospectus dated October 11, 2005 as admitted into evidence.

ARGUMENT - ISSUE NO. 3

DID THE DISTRICT COURT ERR BY IGNORING RULE 1008C OF THE IDAHO RULES OF EVIDENCE?

A. INTRODUCTION

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place. The authenticity and weight of the document was for the jury to decide, not the district court judge. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have precluded granting summary judgment by the district court.

B. STANDARD OF REVIEW

The credibility and weight to be given evidence is in the province of the trier of fact, and the findings made by the trial judge will not be set aside unless clearly erroneous. *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990); I.R.C.P. 52(a). This court will uphold the trial court's findings of fact if supported by substantial and competent evidence. *Ireland v. Ireland*, 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993); *In re baby Boy Doe,* 127 Idaho 452, 456, 902 P.2d 477, 481 (1995). On issues of

law, this court exercises free review. *Ausman v. State* 124 Idaho 839, 841, 864 P.2d 1126, 1128 (1993).

C. THE AUTHENTICITY AND WEIGHT OF THE EVIDENCE WAS FOR THE JURY TO DECIDE

Capps demanded a jury trial making the jury the trier of fact. Capps provided a copy of a contract in possession of FIA, the Second Amended and Restated Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place.

In Fox v. Peck Iron and metal Co., Inc., Bkrtcy., 25 B.R. 674 (1982) the court held, "In a case tried to a jury, it is for the district judge to determine whether there is *prima facie* evidence to show that the document is what it is purported to be and, for the jury, as the trier of fact, to make its own determination of the authenticity of the evidence and the weight which it believes it should be accorded. *See* Federal Rule of Evidence 1008; Alexander Dawson, Inc. v. N.L.R.B., 586 F.2d 1300, 1302 (9th Cir. 1978); Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F.Supp. 1190. 1219 (E.Pa. 1980). As to the question of the existence of a *prima facie* showing, all that is required is substantial evidence from which the trier of fact might conclude that the document is authentic."

In Seiler v. Lucasfilms, *Ltd.* 808 F.2d 1316 (9th Cir. 1986) the court stated, "Rule 1008

provides: When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the district is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of facts to determine as in the case of other issues of fact." The conditions in question under Rule 1008(c) are: (1) whether an original can be obtained by any available judicial process; (2) whether an adverse party has possession or control over the original and, if so, whether proper notice was given to that party; and (3) whether evidence goes to a collateral matter or to a controlling issue (commentary – preliminary questions for the court, Federal Rules of Evidence, Rule 1008, p. 656).

The issues for the judge were (1) to determine whether the original can be obtained by any judicial process. Capps had requested the document in discovery and FIA had refused to provide the document. Capps submitted a motion to compel discovery to the court regarding the Pooling and Servicing Agreement (R. Vol. III, p. 552). The court could have ordered FIA to produce the document, but instead chose to ignore Capps' motion. In oral argument on September 25 2008 the following exchange took place (T. Vol. I, p. 28, L. 9-25 & p. 29, L.1-24):

MR. CAPPS: "In addition to this, we have requested from FIA Card Services a certified copy of the second amended and restated pooling and servicing agreement as of October 20th. I believe the year is 2006.

"This document is essential in our defense against FIA Card Services, as it shows a genuine issue over material fact, and that is the standing of FIA Card Services in this case.

"And as a result of our discovery FIA Card Services has essentially refused to provide the document, and subsequent to that we are submitting to the court a motion to compel FIA Card Services to produce the document or in the alternative to admit the previously submitted pooling and servicing agreement as evidence in this case. The pooling and servicing agreement under the Rules of Evidence, Rule 1008(c), the weight of that document as evidence or other evidence of a writing. This also is another issue for the jury to decide the weight of whether this constitutes evidence or other evidence of a writing.

"So, in essence, what we have at this point is we have at least three genuine issues that are in dispute in this case, and these issues are for the jury to weigh and decide. And as a result, we believe that the summary judgment should be vacated and our motion for reconsideration granted.

