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# Capps v. FIA Card Services, N.A. Clerk's Record v. 1 Dckt. 35891

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LAW CLERK®

IN THE

### SUPREME COURT

OF THE

STATE OF IDAHO

David Capps			
Plaintiff and Appellant			
FIA Card Services, N.A. Jka MBNA america Bank, n.A			
Defendant and Respondent			
Appealed from the District Court of the Sloom of Judicial District for the State of Idaho, in and for County			
Hon. She badblery District Judge			
Attorney_for Appellant			
alec Pechota			
Filed this day of			
Clerk  By Supreme CourtCourt of Appeals Deputy  Entered on ATS by			

35891

### IN THE SUPREME COURT OF THE STATE OF IDAHO

David Capps,

Plaintiff/Appellant

vs.

SUPREME COURT
NO. 35891

FIA Card Services, N.A.
Fka MBNA America Bank, N.A.,
Defendant/Respondent.

\*\*\*\*\*\*\*\*

CLERK'S RECORD ON APPEAL

\*\*\*\*\*\*\*\*\*

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Idaho.

HONORABLE John Bradbury

\*\*\*\*\*\*\*\*

David Capps 104 Jefferson Drive Kamiah, ID 83536

Alec Pechota Attorney at Law PO Box 1544 Boise, ID 83701

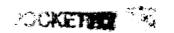
### TABLE OF CONTENTS

Complaint1	
Entry and Order of Default 8	
Amended Entry and Order of Default	0
Order for Pretrial Scheduling Conference	2
Amended Complaint Demand for Jury Trial	5
Answer to Counterclaims23	
Order on Defendant's Motion to Stay Proceedings	
Answer and Counterclaim26	
Opposition to Motion for Summary Judgment	4
Order Staying Order to Compel Discovery43	
Memorandum Decision and Order43	17
Post Hearing Memorandum41	1 9
Affidavit of David F. Capps48	
Memorandum Decision and Order49	
Memorandum Decision and Order49	
Motion for Reconsideration51	
Affidavit in Support of Motion for Reconsideration	
Motion for Continuance Under Rule 56(f)54	
Motion to Dismiss54	
Supplemental Motion for Continuance Under Rule 56(f)55	
Motion to Show Cause55	
Decision and Order56	
Memorandum Decision and Order56	
Memorandum Decision and Order57	
Judgment58	
Notice of Appeal58	
Appeal Order	
Clerk's Certificate59	
Clerk's Certificate Re: Exhibits59	
Motion to Compel Discovery59	
Order Granting Motions60	
Motion for Summary Judgment60	)3
Memorandum in Support of Summary Judgment60	) 5
Affidavit in Support of Summary Judgment61	L1
Reply Memorandum in Support of Summary Judgment63	3 5
Reply and Objection to Plaintiff's Post Hearing Memorandum65	53
Opposition to Motion for Reconsideration65	5 5
Opposition to Motion for Continuance66	54

### INDEX

Affidavit in Support of Motion for Reconsideration	526
Affidavit in Support of Summary Judgment	611
Affidavit of David F. Capps	489
Amended Complaint Demand for Jury Trial	15
Amended Entry and Order of Default	
Answer and Counterclaim	26
Answer to Counterclaims	21
Appeal Order	589
Clerk's Certificate Re: Exhibits	593
Clerk's Certificate	591
Complaint	1
Decision and Order	565
Entry and Order of Default	8
Judgment	581
Memorandum Decision and Order	417
Memorandum Decision and Order	
Memorandum Decision and Order	499
Memorandum Decision and Order	
Memorandum Decision and Order	573
Memorandum in Support of Summary Judgment	
Motion for Continuance Under Rule 56(f)	541
Motion for Reconsideration	516
Motion for Summary Judgment	603
Motion to Compel Discovery	594
Motion to Dismiss	547
Motion to Show Cause	
Notice of Appeal	583
Opposition to Motion for Continuance	664
Opposition to Motion for Reconsideration	
Opposition to Motion for Summary Judgment	
Order for Pretrial Scheduling Conference	
Order Granting Motions	
Order on Defendant's Motion to Stay Proceedings	
Order Staying Order to Compel Discovery	
Post Hearing Memorandum	
Reply and Objection to Plaintiff's Post Hearing Memorandum	
Reply Memorandum in Support of Summary Judgment	
Supplemental Motion for Continuance Under Rule 56(f)	551

David F. Capps HC-11 Box 366 Kamiah, ID 83536 208-935-7962 FAX: 208-926-4169 Plaintiff, in propria persona



AT // SC O'CLOCK A.M.

AUG 08 2007

HOSE E. GEHRING CLERK OF DISTRICT COURT DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS,	
Plaintiff,	) ) Case No. <b>CV-2007</b>
VS.	) ) COMPLAINT
FIA CARD SERVICES, N.A., and,	) )
NATIONAL ARBITRATION FORUM,	DEMAND FOR JURY TRIAL
Defendants,	) )

COMES NOW the Plaintiff, David F. Capps, for cause of action against the Defendants and alleges as follows:

- 1. That the Defendant, FIA Card Services, is a foreign corporation doing business in the State of Idaho.
- 2. That the Defendant, National Arbitration Forum, is a foreign corporation with a representative licensed to do business in the State of Idaho.

