3-23-2009

Capps v. FIA Card Services, N.A. Clerk's Record v. 3 Dckt. 35891

LAW CLERK Vol. 3 of 4

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

David Capps

Plaintiff and Appellant

VS.

FIA Card Services, N.A. fka MBNA America Bank, N.A.

Defendant and Respondent

Appealed from the District Court of the Second *Judicial District for the State of Idaho, in and for* Idaho *County*

Hon. John Bradbury *District Judge*

David Capps

Attorney for Appellant

Alex Pechota

Attorney for Respondent

FILED - COPY

Filed this ____ *day of* NOV 23 2009, *20*__

Clerk

By ____ Supreme Court ____ Court of Appeals ____ Entered on ATS by: ____ *Deputy*

35891

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 9:32 O'CLOCK A .M.
JUN 26 2008
ROSE E. GEHRING
CLERK OF DISTRICT COURT
DEPUTY

JEFFREY M. WILSON, ISB No. 1615
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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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 ORDER STAYING ORDER TO COMPEL DISCOVERY

The above matter having come before this Court upon the Defendant's Motion to Stay Order Compelling Discovery, and good cause appearing;

IT IS HEREBY ORDERED That the Court's Order Granting Motions (Plaintiff's Motion to Compel Discovery), entered on April 29, 2008, is stayed pending the outcome of Defendant's Motion for Reconsideration.

DATED this 25 day of June, 2008.

JUDGE

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.

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 9th day of June, 2008, I mailed a true and correct copy of the foregoing ORDER by regular United States mail with the correct postage affixed thereon addressed to:

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

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536-9410

ROSE E. GEHRING, Clerk

Keith Johnson Deputy
CLERK

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.

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,

v.

FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.,

Defendant.

Case No.: CV 07-38202

MEMORANDUM DECISION AND ORDER

This matter comes before me on David F. Capps' Motion to Allow Late Answers to Discovery.

Background

On March 12, 2008, FIA Card Services [FIA] served Requests for Admission upon David F. Capps. Rule 36(a) of the Idaho Rules of Civil Procedure states that a "matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission written answer or objection. . ."

Due to an inadvertent mistake Mr. Capps failed to respond to the requests for admission within the thirty day time limit. *Motion to Allow Late Answers to Disovery* at 2-3 (May 21, 2008). Mr. Capps became apprised of this mistake upon receiving FIA's Memorandum in Support of its Motion for Summary Judgment, in which argument was made that the requests were deemed admitted due to Mr. Capps' failure to object. *Id.* Immediately upon discovering this mistake, Mr. Capps filed this motion to allow late discovery. Shortly thereafter, Mr. Capps provided responses to FIA's discovery requests. *Plaintiff's Notice of Interrogatories* at 1 (May 29, 2008).

Rule 36(b) of the Idaho Rules of Civil Procedure states I may permit amendment if FIA card services, the party who obtained the admission, fails to satisfy the court that withdrawal or amendment will prejudice them in maintaining an action or defense on the merits. In the hearing held June 26, 2008, FIA stipulated that it would not be prejudiced if Mr. Capps were allowed to amend his discovery. I therefore hold, that Mr. Capps should be allowed to amend his discovery responses to those provided on May 29, 2008 to FIA.

It is so ordered, this the 26th day of June, 2008

JOHN BRADBURY
DISTRICT JUDGE

David F. Capps
104 Jefferson Drive
Kamiah, ID 83536
208-935-7962
FAX: 208-926-4169
Plaintiff, *in propria persona*

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,

Plaintiff,

vs.

FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.,

Defendant/Counterclaimant,

Case No. **CV-2007-38202**

POST HEARING MEMORANDUM

COMES NOW the Plaintiff, David F. Capps, and submits his POST HEARING MEMORANDUM as follows:

I

TRANSFER OF ACCOUNT

The Defendant argues that, "Citing the Second Amended and Restated Pooling and Servicing Agreement, attached as Exhibit 2 to Plaintiff's Affidavit, Section 2.01, Plaintiff argues that "MBNA, through BA Credit Card Funding LLC, assigned both the

Receivables and the Account involved in this action to the BA Master Credit Card Trust II. However, nothing in Section 2.01 establishes such an allegation."" The Defendant's statement is not true. Section 2.01 of the Second Amended and Restated Pooling and Servicing Agreement (EXHIBIT 2) continues in Section 2.01, page 20, ¶ 2, with, "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 of the Pooling and Servicing Agreement (EXHIBIT 2), page 28, ¶ 2, "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)."

The Receivables and the accounts have become the assets of the BA Master Credit Card Trust II, (hereinafter "Master Trust II"), upon which the Collateral Certificate is issued to the Master Note Trust. Under Section 2.09 of the Pooling and Servicing Agreement (EXHIBIT 2), page 37, ¶ 5, "Additional Representations and Warranties of the Transferor. ...(b) The Collateral constitutes "accounts" within the meaning of the Delaware UCC." The transfer of accounts is treated in precisely the same manner as the Receivables, which were transferred, assigned, set-over and otherwise conveyed to the Trustee of Master Trust II.

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 BA Master Credit Card Trust II, without recourse. No rights were retained. Transferred Receivables and transferred accounts are treated the same in the Pooling and Servicing Agreement. Both have been transferred and assigned to the Master Trust. There is nothing in the Pooling and Servicing Agreement stating that the Transferor has retained the account after the transfer and assignment to Master Trust II.

In order for FIA Card Services to gain standing as a real party in interest, FIA must show that ownership has been assigned to them. No such document has been shown or provided. The Bank of New York, as Trustee for Master Trust II is the real party in interest, not FIA Card Services.