"And, in addition, FIA withholding the pooling and servicing agreement when it would establish a genuine issue for the jury to decide is essentially improper and should not be allowed. They should be ordered to put that document on the record, or the summary judgment should be vacated simply on that ground alone.

"THE COURT: We have the fact that you don't have the original agreement, the pooling and servicing agreement. What was the third?

"MR. CAPPS: The third issue is the offered pooling and servicing agreement as evidence of a writing or contents of a writing under Rule 1008(c) of the Idaho Rules of Evidence. According to the rules this is an issue for the jury to weigh and decide whether it is or is not evidence of the writing."

The court was obviously aware that Capps was unable to obtain the original document through discovery, so issue (1) was essentially fulfilled. Issue (2) was to determine whether the

adverse party had possession or control over the original and, if so, whether proper notice was given to that party. It is clear from the document itself that it is an internal document to Bank of America under the control of FIA as Servicer. The court commented on Capps' extensive detail in his affidavit and consequently must have been aware that FIA had been given both actual and inquiry notice regarding the Pooling and Servicing Agreement. The above oral argument also establishes that FIA had possession or control over the original document. Condition (2) is thus fulfilled. Issue (3) for the court to decide was whether the evidence goes to a collateral matter or to a controlling issue. The document clearly states that the credit card receivables, and by specific definition the account itself, were sold to the Master Trust, assigning all rights, title and interest to the Trustee (The Bank of New York). Under Idaho case law once an assignment is made the assignor is no longer a real party in interest (see *McClusky v. Galland*, 95 Idaho 472; 511 P.2d 289 (Idaho 1973), supra), which is a controlling issue. The third condition for the court to decide was thus also fulfilled.

As the commentary in the Federal Rules of Evidence on Rule 1008 explain, under "jury issues" (p. 656), "If an issue is raised as to: (a) whether the asserted writing ever existed, (b) whether another writing, recording, or photograph produced at the district is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the jury to determine. An example is provided in the Advisory Committee's Note. "If the plaintiff offers secondary evidence of the contents of an alleged contract, having produced evidence to show the loss of the original, the District Judge cannot take from the jury the question of whether the defendant's claim that no contract was ever executed is sound. If the judge could decide the point, the Advisory Committee states that the case is at an end without ever going to the jury on a central issue. The same reasoning applies where the question of admissibility is the accuracy of

the secondary evidence. The parties should not be deprived of a jury trial where what might be thought of as a preliminary issue is also the ultimate issue to be decided by the jury. Assume *A* and *B* are involved in a contract dispute, and each offers a photocopy of what each claims the contract to be. What are the respective functions of Judge and jury? It seems that the Judge should determine the following question: Assuming that *A* (or *B*) is correct in asserting that his copy is a copy of the actual contract, had *A* (or *B*) shown a valid excuse for not producing the original? If the answer is yes, the judge should let the evidence in for *A*, and do the same for *B* if *B* makes a similar showing, and let the jury decide which of the two copies actually represents the contract between the parties."

Capps provided a copy of the Second Amended and Restated Pooling and Servicing Agreement contract between Bank of America, FIA and the BA Master Credit Card Trust II (R. Vol. II, p. 273-414), with sufficient *prima facie* evidence that the document was what it was purported to be (see Capps' affidavit (R. Vol. II, p. 52- 55). FIA did not object that such a contract did not exist. FIA did not object that Capps' copy of the document was not accurate or reliable. FIA did not object that Capps' copy of the document was not authentic. FIA did not object that the contents of the document provided by Capps did not correctly reflect the contents of the original document. It is therefore uncontested that the contract exists, that Capps' copy is accurate, reliable, authentic, and correctly reflects the contents of the original contract. Capps therefore requests that this court deem the Second Amended and Restated Pooling and Servicing Agreement as admitted into evidence.