- That this court has jurisdiction pursuant to Idaho Code Title 28, Chapter
   and Idaho Code Title 7, Chapter 9.
- 4. That the Defendants violated the Plaintiff's Civil Rights, specifically the right to a trial by jury, protected by the Seventh Amendment to the U.S. Constitution, as follows:
  - a. That the Defendant, FIA Card Services, filed an arbitration claim with the National Arbitration Forum against the Plaintiff without a valid agreement to do so.
  - b. That the Plaintiff timely objected to such arbitration based on no agreement to arbitrate.
  - c. That the Defendant, FIA Card Services, proceeded with arbitration without proper authority or jurisdiction.
  - d. That the Defendant, National Arbitration Forum, proceeded with arbitration without proper authority or jurisdiction.
  - e. That the Defendant, National Arbitration Forum, issued an award without proper authority or jurisdiction.
  - f. That the Defendant, FIA Card Services, obtained an award letter from the National Arbitration Forum against the Plaintiff without proper authority or jurisdiction.
  - g. That the Plaintiff at no time voluntarily, knowingly and intelligently waived his right to a trial by jury.
  - h. That the Plaintiff was damaged by the award letter in the amount of \$15,448.35.

COMPLAINT Pg. 2 of 7.

- 5. That the Defendant, FIA Card Services, committed the tort of Negligence as follows:
  - a. That the Defendant had a duty not to violate the constitutionally protected rights of the Plaintiff.
  - b. That the Defendant either knew, or should have known that the alleged arbitration agreement was not valid.
  - c. That the Defendant either knew, or should have known, that the Plaintiff did not voluntarily, knowingly and intelligently waive his Seventh Amendment protection to his right of a trial by jury.
  - d. That the Defendant breached their duty of care and proceeded willfully with arbitration knowing that the Plaintiff would be damaged by this action.
  - e. That the Plaintiff was damaged by the award letter issued by the National Arbitration Forum in the amount of \$15,448.35.
  - f. That the Plaintiff's damage was the direct result of the Defendant's invalid arbitration claim.
- 6. That the Defendant, National Arbitration Forum, committed the tort of Negligence as follows:
  - a. That the Defendant had a duty not to violate the constitutionally protected rights of the Plaintiff.
  - b. That the Defendant either knew, or should have known that the National Arbitration Forum had no authority or jurisdiction to

**COMPLAINT** 

Pg. 3 of 7.

- proceed with arbitration after the Plaintiff objected to arbitration on the basis of no agreement to arbitrate.
- c. That the Defendant either knew, or should have known, that the Plaintiff did not voluntarily, knowingly and intelligently waive his Seventh Amendment protection to his right of a trial by jury.
- d. That the Defendant breached their duty of care and proceeded willfully to issue an arbitration award without proper authority or jurisdiction, knowing that the Plaintiff would be damaged by this action.
- e. That the Plaintiff was damaged by the award letter issued by the National Arbitration Forum in the amount of \$15,448.35.
- f. That the Plaintiff's damage was the direct result of the Defendant's proceeding with arbitration without proper authority or jurisdiction.
- 7. That the Defendants, acting together and for the benefit of the individual Defendants committed the act of Civil Conspiracy as follows:
  - a. That the Defendants engaged in arbitration against the Plaintiff without proper authority or jurisdiction to do so.
  - b. That each Defendant acted for their own benefit for financial gain.
    FIA Card Services acted to obtain an arbitration award for the financial benefit of the award letter. That the National Arbitration
    Forum acted to obtain the fees and continued customer activity
    (repeat customer) of FIA Card Services.

COMPLAINT Pg. 4 of 7.

- c. That the Defendant, FIA Card Services, filed an arbitration claim, when the Defendant either knew, or should have known, that the Plaintiff had not voluntarily, knowingly and intelligently waived his right to a trial by jury.
- d. That the Defendant, National Arbitration Forum proceeded with arbitration when the Defendant either knew, or should have known, that it did not have proper authority or jurisdiction to do so.
- e. That the Plaintiff was damaged in the amount of \$15,448.35 by the award letter.
- f. That the Plaintiff's damages were the direct result of the conspiracy between the Defendants.
- g. That the damages to the Plaintiff are continuing through having to defend against the award letter.
- 8. That the Defendant, FIA Card Services, committed the tort of Fraud by misrepresentation against the Plaintiff as follows:
  - a. That the Defendant claimed that a valid agreement to arbitrate existed when the Defendant either knew, or should have known, that the Plaintiff did not voluntarily, knowingly, and intelligently waive his Seventh Amendment protection of his right to a trial by jury.
  - That the Defendant had a statutory duty for honesty and fair dealing.