II

CITIBANK (SOUTH DAKOTA) N.A. v. MIRIAM CARROLL, CV-06-37067

The Defendant has requested that this court take judicial notice of the court's decision and specific pleadings in case CV-06-37067. 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.

III

ACCOUNT ASSIGNED TO THE MASTER TRUST

The account involved in this lawsuit was assigned to Master Trust II. On page S-48 of EXHIBIT 1, the MBNA Credit Card Master Note Trust Prospectus Supplement dated October 12, 2005, in ¶ 3, regarding the credit card business of MBNA, states, "On a managed basis, including loan accounts originated or acquired by MBNA Europe Bank Limited and MBNA Canada Bank, MBNA maintained loan accounts with aggregate outstanding balances of $113.3 billion as of June 30, 2005. Of this amount, $75.0 billion were MasterCard, Visa and American Express credit card loans originated in the United States." This represents the credit card business from which Receivables and accounts are drawn for the Master Trust II Portfolio. Of the $75.0 billion, some were new accounts, or accounts which were about to be added to the Master Trust II Portfolio. On page S-58, $1.788 billion was added on August 24, 2005. The above date of June 30, 2005 is approximately half way from the date of the previous amount of added accounts on April 27, 2005. On June 30, 2005 the amount collected, but not yet added to the Master Trust II Portfolio would be approximately 0.889 billion. On page S-52, as of June 30, 2005, $68.287 billion were shown as Receivables in the Master Trust II Portfolio, with $3.376 delinquent, and on page S-53 $1.863 billion is shown as charged off.

MBNA was required to add eligible accounts to the Master Trust II Portfolio under the Pooling and Servicing Agreement to cover charge-offs and delinquent accounts, which means that MBNA would need to add the $3.376 billion for delinquent accounts, plus the $1.863 billion for the charged off accounts to the Master Trust II Portfolio. When we add the $0.889 billion in new accounts about to be added the Master

Trust II Portfolio, the total of accounts needed by MBNA comes to ($68,287 billion already in the Master Trust II Portfolio, plus $3.376 billion for delinquent accounts, plus $1.863 billion for charged off accounts, plus the $0.889 billion in new accounts) $74.415 billion, very close to the $75.0 billion total credit card business of MBNA. There are going to be some accounts that are fraud against the bank and some new accounts that are ineligible and cannot be added to the Master Trust II Portfolio, which accounts for the remaining difference. Clearly all eligible accounts are added to the Master Trust II Portfolio.

WHY SECURITIZATION?

The answer is in a combination of Walker F. Todd's affidavit and a publication of the Federal Reserve Bank of Chicago titled "Modern Money Mechanics" (attached as EXHIBIT 3). The three key factors are the use of money of account, and money of exchange, as explained in Walker F. Todd's affidavit, and the practice of fractional reserve banking as explained in Modern Money Mechanics (EXHIBIT 3). An extension of credit is money of account. It has no physical reality other that a ledger entry. Money of exchange has a physical reality, as currency, drafts, coins, gold and silver bullion, and monetary instruments. Money of exchange operates as the cash reserve in a fractional reserve system. Money of account is created based on the money of exchange in the possession of the bank. With a cash reserve of 10%, as explained in Modern Money Mechanics on the seventh page of EXHIBIT 3, under **How the Multiple Expansion Process Works**, an additional 90% can be created as money of account. This means that an extension of credit is created out of the 90% that is money of account and not the 10% that is money of exchange.

The use of a credit card by the cardholder creates Receivables, which are sold to the Master Trust II under the Pooling and Servicing Agreement. The Master Trust II issues a Collateral Certificate in the amount of the Receivables to the Master Note Trust, which, in turn sells Promissory Notes to investors. The money from the investors is used to pay MBNA for the Receivables. This process converts the money of account extended as credit into money of exchange, collected from the investor. The money of exchange is then used as the basis for additional extensions of credit as money of account under the practice of fractional reserve banking. Securitization provides a fast and efficient way of converting an extension of credit into a cash reserve. If the bank were to hold the receivables, it could take years to complete the transformation of money of account into money of exchange. During the time the bank is holding the alleged debt, the bank is at risk for any loss. Securitization allows the bank to convert the money of account into money of exchange and to assign any risk involved to the investor. Because of the economics of Securitization, every eligible account is sold to Master Trust II. There is no real economic value, or financial incentive, for MBNA to retain an eligible account.

In the Dictionary of Banking Terms, by Thomas Fitch, published by Barron's Business Guides, ISBN 0-8120-3946-7, page 552-3, "securitization" is defined as, "conversion of bank loans and other assets into marketable securities for sale to investors. Securities offered for sale can be purchased by other depository institutions or non-bank investors. More broadly, corporate financing through Floating Rate Notes and Eurocommercial paper, replacing bank loans as a means of borrowing, is a form of securitization." "By securitizing bank loans and credit receivables, U.S. financial institutions are able to remove bank assets from the balance sheet if certain conditions are

met – boosting its capital ratios, and make new loans from the proceeds of the securities sold to investors. The process effectively merges the credit markets (for example, the mortgage market in which lenders make new mortgages) and the capital markets, because bank receivables are repackaged as bonds collateralized by pools of mortgages, auto loans, credit card receivables, leases, and other types of credit obligations. As banks look to investors as the ultimate holders of the obligations created by bank lending, banks as an industry are inclined to act more as sellers of assets, rather than portfolio lenders that keep all the loans they originate in their own portfolio. Securitization also redefines the bank definition of ASSET QUALITY, and loan underwriting standards, because lenders will be looking at loan quality more in terms of their marketability in the capital markets than probability of repayment by the borrowers." "For regulatory reporting purposes, a loan that is converted into a security and sold as an asset-backed security qualifies as a sale of assets. The seller retains no risk of loss from the assets transferred and has no obligation to the buyer for borrower defaults or changes in market value of securities sold." (Emphasis added.)