ARGUMENT - ISSUE NO. 4

WAS THE DISTRICT COURT'S DECISION THAT FIA HAD STANDING AND WAS THE REAL PARTY IN INTEREST BASED ON SUBSTANTIAL AND COMPETENT EVIDENCE?

A. INTRODUCTION

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit Card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place. The authenticity and weight of the document was for the jury to decide, not the district court judge. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have precluded granting summary judgment by the district court.

B. STANDARD OF REVIEW

A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. ... On appeal, this Court examines the record to see if challenged findings of fact are supported by substantial and competent evidence. Thomas v. Madsen, 142 Idaho 635, 637-38, 132 P.3d 392, 394-95 (2006)(citation omitted).

C. THE STATEMENT USED BY THE DISTRICT COURT IN DECIDING THAT FIA HAD STANDING AND WAS THE REAL PARTY IN INTEREST WAS IN CONFLICT WITH THE CONTRACT BETWEEN FIA AND THE MASTER TRUST.

The terms and conditions relating to the alleged debt and the receivables generated are defined by a contract between FIA and the Master Trust. That contract is the Second Amended and Restated Pooling and Servicing Agreement dated as of October 20 2006 (R. Vol. II, p. 273-414). The district court judge, in his MEMORANDUM DECISION AND ORDER dated July 28 2008 stated (R. Vol. III, p. 509, L. 11-16), "Nothing in the evidence suggests that FIA Card Services transferred to the Master Trust anything more than the receivables on Mr. Capps' account. In fact, the MBNA Credit Card Master Note Trust Prospectus specifically provides that "MBNA transfers the receivables to Master Trust II but continues to own the *credit card accounts*." Prospectus, MBNA Credit Card Master Note Trust at 23 (October 20, 2006) (emphasis added)." The Prospectus is not the contract between FIA and the Master Trust. The statement relied on by the district court does not appear in the actual contract: the Pooling and Servicing Agreement. There is also no equivalent condition, term or statement in the Pooling and Servicing Agreement.

To the contrary, the Pooling and Servicing Agreement explicitly defines the credit card account (with respect to the Receivables now existing and hereafter created for the transfer of accounts (as defined in the Delaware UCC)), which is, "§ 9-102. Definitions and Index of Definitions. (a) Article 9 definitions. (2) "Account", except as used in "account for" means (i) a right to payment of a monetary obligation whether or not earned by performance, (G) arising out of the use of a credit or charge card or information contained on or for use with the card." The "account" is the right to payment of a monetary obligation. What is sold and assigned, with

all rights, title and interest, to the Master Trust includes, "all monies due or to become due with respect to such Receivables (including all Finance Charge Receivables), all Interchange allocable to the Trust as provided herein, all proceeds of such Receivables, Insurance Proceeds and Recoveries relating to such Receivables and the proceeds thereof." (R. Vol. II p. 298). Clearly, within the definitions specified in the Pooling and Servicing Agreement, the Receivables and the "account" are identical. The district court judge's statement that "Nothing in the evidence suggests that FIA Card Services transferred to the Master Trust anything more than the receivables on Mr. Capps' account." is not based on the facts as presented in the Pooling and Servicing Agreement.

While a prospectus may be used to clarify terms in a contract, it cannot be used to introduce entirely new and contrary terms into an existing and settled contract. This is especially true since the Pooling and Servicing Agreement is dated more than a year *after* the Prospectus. The district court judge's statement used as the basis for his decision is not based on the actual contract between FIA and the Master Trust but rather on parole evidence that has no real bearing on the terms of the contract. The district court's decision is therefore not based on substantial and competent evidence and constitutes reversible error. Capps thus requests that this court VACATE the district court's decision that FIA has standing and is a real party in interest and REMAND the case for trial by a jury.

ARGUMENT - ISSUE NO. 5

DID THE DISTRICT COURT VIOLATE DUE PROCESS BY RENDERING A DECISION BEFORE DISCOVERY WAS COMPLETE AND BEFORE THE CASE WAS RIPE?