- That the Defendant intended the Plaintiff to depend on the Defendant's duty for honesty and fair dealing.
- d. That the Plaintiff did depend, to the detriment of the Plaintiff, on the Defendant's duty for honesty and fair dealing.
- e. That the Defendant willfully proceeded to arbitration without proper authority or jurisdiction, when the Defendant either knew or should have known that the Plaintiff would be damaged by this action.
- f. That the Plaintiff was damaged by the award letter issued by the National Arbitration Forum in the amount of \$15,448.35
- g. That Plaintiff's damage was the direct result of Defendant's fraudulent arbitration claim.
- 9. That the award, issued by the National Arbitration Forum, was procured by corruption, fraud or other undue means.
- 10. That the award, issued by the National Arbitration Forum, was obtained with evident partiality on the part of the National Arbitration Forum and the arbitrator.
- 11. That the arbitrator employed by the National Arbitration Forum exceeded his authority and power in deciding this claim and issuing the award letter.
- 12. That the Defendant proceeded to arbitration without a valid agreement to arbitrate.
- 13. That the Plaintiff did not participate in the arbitration without raising the objection.

The Plaintiff therefore demands a jury trial for relief in this court under Idaho Code Title 7, Chapter 9, Section 912 to have the award letter vacated as follows:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality on the part of the National Arbitration Forum and its arbitrator;
- (3) The arbitrator exceeded his authority;
- (4) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 7-902, Idaho Code, and the party did not participate in the arbitration hearing without raising the objection.

The Plaintiff also demands a jury trial and seeks:

Damages for the violation of the Plaintiff's Civil Rights.

Damages for the tort of Civil Conspiracy.

Damages for the tort of Fraud.

Damages for tort of Negligence.

For costs of court incurred herein.

For such other and further relief as the court may deem just.

DATED AND SIGNED this 8th day of August, 2007.

David F. Capps, P

Laintiff in propria

, in propria person

COMPLAINT

Pg. 7 of 7.

DOCKETED

AT 48 O'CLOCK .M.

SEP 17 2007

ROSE E. GEHRING
CLERK OF DISTRICT COURT
CHANGE DEPUTY

David F. Capps HC-11 Box 366 Kamiah, ID 83536 208-935-7962 FAX: 208-926-4169

Plaintiff, in propria persona

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS	)
Plaintiff,	) Case No. <b>CV-07-38202</b>
VS.	) ENTRY AND ORDER ) OF DEFAULT
FIA CARD SERVICES, N.A., and NATIONAL ARBITRATION FORUM,	) )
Defendants,	) ) )

IT APPEARING that the Defendant, FIA Card Services, N.A., was duly and regularly served with process and having failed to appear and plead to the Complaint on file herein, and it further appearing from the Affidavit of DAVID F. CAPPS that the above named Defendant is not in the military services of the United States of America, as defined by Section 101(1) of the Servicemembers Civil Relief Act (SCRA), nor is said Defendant a minor or incompetent person.

IT IS THEREFORE ORDERED That the default of said Defendant may be

entered according to law. is Klenned for want of filesuction 17 day of September, 2007.

Judge

### **CERTIFICATE OF SERVICE**

I, the Clerk of the District Court hereby certify on the \_\_\_\_\_\_ day of September, 2007, that I mailed a true and correct copy of the foregoing ENTRY AND ORDER OF DEFAULT by regular United States Mail with the correct postage affixed thereon addressed to:

FIA Card Services, N.A. 1100 N. King St. Wilmington, DE 19884

David F. Capps HC-11 Box 366 Kamiah, ID 83536-9410

ROSE E. GEHRING , Clerk

Clerk of the District Court

IDAHO COUNTY DISTRICT COURT AT 2:45 FILED

David F. Capps HC-11 Box 366

Kamiah, ID 83536 208-935-7962

FAX: 208-926-4169

Plaintiff, in propria persona

DOCKETED

SEP 21 2007

ROSE E. GEHRING CLERK OF DISTRICT COURT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS	)	
Dlaintiff	)	Case No. CV-07-38202
Plaintiff,	)	AMENDED
VS.	)	ENTRY AND ORDER
	)	OF DEFAULT
FIA CARD SERVICES, N.A., and	)	
NATIONAL ARBITRATION FORUM,	)	
	)	
Defendants,	)	
	)	

IT APPEARING that the Defendant, FIA Card Services, N.A., was duly and regularly served with process and having failed to appear and plead to the Complaint on file herein, and it further appearing from the Affidavit of DAVID F. CAPPS that the above named Defendant is not in the military services of the United States of America, as defined by Section 101(1) of the Servicemembers Civil Relief Act (SCRA), nor is said Defendant a minor or incompetent person.