In both EXHIBIT 1 and 2, MBNA, and subsequently FIA Card Services, refers to itself as Seller, not lender. The role of lender came to an end with the sale of the Receivables and the associated accounts. So, in addition to converting money of account into money of exchange through securitization, MBNA has sold the receivables and the account to Master Trust II, removed the account from its balance sheet and transferred MBNA's risk to the investor. MBNA has divested itself of the assets, the risk, and any obligation associated with the account. FIA Card Services inherited no asset in regard to the account in question, no risk, and no obligation to anyone in case of a default by the

borrower. FIA Card Services has no stake in the outcome of this suit and is not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure. FIA Card Services does not have any demonstrable loss or damages, nor does FIA have a cause of action for which relief can be granted.

THE ACCOUNT IN QUESTION WAS AN ELIGIBLE ACCOUNT

In the Second Amended and Restated Pooling and Servicing Agreement (EXHIBIT 2), on page 7, "Eligible Account" is defined. ""Eligible Account" shall mean any Visa®, MasterCard®, or American Express® credit card account for which each of the following requirements is satisfied as of the date of its designation under the prior Pooling and Servicing Agreement, in the case of any Initial Account, or as of the related Addition Date, in the case of any Additional Account:

(a) it exists and is maintained by the Account Owner;

(b) its receivables are payable in Dollars;

(c) the related Obligor's most recent billing address is located in the United States or its territories or possessions;

(d) it is not classified on the Account Owner's electronic records as counterfeit, cancelled, fraudulent, stolen, or lost; and,

(e) all of its Receivables have not been charged off as uncollectable under the Account Owner's customary and usual procedures for servicing credit card accounts."

At the time the Receivables and the account were sold to Master Trust II, the account existed, was maintained by MBNA, was payable in Dollars, the Obligor's address was in

the State of Idaho, the account was not classified as counterfeit, cancelled, fraudulent, stolen, or lost, and none of its receivables had been charged off as uncollectible.

IV

ADMISSIBILITY OF EXHIBITS 1 AND 2

The contents of EXHIBITS 1 and 2 are admissible under Rule 1004. Exhibits 1 and 2 are documents internal to FIA Card Services. The original documents are not obtainable under Rule 1004(2) of the Idaho Rules of Evidence and are in the possession of the opponent (FIA Card Services) under Rule 1004(3) of the Idaho Rules of Evidence. The Defendant has had ample time to contest the contents of both exhibits and has not done so.

In addition, EXHIBIT 1 is a public record maintained by the Securities and Exchange Commission and is admissible under Rule 803(8) of the exceptions to the hearsay rule. Both EXHIBIT 1 and 2 are also admissible under Rule 803(24) of the exceptions to the hearsay rule. The Exhibits are offered as evidence as stated in item 37 of the Plaintiff's Affidavit (complying with Rule 803(24)(A)), dated the 9th day of June 2008, which was attached to the Plaintiff's OPPOSITION TO MOTION FOR SUMMARY JUDGMENT. The exhibits are probative to the case at hand (complying with Rule 803(24)(B)) and are in the interest of justice (complying with Rule 803(24)(C)). The opponent was notified of the Plaintiff's intent to admit the exhibits as evidence and the Defendant had ample time to contest the contents of the exhibits. The contents of the exhibits were not contested. The exhibits are thus admissible under Rule 803(24) of the Idaho Rules of Evidence. The unsigned affidavit of Walker F. Todd, the

contents of which were verified with personal knowledge from conversation with Mr. Todd, is also admissible under the same rule.

The contents of the Plaintiff's above identified Affidavit are obviously demonstrative of personal knowledge and complies with Rule 901(b)(7) and (9) as an illustration of authentication of (7) Public Records. The process of acquiring the documents over the Internet was provided under Rule 901(b)(9), construing the Internet as a system or process, showing accurate results for the purpose of authentication.

V

CONDITIONS NECESSARY FOR SUMMARY JUDGMENT

The pleading, depositions and admissions on file must 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). As clearly demonstrated in the Plaintiff's OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, there is a genuine issue with the following material facts:

1. That the Plaintiff agreed to pay the Defendant all moneys loaned on that account.
2. That the Defendant actually loaned any money to the Plaintiff.
3. That the Plaintiff owes any sum to the Defendant.
4. That the statement of account is accurate.
5. Plaintiff has no defense to payment of the amount shown as owing to Defendant on the statements of account.

Since there is no agreement on these material facts and the Plaintiff has put forth sworn testimony in the form of Answers to Interrogatories and Request for Admissions, as provided in the Plaintiff's OPPOSITION TO MOTION FOR SUMMARY

JUDGMENT, rebutting the issues and providing supporting evidence thereof, there is no basis for the Defendant's Motion for Summary Judgment. The Plaintiff has also provided evidence indicating that the Defendant is NOT entitled to a judgment by law. In addition, the Plaintiff's Affirmative Defenses have not been addressed or overcome by the Defendant. Under these conditions, the Defendant's Motion for Summary Judgment should be DENIED.

Dated this 1st day of July 2008.

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

CERTIFICATE OF MAILING

I, Miriam G. Carroll, do hereby certify, under penalty of perjury, that I mailed a true and correct copy of the Plaintiff's POST HEARING MEMORANDUM to the attorney for the Defendant this 1st day of July 2008 by Certified Mail # 7006 2150 0003 4550 2703 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

Miriam G. Carroll

Miriam G. Carroll

EXHIBIT 3

MODERN MONEY MECHANICS

A Workbook on Bank Reserves and Deposit Expansion

Federal Reserve Bank of Chicago

This complete booklet is available in printed form free of charge from:
Public Information Center
Federal Reserve Bank of Chicago
P. O. Box 834
Chicago, IL 60690-0834
telephone: 312 322 5111

Introduction

The purpose of this booklet is to describe the basic process of money creation in a "fractional reserve" banking system. The approach taken illustrates the changes in bank balance sheets that occur when deposits in banks change as a result of monetary action by the Federal Reserve System - the central bank of the United States. The relationships shown are based on simplifying assumptions. For the sake of simplicity, the relationships are shown as if they were mechanical, but they are not, as is described later in the booklet. Thus, they should not be interpreted to imply a close and predictable relationship between a specific central bank transaction and the quantity of money.