A. INTRODUCTION

Capps raised two affirmative defenses in his ANSWER TO COUNTERCLAIMS (R. Vol. I, p. 22), *inter alia*, that "18. The Defendant is not a real party in interest in this action and cannot maintain a counterclaim Action against the Plaintiff." And that "19. The Defendant cannot establish standing and as such cannot invoke the jurisdiction of this court for its counterclaims." Capps was pursuing FIA's financial records as proof that FIA had removed the account in question from its books as a result of the sale of the account and the associated receivables to the BA master Credit Card Trust II and was no longer owner of the alleged debt. Capps filed a MOTION TO COMPEL DISCOVERY (R. Vol. IV, p. 594-600), which the district court granted. FIA's answers were evasive and incomplete. Capps filed a MOTION TO SHOW CAUSE regarding the evasive and incomplete answers. The district court DENIED the motion based on the fact that it had dismissed Capps' claims (R. Vol. III, p. 565).

B. STANDARD OF REVIEW

> A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. ... On appeal, this Court examines the record to see if challenged findings of fact are supported by substantial and competent evidence. Thomas v. Madsen, 142 Idaho 635, 637-38, 132 P.3d 392, 394-95 (2006)(citation omitted).

C. DISCOVERY WAS STILL IN PROCESS

In Dunnick v. Elder, 126 Idaho 308, 882 P.2d 475 (1984), the Court of Appeals of Idaho stated, "The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated,

> In our view, [HN5] the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. '[The] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) ...' *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (citations omitted).
>
> The language and reasoning of *Celotex* has been adopted by the appellate courts of Idaho. *See, e.g., G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Barab v. Plumleigh*, 123 Idaho 890, 892, 853 P.2d 635, 637 (Ct. App. 1993); *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 941, 854 P.2d 280, 284 (Ct. App. 1993); *Ryan v. Beisner*, 123 Idaho 42, 44-45, 844 P.2d 24, 26-27 (Ct. App. 1992)."

One of the crucial elements for a summary judgment hearing was ignored by the district court: adequate time for discovery. It is clear from the proceedings that discovery was still in progress. The court had not scheduled a time for completion of discovery and several discovery related motions were before the court; specifically, Capps' Motion to Show Cause (R. Vol. III, p.), and his Motion to Compel Discovery (R. Vol. III, p. 552).

The implication of the documents sought in discovery, as pointed out by the district court in the MEMORANDUM DECISION AND ORDER of July 22, 2008 (R. Vol. III, p. 495-96), is that "A material fact to these defenses is whether or not FIA Card Services owns the account in question. The information requested by Mr. Capps in his Interrogatory Request No. 5, namely the financial records relating to the account in question, will help

prove whether FIA in fact owns the account in question. I therefore hold that such information is relevant." Since the contents of the Pooling and Servicing Agreement detail the sale of the receivables and the associated account, including all rights, title and interest, to a third party, it is equally relevant and material to FIA's standing and whether FIA is the real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure. The fact that the receivables associated with the alleged account, and the alleged account itself, were sold to a third party, if proved at trial, would eliminate FIA as a proper plaintiff and also remove the jurisdiction of the district court.

"Due Process is a flexible constitutional principle, and calls for such procedural protection as the particular situation demands." In re Baby Doe, 130 Idaho 47, 936 P.2d 690 (Ct. App. 1997). From State of Idaho, Buerau of Child Support Services v. Garcia, 132 Idaho 505, 975 P.2d 793, (1999) Ida. App. LEXIS 8, "The essence of due process is the right to be heard at a meaningful time and in a meaningful manner. *See also* Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)." "The 'basic concepts of fair play' are 'inexorable safeguards' for due process." Garvey v. Freeman, 397 F.2d 600; 1968 U.S. App. LEXIS 6309.