IT IS THEREFORE ORDERED That the default of said Defendant may be

entered according to law up aloned far want of which is now useld in The Dated this 3/ day of September, 2007. US Alestreat Court



I, the Clerk of the District Court hereby certify on the 21<sup>S+</sup> day of September, 2007, that I mailed a true and correct copy of the foregoing ENTRY AND ORDER OF DEFAULT by regular United States Mail with the correct postage affixed thereon addressed to:

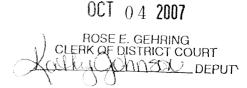
FIA Card Services, N.A. 1100 N. King St. Wilmington, DE 19884

David F. Capps HC-11 Box 366 Kamiah, ID 83536-9410

ROSE E. GEHRING , CLENK

Clerk of the District Court

DOCKETED



## IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

David F. Capps,	) CASE NO. CV 07-38202
Plaintiff,	ORDER FOR PRETRIAL  SCHEDULING CONFERENCE  ORDER FOR PRETRIAL
VS.	
FIA Card Services, N.A. and National Arbitration Forum,	) )
Defendant.	)

Pursuant to Civil Rule 16(a)(1) & (3) & 16(b) a telephonic pretrial scheduling conference will be held with the District Judge at Grangeville, Idaho, on Thursday, December 6, 2007 at 2:00 p.m. Counsel and unrepresented parties shall be prepared and with authority to discuss and stipulate regarding those issues set forth in Civil Rule 16(b). The court will place the call.

In preparation for the conference and within 30 days of this order, each party, without the need for a formal discovery request, shall file with the court and provide every other party the following:

1. The name, last known address and telephone number of each person known by a party to have knowledge or information about the claims or defenses of any party to this action, together with the subject of the knowledge or information. Witnesses to be used

ORDER FOR PRETRIAL SCHEDULING CONFERENCE 1

\_ 1 1 2

solely for impeachment need not be included.

2. Make available for copying or inspection all documents, data compilations, and tangible things that are subject to the control of the disclosing party that are relevant to the claims or defenses of any party to this action, unless it is to be used solely for

impeachment.

3. Computations of each category of damages claimed by the disclosing party and make available for inspection and copying the non-privileged documents and other evidentiary

material on which the computations are based and any other documents or materials that

pertain to the nature and extent of the damages.

4. Any insurance or indemnity policy that may cover any claims or defenses in this action

or indemnify any party for some or all of any judgment rendered in this action.

As soon as practicable after complying with the foregoing paragraph, the parties

shall confer to (1) better define the bases of their claims and defenses, (2) discuss the

possibilities of settlement, and (3) develop a discovery plan which shall include a list of

agreed discovery and a list of discovery to which a party objects, noting who objects and

the gist of each objection. The parties shall be jointly responsible for formulating the

discovery plan and filing it with the court not later than 5 days before the date of the

scheduling conference.

BY ORDER OF THE COURT.

DATED this 4th day of October 2007.

Rose E. Gehring, Clerk

Deputy Court Clerk

ORDER FOR PRETRIAL SCHEDULING CONFERENCE 2

1 19

### **CERTIFICATE OF MAILING**

I hereby certify that a true copy of the foregoing ORDER FOR PRETRIAL SCHEDULING CONFERENCE, was mailed, postage prepaid or hand delivered by the undersigned at Grangeville, Idaho, this 4th day of October 2007, to:

David F. Capps HC 11 Box 366 Kamiah, ID 83536

Jeffrey M. Wilson Attorney at Law PO Box 1544 Boise, ID 83701

ROSE E. GEHRING, Clerk

Denuty Clerk

ORDER FOR PRETRIAL SCHEDULING CONFERENCE 3

David F. Capps
HC-11 Box 366
Kamiah, ID 83536

AT3 48 FILED O'CLOCK P.M.

OCT 12 2007

ROSE E. GEHRING
CLERK OF DISTRICT COURT
CLERK OF DISTRICT COURT
CLERK OF DISTRICT COURT

Kamiah, ID 83536 208-935-7962 FAX: 208-926-4169 Plaintiff, in propria persona

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS,	)
Plaintiff,	) Case No. <b>CV-07-38202</b>
	AMENDED COMPLAINT
VS.	) DEMAND FOR JURY TRIAL
FIA CARD SERVICES, N.A.,	)
Defendant,	)
	)

COMES NOW the Plaintiff, David F. Capps, for cause of action against the Defendant and alleges as follows:

- That the Defendant, FIA Card Services, N.A., is a foreign corporation doing business in the State of Idaho.
- 2. That the District Court of the State of Idaho has jurisdiction pursuant to Idaho Code Title 28, Chapter 41 and Idaho Code Title 7, Chapter 9.