The introductory pages contain a brief general description of the characteristics of money and how the U.S. money system works. The illustrations in the following two sections describe two processes: first, how bank deposits expand or contract in response to changes in the amount of reserves supplied by the central bank; and second, how those reserves are affected by both Federal Reserve actions and other factors. A final section deals with some of the elements that modify, at least in the short run, the simple mechanical relationship between bank reserves and deposit money.

Money is such a routine part of everyday living that its existence and acceptance ordinarily are taken for granted. A user may sense that money must come into being either automatically as a result of economic activity or as an outgrowth of some government operation. But just *how* this happens all too often remains a mystery.

What is Money?

If money is viewed simply as a tool used to facilitate transactions, only those media that are readily accepted in exchange for goods, services, and other assets need to be considered. Many things - from stones to baseball cards - have served this monetary function through the ages. Today, in the United States, money used in transactions is mainly of three kinds - currency (paper money and coins in the pockets and purses of the public); demand deposits (non-interest bearing checking accounts in banks); and other checkable deposits, such as negotiable order of withdrawal (NOW) accounts, at all

depository institutions, including commercial and savings banks, savings and loan associations, and credit unions. Travelers checks also are included in the definition of transactions money. Since $1 in currency and $1 in checkable deposits are freely convertible into each other and both can be used directly for expenditures, they are money in equal degree. However, only the cash and balances held by the nonbank public are counted in the money supply. Deposits of the U.S. Treasury, depository institutions, foreign banks and official institutions, as well as vault cash in depository institutions are excluded.

This transactions concept of money is the one designated as M1 in the Federal Reserve's money stock statistics. Broader concepts of money (M2 and M3) include M1 as well as certain other financial assets (such as savings and time deposits at depository institutions and shares in money market mutual funds) which are relatively liquid but believed to represent principally investments to their holders rather than media of exchange. While funds can be shifted fairly easily between transaction balances and these other liquid assets, the money-creation process takes place principally through transaction accounts. In the remainder of this booklet, "money" means M1.

The distribution between the currency and deposit components of money depends largely on the preferences of the public. When a depositor cashes a check or makes a cash withdrawal through an automatic teller machine, he or she reduces the amount of deposits and increases the amount of currency held by the public. Conversely, when people have more currency than is needed, some is returned to banks in exchange for deposits.

While currency is used for a great variety of small transactions, most of the dollar amount of money payments in our economy are made by check or by electronic transfer between deposit accounts. Moreover, currency is a relatively small part of the money stock. About 69 percent, or $623 billion, of the $898 billion total stock in December 1991, was in the form of transaction deposits, of which $290 billion were demand and $333 billion were other checkable deposits.

What Makes Money Valuable?

In the United States neither paper currency nor deposits have value as commodities. Intrinsically, a dollar bill is just a piece of paper, deposits merely book entries. Coins do have some intrinsic value as metal, but generally far less than their face value.

What, then, makes these instruments - checks, paper money, and coins - acceptable at face value in payment of all debts and for other monetary uses? Mainly, it is the confidence people have that they will be able to exchange such money for other financial assets and for real goods and services whenever they choose to do so.

Money, like anything else, derives its value from its *scarcity* in relation to its usefulness. Commodities or services are more or less valuable because there are more or less of them relative to the amounts people want. Money's usefulness is its unique ability to command other goods and services and to permit a holder to be constantly ready to do so. How

much money is demanded depends on several factors, such as the total volume of transactions in the economy at any given time, the payments habits of the society, the amount of money that individuals and businesses want to keep on hand to take care of unexpected transactions, and the forgone earnings of holding financial assets in the form of money rather than some other asset.

Control of the *quantity* of money is essential if its value is to be kept stable. Money's real value can be measured only in terms of what it will buy. Therefore, its value varies inversely with the general level of prices. Assuming a constant rate of use, if the volume of money grows more rapidly than the rate at which the output of real goods and services increases, prices will rise. This will happen because there will be more money than there will be goods and services to spend it on at prevailing prices. But if, on the other hand, growth in the supply of money does not keep pace with the economy's current production, then prices will fall, the nations's labor force, factories, and other production facilities will not be fully employed, or both.

Just how large the stock of money needs to be in order to handle the transactions of the economy without exerting undue influence on the price level depends on how intensively money is being used. Every transaction deposit balance and every dollar bill is part of somebody's spendable funds at any given time, ready to move to other owners as transactions take place. Some holders spend money quickly after they get it, making these funds available for other uses. Others, however, hold money for longer periods. Obviously, when some money remains idle, a larger total is needed to accomplish any given volume of transactions.

Who Creates Money?

Changes in the quantity of money may originate with actions of the Federal Reserve System (the central bank), depository institutions (principally commercial banks), or the public. The major control, however, rests with the central bank.

The actual process of money creation takes place primarily in banks.(1) As noted earlier, checkable liabilities of banks are money. These liabilities are customers' accounts. They increase when customers deposit currency and checks and when the proceeds of loans made by the banks are credited to borrowers' accounts.

In the absence of legal reserve requirements, banks can build up deposits by increasing loans and investments so long as they keep enough currency on hand to redeem whatever amounts the holders of deposits want to convert into currency. This unique attribute of the banking business was discovered many centuries ago.