When the district court ignored Capps' Motion to Compel Discovery regarding the Pooling and Servicing Agreement in favor of granting summary judgment to FIA, Capps was deprived of the right to be heard at a meaningful time (when the Pooling and Servicing Agreement would have been properly on the record as evidence) and in a meaningful manner (with solid evidence on the record that FIA was not the real party in interest and had no standing). The fact that standing and the real party in interest were issues for the jury and not the district court judge is additional evidence of the district court violating Capps' due

process rights. To deprive Capps of critical evidence and the cooperation of the court in obtaining that and additional evidence to support his case violates any sense of fair play and removes any concept of safeguards from the judicial process.

The district court also granted FIA's motion to dismiss Capps' claims while discovery was still in progress, ignoring the fact that FIA was evading discovery and violating the discovery order of the court. It is clear from the proceedings that due process was not being followed and Capps' due process rights were being violated.

Capps therefore requests that this court VACATE the summary judgment against him, VACATE the denial of Capps' Motion to Show Cause, REINSTATE Capps' Motion to Compel Discovery, REINSTATE Capps' claims in his complaint, and REMAND this case for continued discovery, a jury trial and any remaining procedures.

ARGUMENT - ISSUE NO. 6

DID THE DISTRICT COURT IMPROPERLY DISMISS THE PLAINTIFF'S MOTION TO SHOW CAUSE?

A. INTRODUCTION

Capps raised two affirmative defenses in his ANSWER TO COUNTERCLAIMS (R. Vol. I, p. 22), *inter alia*, that "18. The Defendant is not a real party in interest in this action and cannot maintain a counterclaim Action against the Plaintiff." And that "19. The Defendant cannot establish standing and as such cannot invoke the jurisdiction of this court for its counterclaims." Capps was pursuing FIA's financial records as proof that FIA had removed the account in question from its books as a result of the sale of the account and the associated receivables to the BA master Credit Card Trust II and was no longer owner of the alleged debt. Capps filed a MOTION TO COMPEL DISCOVERY (R. Vol. IV, p. 594-600), which the district court granted. FIA's answers were evasive and incomplete. Capps filed a MOTION TO SHOW CAUSE regarding the evasive and incomplete answers. The district court DENIED the motion based on the fact that it had dismissed Capps' claims (R. Vol. III, p. 565).

B. STANDARD OF REVIEW

A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. ... On appeal, this Court examines the record to see if challenged findings of fact are supported by substantial and competent evidence. Thomas v. Madsen, 142 Idaho 635, 637-38, 132 P.3d 392, 394-95 (2006)(citation omitted).

C. THE SHOW CAUSE MOTION WAS BASED ON AN AFFIRMATIVE DEFENSE

Two affirmative defenses were raised based on FIA's lack of standing: That FIA was not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure because the

alleged debt had been sold, with all rights, title and interest assigned to a third party, and that FIA could not establish standing because the alleged debt was sold, and FIA could not prove any damages. Without actual damages, FIA could not invoke the jurisdiction of the court.

The fact that the alleged debt was sold is established in both a PROSPECTUS, dated October 11, 2005 (R. Vol. II, p. 71-272) and a SECOND AMENDED AND RESTATED POOLING AND SERVICING AGREEMENT dated October 20, 2006 (R. Vol. II, p. 273-414). Capps was pursuing certain FIA financial records generally identified in the PROSPECTUS and the POOLING AND SERVICING AGREEMENT, as proof that FIA did not have the alleged debt on its books, did not claim the alleged debt either as an asset or a liability, did not have any ownership interest in the alleged debt, and had no financial damages relating to the alleged debt. Capps filed a MOTION TO COMPEL DISCOVERY on April 4 2008 (R. Vol. IV, p. 594-600) seeking the nomenclature used in FIA's record keeping system so the specific financial records could be properly identified. The district court granted Capps' motion in its April 29 2008 ORDER GRANTING MOTIONS (R. Vol. IV, p. 601-602). FIA was given 60 days to comply with the court's order.