Section 7, as follows:

- 3. That the Defendant violated the Plaintiff's Civil Rights, specifically the right to trial by jury, protected by the Constitution of the State of Idaho, Article 1,
  - a. That the Defendant, FIA Card Services, filed an arbitration claim with the National Arbitration Forum against the Plaintiff without a valid agreement to do so.
  - b. That the Plaintiff timely objected to such arbitration based on no agreement to arbitrate.
  - c. That the Defendant, FIA Card Services, proceeded with arbitration without proper authority or jurisdiction
  - d. That the Defendant, FIA Card Services obtained an award letter from the National Arbitration Forum against the Plaintiff without proper authority or jurisdiction.
  - e. That the Plaintiff at no time voluntarily, knowingly and intelligently waived his right to a trial by jury.
  - f. That the Plaintiff was damaged by the award letter in the amount of \$15,448.35.
- 4. That the Defendant, FIA Card Services, committed the tort of Negligence as follows:
  - a. That the Defendant had a duty not to violate the constitutionally protected rights of the Plaintiff.
  - b. That the Defendant either knew, or should have known that the alleged arbitration agreement was not valid.

- c. That the Defendant either knew, or should have known, that the Plaintiff did not voluntarily, knowingly and intelligently waive his State of Idaho Constitutionally protected Article 1, Section 7 right to a trial by jury.
- d. That the Defendant breached their duty of care and proceeded willfully with arbitration knowing that the Plaintiff would be damaged by this action.
- e. That the Plaintiff was damaged by the award letter issued by the National Arbitration Forum in the amount of \$15,448.35.
- f. That the Plaintiff's damage was the direct result of the Defendant's invalid arbitration claim.
- 5. That the Defendant, FIA Card Services, committed the tort of Fraud by misrepresentation against the Plaintiff as follows:
  - a. That the Defendant claimed that a valid agreement to arbitrate existed when the Defendant either knew, or should have known, that the Plaintiff did not voluntarily, knowingly and intelligently waive his State of Idaho Constitutionally protected Article 1, Section 7 right to a trial by jury.
  - That the Defendant had a statutory duty for honesty and fair dealing.
  - c. That the Defendant intended the Plaintiff to depend on the Defendant's duty for honesty and fair dealing.

AMENDED COMPLAINT - DEMAND FOR JURY TRIAL

Pg. 3 of 5.

- d. That the Plaintiff did depend, to the detriment of the Plaintiff, on the Defendant's duty for honesty and fair dealing.
- e. That the Defendant willfully proceeded to arbitration without proper authority or jurisdiction, when the Defendant either knew, or should have known, that the Plaintiff would be damaged by this action.
- f. That the Plaintiff was damaged by the award letter issued by the National Arbitration Forum in the amount of \$15,448,35
- g. That Plaintiff's damage was the direct result of Defendant's fraudulent arbitration claim.
- 6. That the award, issued by the National Arbitration Forum, was procured by corruption, fraud or other undue means.
  - a. That the award, issued by the National Arbitration Forum, was obtained with evident partiality on the part of the National Arbitration Forum and the arbitrator.
  - b. That the arbitrator employed by the National Arbitration Forum exceeded his authority and power in deciding this claim and issuing the award letter.
  - c. That the Defendant proceeded to arbitration without a valid agreement to arbitrate.
  - d. That the Plaintiff did not participate in the arbitration without raising the objection.

AMENDED COMPLAINT - DEMAND FOR JURY TRIAL

Pg. 4 of 5.

The Plaintiff therefore demands a jury trial for relief in the District Court of the State of Idaho under Idaho Code Title 7, Chapter 9, Section 912 to have the award letter vacated as follows:

- (1) The award was procured by corruption, fraud or other undue means;
- (2) There was evident partiality on the part of the National Arbitration Forum and its arbitrator;
- (3) The arbitrator exceeded his authority;
- (4) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 7-902, Idaho Code, and the party did not participate in the arbitration hearing without raising the objection.

The Plaintiff also demands a jury trial and seeks:

Damages for the violation of the Plaintiff's Civil Rights in the amount of \$25,000.

Damages for the tort of Fraud in the amount of \$25,000.

Damages for tort of Negligence in the amount of \$25,000.

For costs of court incurred herein.

For such other and further relief as the court may deem just.

DATED AND SIGNED this \_\_\_\_\_ day of October, 2007.

David F. Capps, Plaintiff, in proj

s, Plaintiff, *in propria persona* 

### CERTIFICATE OF SERVICE

Jeffrey M. Wilson Wilson & McColl 420 W. Washington P.O. Box 1544 Boise, ID 83701

David F. Capps, Plaintiff, in propria persona



FAX: 208-926-4169

Plaintiff, in propria persona

### DOCKETED

AHO COUNTY DISTRICT COL AT 30 FILED O'CLOCK M

FEB 04 2008

ROSE E. GEHRING CLERK OF DISTRICT COOP-

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS,	)
Plaintiff,	) Case No. <b>CV-2007-38202</b>
vs.	ANSWER TO COUNTERCLAIMS
FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.,	) ) )
Defendant,	) ) )

COMES NOW the Plaintiff, David F. Capps, and answers the Defendant's counterclaims as follows:

- 1. The Plaintiff has no knowledge regarding this claim.
- 2. The Plaintiff denies that he is, or ever has been, a resident of Lewis County, Idaho.
- 3. See response to 1, and 2 above.
- 4. The Plaintiff admits counterclaim 4.