It started with goldsmiths. As early bankers, they initially provided safekeeping services, making a profit from vault storage fees for gold and coins deposited with them. People would redeem their "deposit receipts" whenever they needed gold or coins to purchase something, and physically take the gold or coins to the seller who, in turn, would deposit them for safekeeping, often with the same banker. Everyone soon found that it was a lot

easier simply to use the deposit receipts directly as a means of payment. These receipts, which became known as notes, were acceptable as money since whoever held them could go to the banker and exchange them for metallic money.

Then, bankers discovered that they could make loans merely by giving their promises to pay, or bank notes, to borrowers. In this way, banks began to create money. More notes could be issued than the gold and coin on hand because only a portion of the notes outstanding would be presented for payment at any one time. Enough metallic money had to be kept on hand, of course, to redeem whatever volume of notes was presented for payment.

Transaction deposits are the modern counterpart of bank notes. It was a small step from printing notes to making book entries crediting deposits of borrowers, which the borrowers in turn could "spend" by writing checks, thereby "printing" their own money.

What Limits the Amount of Money Banks Can Create?

If deposit money can be created so easily, what is to prevent banks from making too much - more than sufficient to keep the nation's productive resources fully employed without price inflation? Like its predecessor, the modern bank must keep available, to make payment on demand, a considerable amount of currency and funds on deposit with the central bank. The bank must be prepared to convert deposit money into currency for those depositors who request currency. It must make remittance on checks written by depositors and presented for payment by other banks (settle adverse clearings). Finally, it must maintain legally required reserves, in the form of vault cash and/or balances at its Federal Reserve Bank, equal to a prescribed percentage of its deposits.

The public's demand for currency varies greatly, but generally follows a seasonal pattern that is quite predictable. The effects on bank funds of these variations in the amount of currency held by the public usually are offset by the central bank, which replaces the reserves absorbed by currency withdrawals from banks. (Just how this is done will be explained later.) For all banks taken together, there is no net drain of funds through clearings. A check drawn on one bank normally will be deposited to the credit of another account, if not in the same bank, then in some other bank.

These operating needs influence the minimum amount of reserves an individual bank will hold voluntarily. However, as long as this minimum amount is less than what is legally required, operating needs are of relatively minor importance as a restraint on aggregate deposit expansion in the banking system. Such expansion cannot continue beyond the point where the amount of reserves that all banks have is just sufficient to satisfy legal requirements under our "fractional reserve" system. For example, if reserves of 20 percent were required, deposits could expand only until they were five times as large as reserves. Reserves of $10 million could support deposits of $50 million. The lower the percentage requirement, the greater the deposit expansion that can be supported by each additional reserve dollar. Thus, the legal reserve ratio together with the dollar amount of bank reserves are the factors that set the upper limit to money creation.

What Are Bank Reserves?

Currency held in bank vaults may be counted as legal reserves as well as deposits (reserve balances) at the Federal Reserve Banks. Both are equally acceptable in satisfaction of reserve requirements. A bank can always obtain reserve balances by sending currency to its Reserve Bank and can obtain currency by drawing on its reserve balance. Because either can be used to support a much larger volume of deposit liabilities of banks, currency in circulation and reserve balances together are often referred to as "high-powered money" or the "monetary base." Reserve balances and vault cash in banks, however, are not counted as part of the money stock held by the public.

For individual banks, reserve accounts also serve as working balances.(2) Banks may increase the balances in their reserve accounts by depositing checks and proceeds from electronic funds transfers as well as currency. Or they may draw down these balances by writing checks on them or by authorizing a debit to them in payment for currency, customers' checks, or other funds transfers.

Although reserve accounts are used as working balances, each bank must maintain, on the average for the relevant reserve maintenance period, reserve balances at their Reserve Bank and vault cash which together are equal to its required reserves, as determined by the amount of its deposits in the reserve computation period.

Where Do Bank Reserves Come From?

Increases or decreases in bank reserves can result from a number of factors discussed later in this booklet. From the standpoint of money creation, however, the essential point is that the reserves of banks are, for the most part, liabilities of the Federal Reserve Banks, and net changes in them are largely determined by actions of the Federal Reserve System. Thus, the Federal Reserve, through its ability to vary both the total volume of reserves and the required ratio of reserves to deposit liabilities, influences banks' decisions with respect to their assets and deposits. One of the major responsibilities of the Federal Reserve System is to provide the total amount of reserves consistent with the monetary needs of the economy at reasonably stable prices. Such actions take into consideration, of course, any changes in the pace at which money is being used and changes in the public's demand for cash balances.

The reader should be mindful that deposits and reserves tend to expand simultaneously and that the Federal Reserve's control often is exerted through the market place as individual banks find it either cheaper or more expensive to obtain their required reserves, depending on the willingness of the Fed to support the current rate of credit and deposit expansion.

While an individual bank can obtain reserves by bidding them away from other banks, this cannot be done by the banking system as a whole. Except for reserves borrowed temporarily from the Federal Reserve's discount window, as is shown later, the supply of reserves in the banking system is controlled by the Federal Reserve.

Moreover, a given increase in bank reserves is not necessarily accompanied by an expansion in money equal to the theoretical potential based on the required ratio of reserves to deposits. What happens to the quantity of money will vary, depending upon the reactions of the banks and the public. A number of slippages may occur. What amount of reserves will be drained into the public's currency holdings? To what extent will the increase in total reserves remain unused as excess reserves? How much will be absorbed by deposits or other liabilities not defined as money but against which banks might also have to hold reserves? How sensitive are the banks to policy actions of the central bank? The significance of these questions will be discussed later in this booklet. The answers indicate why changes in the money supply may be different than expected or may respond to policy action only after considerable time has elapsed.