FIA's response to the court order was evasive and incomplete. Capps then filed a MOTION TO SHOW CAUSE on September 11 2008 (R. Vol. III, p. 559-564), asking the district court to order FIA to show cause why it should not be held in contempt of court for failure to properly comply with the court's order of July 22, 2008. In Capps' MOTION TO SHOW CAUSE, the issue was clearly identified as being related to Capps' affirmative defenses, specifically (R. Vol. III, p. 560), "Capps has raised affirmative defenses that FIA 'lacks standing' and 'is not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure.' In the MEMORANDUM DECISION AND ORDER of July 22, 2008 (R. Vol. III, p. 495-96), the

district court held that 'A material fact to these defenses is whether or not FIA Card Services owns the account in question. The information requested by Mr. Capps in his Interrogatory Request No. 5, namely the financial records relating to the account in question, will help prove whether FIA in fact owns the account in question. I therefore hold that such information is relevant.'"

On October 30 2008 the district court issued a DECISION AND ORDER stating (R. Vol. III, p. 565), "IT IS HEREBY ORDERED that the motion to show cause why FIA Card Services should not be held in contempt of court is DENIED. The issue is moot because Mr. Capps' complaint was dismissed." As noted in Capps' motion to show cause (R. Vol. III, p. 560), the issue in Interrogatory No. 5 was related to Capps' affirmative defenses, not his complaint. The district court improperly denied Capps' motion to show cause. Capps therefore requests that this court REVERSE the district court's order denying his motion, reinstate his Motion to Show Cause, and REMAND to the district court for further processing consistent with this court's decision.

ARGUMENT - ISSUE NO. 7

DID THE DISTRICT COURT ERR BY RELYING ON AN UNSETTLED CASE AS THE BASIS FOR ITS DECISION?

A. INTRODUCTION

Capps provided a copy of a contract in possession of FIA, the Pooling and Servicing Agreement between FIA and the BA Master Credit card Trust II, and notified FIA that the copy was being presented as evidence. The copy was admissible under Rule 1004(3) of the Idaho Rules of Evidence. Capps had sought a certified copy of the contract during discovery and FIA refused to provide the document. Capps provided *prima facie* evidence that the document was what it was purported to be Under Rule 1008(c) of the Idaho Rules of Evidence. FIA did not object to the document as not being authentic and did not provide a certified copy of the document in its place. The authenticity and weight of the document was for the jury to decide, not the district court. The document is proof that FIA is not a real party in interest in this action and constitutes a dispute of a material fact, which should have prevented granting summary judgment by the district court.

B. STANDARD OF REVIEW

> A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. ... On appeal, this Court examines the record to see if challenged findings of fact are supported by substantial and competent evidence. Thomas v. Madsen, 142 Idaho 635, 637-38, 132 P.3d 392, 394-95 (2006)(citation omitted).

C. THE CASE THE COURT USED AS THE BASIS FOR ITS REASONING WAS ON APPEAL

FIA asked the district court to take judicial notice of a previous case: Citibank (South

Dakota) N.A. v. Miriam Carroll, CV-06-37067 (Idaho Supreme Court Docket No. 35053). Capps objected as follows: (R. Vol. III, p. 421) "The Plaintiff hereby objects based on relevance, to the court taking judicial notice as the referenced case and pleadings are different in its terms and conditions, as demonstrated in section I above, and therefore are not relevant to this case. In addition, the referenced case is currently in appeal and none of the issues raised by the Defendant are in fact settled. As such, this court should DECLINE judicial notice."

The court used the reasoning from a case currently on appeal as follows: (R. Vol. III, p. 509) "The receivables are separate from the account contract and the one can be transferred without the other. *Citibank (South Dakota) N.A. v. Miriam Carroll*, CV-06-37067 (2nd Dist. Idaho, December 10, 2007). The record reflects that only the receivables on Mr. Capps' account were transferred to the Master Trust. As owner of the account itself, FIA has standing to collect the debt owed on the account. It is of no moment that FIA contractually obliged itself to transfer the money it collects on its accounts to the Master Trust."