- 5. The Plaintiff denies counterclaim 5.
- 6. The Plaintiff denies counterclaim 6.
- 7. The Plaintiff denies counterclaim 7.
- 8. The Plaintiff denies counterclaim 8.
- 9. The Plaintiff admits counterclaim 9.
- 10. The Plaintiff denies counterclaim 10.
- 11. See answers to counterclaims 1 through 10 above.
- 12. The Plaintiff denies counterclaim 12.
- 13. The Plaintiff denies counterclaim 13.
- 14. The Plaintiff denies counterclaim 14.
- 15. See answers to counterclaims 1 through 14 above.
- 16. The Plaintiff denies counterclaim 16.
- 17. The Plaintiff denies counterclaim 17.

### AFFIRMATIVE DEFENSES

- 18. The Defendant is not a real party in interest in this action and cannot maintain a counterclaim Action against the Plaintiff.
- 19. The Defendant cannot establish standing and as such cannot invoke the jurisdiction of this court for its counterclaims.
- 20. Some or all of the Defendant's counterclaims are barred by the doctrine of unclean hands.
- 21. Some or all of the Defendant's counterclaims are barred by breach of contract.

- 22. Some or all of the Defendant's counterclaims are barred by the doctrines of estoppel, laches and waiver.
- 23. Some or all of the Defendant's counterclaims are barred by the Defendant's contributory or comparative negligence.
- 24. The Defendant has failed to act reasonably or to otherwise mitigate their damages, if any.

The plaintiff therefore prays that this court will dismiss the counterclaims against the Plaintiff in this case, and award appropriate costs to the Plaintiff for having to defend against the counterclaims.

Dated this <u>friction</u> day of February, 2008.

David F. Capps, Plaintiff, in propria persona

### **CERTIFICATE OF MAILING**

Jeffrey M. Wilson Wilson & McColl 420 W. Washington P.O. Box 1544

Boise, ID 83701

David F. Capps

DOCKETED

IDAHO COUNTY DISTRICT COURT

AT 3 4 0 O'CLOCK PM

OCT 25 2007

ROSE E GEHRING CLERK OF DISTRICT COURT OF DISTRICT COURT

JEFFREY M. WILSON, ISB No. 1615 ALEC T. PECHOTA, ISB No. 7176 WILSON & McCOLL 420 W. Washington P.O. Box 1544 Boise, Idaho 83701

Telephone: 208-345-9100 Facsimile: 208-384-0442

Attorneys for FIA Card Services, N.A.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS,		)				
	Plaintiff,	)				
<b>v.</b>		)	Case No.	CV-07	-38202	
FIA CARD SERVICES, N.A	A.,	)	ORDER MOTION	ON	DEFEN TO	DANT'S STAY
	Defendant.	)	PROCEE			31A1
		)				

The above matter having come before this Court on the Defendant's Motion to Stay Proceedings, and good cause appearing;

IT IS HEREBY ORDERED that the Defendant's Motion to Stay Proceedings is GRANTED.

DATED this day of Cetales, 2007.

Jung Raduery



### CERTIFICATE OF MAILING

n & McColl

Wil

) Hober, 2007, I caused to be I DO HEREBY CERTIFY that on this 15 day of 1 served on the following parties of interest a true and correct copy of the within and foregoing document by placing the same in the United States Mail, sufficient postage affixed thereon and addressed to:

JEFFREY M. WILSON ALEC T. PECHOTA WILSON & McCOLL 420 W. Washington P.O. Box 1544 Boise, Idaho 83701

David F. Capps HC-11 Box 366 Kamiah, ID 83536

PROSE E. GEHRING, WENK

### DOCKETED

JEFFREY M. WILSON ISB No. 1615 ALEC T. PECHOTA, ISB No. 7176 WILSON & McCOLL 420 W. Washington P.O. Box 1544 Boise, Idaho 83701

Telephone: 208-345-9100 Facsimile: 208-384-0442

AT 9.00 O'CLOCK A M.

JAN 3 2008

ROSE E. GEHRING
CLERK OF DISTRICT SOLIT

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

DAVID F. CAPPS,	)
,	) Case No. CV-07-38202
Plaintiff,	)
	) ANSWER AND COUNTERCLAIM
vs.	)
	) Filing Fcc Answer: \$58.00
FIA CARD SERVICES, N.A., fka MBNA	) Filing Fee Counterclaim: \$14.00
AMERICA BANK, N.A.,	)
	)
- a 1	
Defendant,	)
	)

COMES NOW the Defendant, by and through its counsel of record, and hereby submits the following Answer as follows:

- 1. The Defendant deny each and every allegation contained in the Plaintiff's Amended Complaint not specifically herein admitted.
  - 2. The Defendant admits paragraph 1 of Plaintiff's Amended Complaint.
- 3. In response to paragraph 2 of Plaintiff's Amended Complaint, the Defendant admits that the Court has jurisdiction of this matter.