In the succeeding pages, the effects of various transactions on the quantity of money are described and illustrated. The basic working tool is the "T" account, which provides a simple means of tracing, step by step, the effects of these transactions on both the asset and liability sides of bank balance sheets. Changes in asset items are entered on the left half of the "T" and changes in liabilities on the right half. For any one transaction, of course, there must be at least two entries in order to maintain the equality of assets and liabilities.

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1 In order to describe the money-creation process as simply as possible, the term "bank" used in this booklet should be understood to encompass all depository institutions. Since the Depository Institutions Deregulation and Monetary Control Act of 1980, all depository institutions have been permitted to offer interest bearing transaction accounts to certain customers. Transaction accounts (interest bearing as well as demand deposits on which payment of interest is still legally prohibited) at all depository institutions are subject to the reserve requirements set by the Federal Reserve. Thus all such institutions, not just commercial banks, have the potential for creating money. back

2 Part of an individual bank's reserve account may represent its reserve balance used to meet its reserve requirements while another part may be its required clearing balance on which earnings credits are generated to pay for Federal Reserve Bank services. back

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Bank Deposits - How They Expand or Contract

Let us assume that expansion in the money stock is desired by the Federal Reserve to achieve its policy objectives. One way the central bank can initiate such an expansion is through purchases of securities in the open market. Payment for the securities adds to bank reserves. Such purchases (and sales) are called "open market operations."

How do open market purchases add to bank reserves and deposits? Suppose the Federal Reserve System, through its trading desk at the Federal Reserve Bank of New York, buys $10,000 of Treasury bills from a dealer in U. S. government securities.(3) In today's world of computerized financial transactions, the Federal Reserve Bank pays for the securities with an "telectronic" check drawn on itself.(4) Via its "Fedwire" transfer network, the Federal Reserve notifies the dealer's designated bank (Bank A) that payment for the securities should be credited to (deposited in) the dealer's account at Bank A. At

the same time, Bank A's reserve account at the Federal Reserve is credited for the amount of the securities purchase. The Federal Reserve System has added $10,000 of securities to its assets, which it has paid for, in effect, by *creating* a liability on itself in the form of bank reserve balances. These reserves on Bank A's books are matched by $10,000 of the dealer's deposits that did not exist before. *See illustration 1.*

How the Multiple Expansion Process Works

If the process ended here, there would be no "multiple" expansion, i.e., deposits and bank reserves would have changed by the same amount. However, banks are required to maintain reserves equal to only a fraction of their deposits. Reserves in excess of this amount may be used to increase earning assets - loans and investments. Unused or excess reserves earn no interest. Under current regulations, the reserve requirement against most transaction accounts is 10 percent.(5) Assuming, for simplicity, a uniform 10 percent reserve requirement against all transaction deposits, and further assuming that all banks attempt to remain fully invested, we can now trace the process of expansion in deposits which can take place on the basis of the additional reserves provided by the Federal Reserve System's purchase of U. S. government securities.

The expansion process may or may not begin with Bank A, depending on what the dealer does with the money received from the sale of securities. If the dealer immediately writes checks for $10,000 and all of them are deposited in other banks, Bank A loses both deposits and reserves and shows no net change as a result of the System's open market purchase. However, other banks have received them. Most likely, a part of the initial deposit will remain with Bank A, and a part will be shifted to other banks as the dealer's checks clear.

It does not really matter where this money is at any given time. The important fact is that *these deposits do not disappear*. They are in some deposit accounts at all times. All banks together have $10,000 of deposits and reserves that they did not have before. However, they are not required to keep $10,000 of reserves against the $10,000 of deposits. All they need to retain, under a 10 percent reserve requirement, is $1000. The remaining $9,000 is "excess reserves." This amount can be loaned or invested. *See illustration 2.*

If business is active, the banks with excess reserves probably will have opportunities to loan the $9,000. Of course, they do not really pay out loans from the money they receive as deposits. If they did this, no additional money would be created. What they do when they make loans is to accept promissory notes in exchange for credits to the borrowers' transaction accounts. Loans (assets) and deposits (liabilities) both rise by $9,000. Reserves are unchanged by the loan transactions. But the deposit credits constitute new additions to the total deposits of the banking system. *See illustration 3.*

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3 Dollar amounts used in the various illustrations do not necessarily bear any resemblance to actual transactions. For example, open market operations typically are conducted with many dealers and in amounts totaling several billion dollars. back

4Indeed, many transactions today are accomplished through an electronic transfer of funds between accounts rather than through issuance of a paper check. Apart from the time of posting, the accounting entries are the same whether a transfer is made with a paper check or electronically. The term "check," therefore, is used for both types of transfers. back

5For each bank, the reserve requirement is 3 percent on a specified base amount of transaction accounts and 10 percent on the amount above this base. Initially, the Monetary Control Act set this base amount - called the "low reserve tranche" - at $25 million, and provided for it to change annually in line with the growth in transaction deposits nationally. The low reserve tranche was $41.1 million in 1991 and $42.2 million in 1992. The Garn-St. Germain Act of 1982 further modified these requirements by exempting the first $2 million of reservable liabilities from reserve requirements. Like the low reserve tranche, the exempt level is adjusted each year to reflect growth in reservable liabilities. The exempt level was $3.4 million in 1991 and $3.6 million in 1992. back

---

Deposit Expansion

1. When the Federal Reserve Bank purchases government securities, bank reserves increase. This happens because the seller of the securities receives payment through a credit to a designated deposit account at a bank (Bank A) which the Federal Reserve effects by crediting the reserve account of Bank A.