The Pooling and Servicing Agreement clearly states in section 2.01 (R. Vol. II, p. 298), "In connection with such transfer, assignment, set-over and conveyance, the transferor agrees to record and file, at its own expense, all financing statements (including any amendments of financing statements and continuation statements when applicable) with respect to the Receivables now existing and hereafter created for the transfer of accounts (as defined in the Delaware UCC)". (Emphasis added). In section 2.05, the Pooling and Servicing Agreement states (R. Vol. II, p. 306), "Covenants of the Transferor. The Transferor hereby covenants that: (a) Receivables to be Accounts. ... The Transferor will take no action to cause any Receivable to be anything other than an account (as defined in the Delaware UCC)." In section 2.09 the Pooling and Servicing Agreement also states (R. Vol. II, p. 315), "Additional Representations

and Warranties of the Transferor. …(b) The Collateral constitutes "accounts" within the meaning of the Delaware UCC."

Account, as defined in the Delaware UCC is, "**§9-102. Definitions and Index of definitions.** (a) **Article 9 definitions.** (2) "Account", except as used in "account for" means (i) a right to payment of a monetary obligation whether or not earned by performance, (G) arising out of the use of a credit or charge card or information contained on or for use with the card." All rights, including the right to payment of a monetary obligation, were transferred and assigned to the Master Trust per the Pooling and Servicing Agreement as demonstrated above. There is nothing in the Pooling and Servicing Agreement stating that the transferor, or FIA, has retained the account after the transfer and assignment to the Master Trust. The Pooling and Servicing Agreement clearly establishes that FIA does not own the account.

The reasoning of the district court was not based on substantial and competent evidence and constitutes reversible error. In addition, this decision was for the jury, not the district court judge. Capps therefore requests that this court VACATE the summary judgment against him, VACATE the district court decision that FIA has standing and is a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure, and REMAND the case for further proceedings and a jury trial.

CONCLUSION

The district court made a decision in summary judgment when it was for the jury to weigh the evidence and decide the case. There were several genuine disputes over the material facts of the case precluding summary judgment. The district court ignored the fact that discovery was still in progress, denying Capps his due process rights by granting summary judgment. Capps had raised at least two affirmative defenses relating to the real party in interest and the existence of damages leading to a lack of standing. Capps also provided documents in support of his affirmative defenses substantially proving that FIA was not the real party in interest and did not have standing. FIA had the burden of proving that there were no genuine disputes over the material facts of the case, and failed to provide any evidence disproving Capps' affirmative defenses that FIA was not the real party in interest and did not have standing under Rule 17(a) of the Idaho Rules of Civil Procedure.

The district court first decided Capps' evidence (the Pooling and Servicing Agreement and the Prospectus) regarding FIA's not being a real party in interest and not having standing could not be considered, and then used that same evidence as the basis for making a decision that was for the jury to make. The district court did not make its decision based on competent and substantial evidence, but rather on parole evidence that was not relevant or material to the contract between FIA and the Master Trust (the Pooling and Servicing Agreement). The district court also ignored Rule 1004(3) and Rule 1008(c) of the Idaho Rules of Evidence in crafting its judgment against Capps. The district court improperly dismissed Capps' Motion to Show Cause, and the claims in his Complaint.

Capps therefore requests that this court VACATE the summary judgment against him, VACATE the district court's decision that FIA is a real party in interest and has standing,

REINSTATE Capps' Motion to Show cause, the claims in his Complaint, all of his affirmative defenses, his Motion to Compel Discovery, DEEM the Prospectus and the Second Amended and Restated Pooling and Servicing Agreement as entered into evidence and REMAND this case for further discovery, proceedings and a jury trial on all issues.

Dated this 27TH day of April 2009.

David F. Capps, Appellant/Plaintiff, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify, under penalty of perjury, that I mailed two true and correct copies of this APPELLANT'S BRIEF to the attorney for the respondent this 27TH day of April 2009 by Certified Mail #7006 2150 0003 4551 2481 at the following address:

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David F. Capps