This communication is from a debt collector, the purpose of which is to collect a debt; any information obtained may be used for that purpose.

ANSWER AND COUNTERCLAIM - 1



4. The Defendant denies paragraphs 3, 3a, 3b, 3c, 3d, 3e, 3f, 4, 4a, 4b, 4c, 4d, 4e, 4f, 5, 5a, 5b, 5c, 5d, 5e, 5f, 5g, 6, 6a, 6b, 6c, 6d of Plaintiff's Amended Complaint.

### **AFFIRMATIVE DEFENSES**

- 5. The Plaintiff's Amended Complaint fails to state a cause of action against the Defendant upon which relief can be granted.
  - 6. Some or all of the Plaintiff's claims are barred by breach of contract.
- 7. Some or all of the Plaintiff's claims are barred by the doctrines of estoppel, laches and waiver.
  - 8. Some or all of the Plaintiff's claims are barred by the doctrine of unclean hands.
- 9. Some or all of the Plaintiff's claims are barred by the doctrine of unjust enrichment.
- 10. Some or all of the Plaintiff's claims are barred by Idaho Rule of Civil Procedure 9(b).
- 11. Some or all of the Plaintiff's claims are barred by the Plaintiff's contributory or comparative negligence.
- 12. The Plaintiff has failed to act reasonably or to otherwise mitigate his damages, if any.

The Defendant reserves the right to amend this Answer and to include additional affirmative defenses once they have had an opportunity to complete discovery regarding the allegations in the Plaintiff's Amended Complaint. The Defendant further hereby demands a jury trial pursuant to the Idaho Rules of Civil Procedure.

### WHEREFORE, this the Defendant prays:

- 1. The Plaintiff takes nothing by way of his Amended Complaint and that such be dismissed with prejudice;
- 2. For costs and attorney fees incurred in defending this action pursuant to I.C. §§ 12-120, 12-121, I.R.C.P. 54 and all other applicable law; and
  - 3. Any and all other relief the Court deems equitable and just.

### **COUNTERCLAIM**

COMES NOW the Defendant, by and through its counsel of record and hereby submits the following Counterclaim as follows:

- 1. That the Defendant is now and at all times pertinent hereto was a foreign corporation with its principal place of business located outside the State of Idaho.
  - The Plaintiff now and at all pertinent times hereto resided in Lewis County, Idaho.
     COUNT I -- APPLICATION OF ARBITRATION AWARD
- 3. The Defendant realleges and incorporates each and every allegation contained in the paragraphs stated above.
- 4. That the Plaintiff entered into an credit card agreement with the Defendant whereby the Defendant agreed to extend a revolving line of credit to the Plaintiff for cash advances or the purchase of goods and services. The account was assigned account no. xxxx-xxxx-xxxx-1014.
- 5. The agreement includes a provision to the effect that any dispute arising out of the agreement, its performance or breach, can be submitted to arbitration by the National Arbitration Forum. The arbitration hearing is to occur within the federal district that includes the Plaintiff's This communication is from a debt collector, the purpose of which is to collect a debt; any information obtained may be used for that purpose.

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billing address at the time the claim was filed. A copy of the National Arbitration Forum Rules of Procedure is available at www.arb-forum.com.

- That the Plaintiff breached the agreement by failing to pay the minimum monthly 6. installment as called for in the agreement.
- The Defendant submitted the matter to arbitration by the National Arbitration Forum 7. as specified in the agreement, file no. FA0702000914241. Following its procedure, a notice of arbitration was served upon the Plaintiff.
- The arbitrator entered an award in favor of the Defendant in the sum of \$15,448.35. 8. A true and correct copy of the arbitrator's award is attached hereto as Exhibit "A".
  - 9. The arbitration award remains unpaid.
- The Defendant is entitled to a judicial confirmation of an arbitration award pursuant 10. to Idaho Code § 7-901 et seq.

### COUNT II - - BREACH OF CONTRACT

- The Defendant realleges and incorporates each and every allegation contained in the 11. paragraphs stated above.
- That the Plaintiff has been advanced payment of goods and services pursuant to an 12. Account Agreement, account # xxxx-xxxx-1014, which account balance currently totals \$12,459.
- That said account was due and payable within thirty (30) days after receipt of a 13. statement of account.
- That Plaintiff is in breach of said Account Agreement by failing to make all required 14. monthly payments in a timely fashion. As a result of such breach, Defendant has declared the entire This communication is from a debt collector, the purpose of which is to collect a debt; any information obtained may be used for that purpose.



amount due and payable in full.