FR BANK		BANK A	
Assets	**Liabilities**	**Assets**	**Liabilities**
US govt securities.. +10,000	Reserve acct. Bank A.. +10,000	Reserves with FR Banks.. +10,000	Customer deposit.. +10,000

The customer deposit at Bank A likely will be transferred, in part, to other banks and quickly loses its identity amid the huge interbank flow of deposits. back

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2. As a result, all banks taken together now have "excess" reserves on which deposit expansion can take place.

Total reserves gained from new deposits.....10,000
less: required against new deposits (at 10%)... 1,000
equals: Excess reserves 9,000

back

Expansion - Stage 1

3. Expansion takes place only if the banks that hold these excess reserves (Stage 1 banks) increase their loans or investments. Loans are made by crediting the borrower's account, i.e., by creating additional deposit money. back

STAGE 1 BANKS	
Assets	**Liabilities**
Loans..... +9,000	Borrower deposits.... +9,000

This is the beginning of the deposit expansion process. In the first stage of the process, total loans and deposits of the banks rise by an amount equal to the excess reserves existing before any loans were made (90 percent of the initial deposit increase). At the end of Stage 1, deposits have risen a total of $19,000 (the initial $10,000 provided by the Federal Reserve's action plus the $9,000 in deposits created by Stage 1 banks). *See illustration 4.* However, only $900 (10 percent of $9000) of excess reserves have been absorbed by the additional deposit growth at Stage 1 banks. *See illustration 5.*

The lending banks, however, do not expect to retain the deposits they create through their loan operations. Borrowers write checks that probably will be deposited in other banks. As these checks move through the collection process, the Federal Reserve Banks debit the reserve accounts of the paying banks (Stage 1 banks) and credit those of the receiving banks. *See illustration 6.*

Whether Stage 1 banks actually do lose the deposits to *other* banks or whether any or all of the borrowers' checks are redeposited in these *same* banks makes no difference in the expansion process. If the lending banks *expect* to lose these deposits - and an equal amount of reserves - as the borrowers' checks are paid, they will not lend more than their excess reserves. Like the original $10,000 deposit, the loan-credited deposits may be transferred to other banks, but they remain somewhere in the banking system. Whichever banks receive them also acquire equal amounts of reserves, of which all but 10 percent will be "excess."

Assuming that the banks holding the $9,000 of deposits created in Stage 1 in turn make loans equal to their excess reserves, then loans and deposits will rise by a further $8,100 in the second stage of expansion. This process can continue until deposits have risen to the point where all the reserves provided by the initial purchase of government securities by the Federal Reserve System are just sufficient to satisfy reserve requirements against the newly created deposits. *(See pages 10 and 11.)*

The individual bank, of course, is not concerned as to the stages of expansion in which it may be participating. Inflows and outflows of deposits occur continuously. Any deposit received is new money, regardless of its ultimate source. But if bank policy is to make loans and investments equal to whatever reserves are in excess of legal requirements, the expansion process will be carried on.

How Much Can Deposits Expand in the Banking System?

The total amount of expansion that can take place is illustrated on page 11. Carried through to theoretical limits, the initial $10,000 of reserves distributed within the banking system gives rise to an expansion of $90,000 in bank credit (loans and investments) and supports a total of $100,000 in new deposits under a 10 percent reserve requirement. The deposit expansion factor for a given amount of new reserves is thus the reciprocal of the required reserve percentage (1/.10 = 10). Loan expansion will be less by the amount of the initial injection. The multiple expansion is possible because the banks as a group are like one large bank in which checks drawn against borrowers' deposits result in credits to accounts of other depositors, with no net change in the total reserves.

Expansion through Bank Investments

Deposit expansion can proceed from investments as well as loans. Suppose that the demand for loans at some Stage 1 banks is slack. These banks would then probably purchase securities. If the sellers of the securities were customers, the banks would make payment by crediting the customers' transaction accounts, deposit liabilities would rise just as if loans had been made. More likely, these banks would purchase the securities through dealers, paying for them with checks on themselves or on their reserve accounts. These checks would be deposited in the sellers' banks. In either case, the net effects on the banking system are identical with those resulting from loan operations.

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4 As a result of the process so far, total assets and total liabilities of all banks together have risen 19,000. back

ALL BANKS

Assets		Liabilities	
Reserves with F. R. Banks	+10,000	Deposits: Initial	+10,000
Loans	+ 9,000	Stage 1	+ 9,000
Total	+19,000	Total	+19,000

---

5 Excess reserves have been reduced by the amount required against the deposits created by the loans made in Stage 1. back

Total reserves gained from initial deposits. . . . 10,000
less: Required against initial deposits . . . . . -1,000
less: Required against Stage 1 requirements . . . . -900
equals: Excess reserves. 8,100

Why do these banks stop increasing their loans and deposits when they still have excess reserves?

---

6 ...because borrowers write checks on their accounts at the lending banks. As these checks are deposited in the payees' banks and cleared, the deposits created by Stage 1 loans and an equal amount of reserves may be transferred to other banks. back

STAGE 1 BANKS

Assets	**Liabilities**
Reserves with F. R. Banks . -9000 (matched under FR bank liabilities)	Borrower deposits . . . -9,000 (shown as additions to other bank deposits)

FEDERAL RESERVE BANK

Assets	**Liabilities**
	Reserve accounts: Stage 1 banks . -9,000
	Other banks. . . . . +9,000

OTHER BANKS

Assets	**Liabilities**
Reserves with F. R. Banks . +9,000	Deposits . . . . . +9,000

Deposit expansion has just begun!

Page 10.

7 Expansion continues as the banks that have excess reserves increase their loans by that amount, crediting borrowers' deposit accounts in the process, thus creating still more money.