### **COUNT III - - ACCOUNT STATED**

- 15. The Defendant realleges and incorporates each and every allegation contained in the paragraphs stated above.
- The final balance owing Defendant has been ascertained and Plaintiff has received written statements evidencing that amount. Plaintiff has impliedly agreed with Defendant that such amount is due and owing as evidenced by Plaintiff's failure to object to the charges within a reasonable time. Defendant is therefore entitled to damages in the sum of \$12,459.74

#### ATTORNEYS FEES

17. That the Defendant, by reason of Plaintiff's failure to pay the account above stated, has been required to retain the services of counsel and has retained the firm of Wilson & McColl to prosecute this action. Further, that should Defendant be successful in this action, that Plaintiff, in addition to being responsible for Defendant's costs incurred herein, should be responsible for Defendant's reasonable attorney's fees incurred herein pursuant to the parties' agreement and/or to the extent permitted by law. That a reasonable attorney's fee, should this action be uncontested, is the sum of \$1,000.00; and further, that should said action be contested, the sum of \$150.00 per hour for time expended on Defendant's behalf is a reasonable attorney's fee herein.

WHEREFORE, the Defendant applies for relief as follows AS TO COUNT I:

- 1. That the arbitration award be confirmed;
- 2. For a money judgment in the sum of \$15,448.35.
- 3. For Defendant's reasonable attorney's fees incurred herein pursuant to Idaho Code §



12-120(3) and other applicable law, in the amount of \$1000.00 should this matter be uncontested; otherwise, the sum of \$150.00 per hour for the time expended on behalf of Defendant herein, should said action be contested;

- 4. For Defendant's costs incurred herein; and,
- 5. For such other and further relief as to the Court may appear just.

IN THE ALTERNATIVE, Defendant prays for judgment against the Defendant as follows
AS TO COUNTS II AND III:

- 6. For the sum of \$12,459.74.
- 7. For Defendant's reasonable attorney's fees incurred herein pursuant to the parties' agreement and/or to the extent by law, in the amount of \$1000.00 should this matter be uncontested; otherwise, the sum of \$150.00 per hour for the time expended on behalf of Defendant herein, should said action be contested;
  - 8. For Defendant's costs incurred herein; and,
  - 9. For such other and further relief as to the Court may appear just.

DATED this **29** day of January, 2008.

Alec T. Pechota

Of The firm



### **CERTIFICATE OF MAILING**

I HEREBY CERTIFY That on the 29 day of January, 2008, I mailed a true and correct copy of the foregoing ANSWER AND COUNTERCLAIM by regular United States Mail with correct postage affixed thereon addressed to:

David F. Capps HC-11 Box 366 Kamiah, Idaho 83536

Alec T. Pechota





FlA Card Services, N.A., fka MBNA America Bank, N.A. c/o Wolpoff & Abramson, L.L.P.
Attorneys in the Practice of Debt Collection
702 King Farm Blvd, Two Irvington Centre
Rockville, MD 20850-5775

CLAIMANT(s),

AWARD

RE:

FIA Card Services, N.A., fka MBNA America Bank, N.A. v David F Capps

File Number: FA0702000914241

Claimant Account Number: 5490997999759015

David F Capps HC-11, Box 366 Kamiah, ID 83536

#### RESPONDENT(s).

The undersigned Arbitrator in this case FINDS and CONCLUDES:

#### Case Summary

- 1. The Claimant has filed a Claim with the National Arbitration Forum.
- After Proof of Service of the Claim was filed with the Forum, where no Response has been filed, the Forum mailed to Respondent a Second Notice of Arbitration.
- 3. The Respondent has filed a Response with the Forum and served it on the Claimant.
- 4. An arbitration hearing notice was duly delivered to the Parties as required by the Forum Rules.
- 5. The Arbitrator conducted a Hearing in this case in accordance with the Forum Rules.
- 6. The Parties have had the opportunity to present all evidence and information to the Arbitrator.
- 7. The Arbitrator has reviewed all evidence submitted in this case.

### Decision

- 1. The Arbitrator knows of no conflict of interests that exist.
- 2. This matter involves interstate commerce and the Federal Arbitration Act governs this arbitration.
- 3. The Claim was properly served on the Respondent by Claimant in accordance with Rule 6, including a Notice of Arbitration.
- 4. On or before 02/08/2007 the Parties entered into a valid, written agreement to arbitrate their dispute.
- 5. The Parties' Arbitration Agreement is valid and enforceable and governs all the issues in dispute.
- 6. This matter is arbitrable under the terms of the Parties' Arbitration Agreement and the law.
- 7. The matter has proceeded in accord with the applicable Forum Code of Procedure Rules.
- 8. The evidence submitted supports the issuance of this Award.
- 9. The applicable substantive law supports the issuance of this Award.

### Therefore, the Arbitrator ISSUES:

An Award in favor of the Claimant, for a total amount of \$15,448.35.

Entered and Affirmed in the State of Idaho

A. Charles Dell'Ario, Esq.

Arbitrator

Date: 06/13/2007

### ACKNOWLEDGEMENT AND CERTIFICATE OF SERVICE

This Award was duly entered and the Forum hereby certifies that pursuant to the Parties' Arbitration Agreement, a copy of this Award was sent by first class mail postage presaid to the Parties at the above referenced addresses, or their Representatives, on this date.

Honogable Harold Faliba Re

Director