STAGE 2 BANKS

Assets	**Liabilities**
Loans . . . . . + 8100	Borrower deposits . . . +8,100

---

8 Now the banking system's assets and liabilities have risen by 27,100.

ALL BANKS			
Assets		**Liabilities**	
Reserves with F. R. Banks .	+10,000	Deposits: Initial	+10,000
Loans: Stage 1	+ 9,000	Stage 1	+9,000
Stage 2	+ 8,100	Stage 2	+8,100
Total.	+27,000	Total	+27,000

---

9 But there are still 7,290 of excess reserves in the banking system.

Total reserves gained from initial deposits 10,000
less: Required against initial deposits . -1,000
less: Required against Stage 1 deposits . -900
less: Required against Stage 2 deposits . -810 . . . 2,710
equals: Excess reserves . . . . . 7,290 --> to Stage 3 banks

---

10 As borrowers make payments, these reserves will be further dispersed, and the process can continue through many more stages, in progressively smaller increments, until the entire 10,000 of reserves have been absorbed by deposit growth. As is apparent from the summary table on page 11, more than two-thirds of the deposit expansion potential is reached after the first ten stages.

It should be understood that the stages of expansion occur neither simultaneously nor in the sequence described above. Some banks use their reserves incompletely or only after a considerable time lag, while others expand assets on the basis of expected reserve growth.
The process is, in fact, continuous and may never reach its theoretical limits.

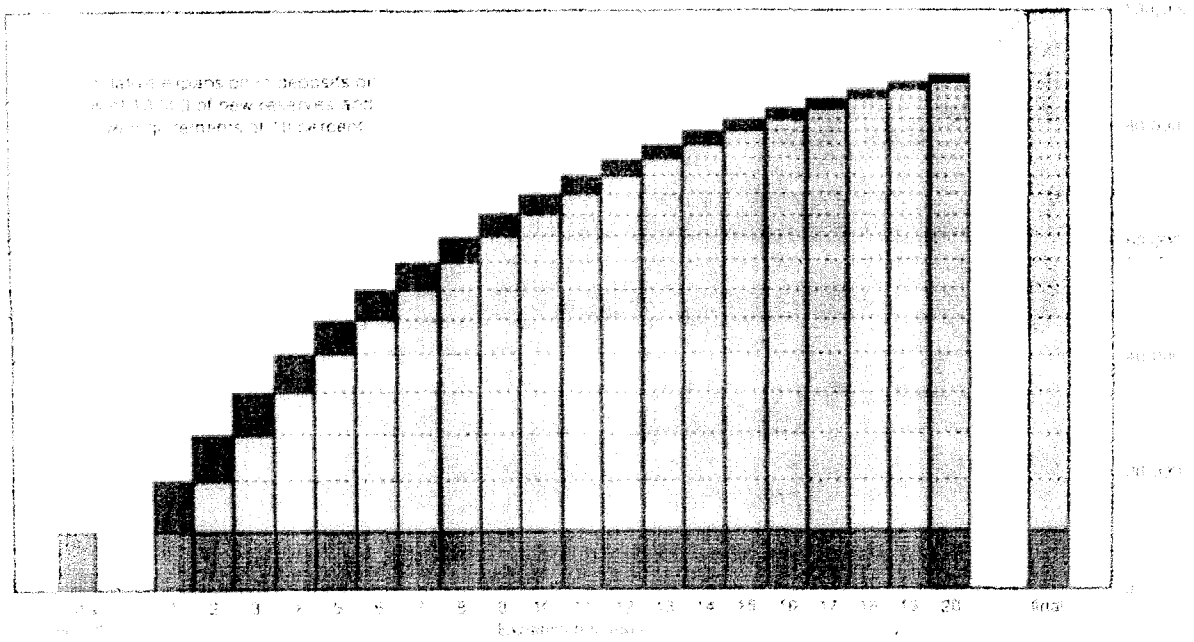
End page 10. back

Page 11.

Thus through stage after stage of expansion, "money" can grow to a total of 10 times the new reserves supplied to the banking system....

	Assets				Liabilities
	[Reserves		]		
	Total	(Required)	(Excess)	Loans and Investments	Deposits
Reserves provided	10,000	1,000	9,000	-	10,000
Exp. Stage 1	10,000	1900	8,100	9,000	19,000
Stage2	10,000	2,710	7,290	17,100	27,100
Stage 3	10,000	3,439	6,561	24,390	34,390
Stage 4	10,000	4,095	5,905	30,951	40,951
Stage 5	10,000	4,686	5,314	36,856	46,856
Stage 6	10,000	5,217	4,783	42,170	52,170
Stage 7	10,000	5,695	4,305	46,953	56,953
Stage 8	10,000	6,126	3,874	51,258	61,258
Stage 9	10,000	6,513	3,487	55,132	65,132
Stage 10	10,000	6,862	3,138	58,619	68,619
...	...	...	...	...	...
...	...	...	...	...	...
...	...	...	...	...	...
Stage 20	10,000	8,906	1,094	79,058	89,058
...	...	...	...	...	...
...	...	...	...	...	...
...	...	...	...	...	...
Final Stage	10,000	10,000	0	90,000	100,000

...as the new deposits created by loans at each stage are added to those created at all earlier stages and those supplied by the initial reserve-creating action.



End page 11. back

How Open Market Sales Reduce bank Reserves and Deposits

Now suppose some reduction in the amount of money is desired. Normally this would reflect temporary or seasonal reductions in activity to be financed since, on a year-to-year basis, a growing economy needs at least some monetary expansion. Just as purchases of government securities by the Federal Reserve System can provide the basis for deposit expansion by adding to bank reserves, sales of securities by the Federal Reserve System reduce the money stock by absorbing bank reserves. The process is essentially the reverse of the expansion steps just described.

Suppose the Federal Reserve System sells $10,000 of Treasury bills to a U.S. government securities dealer and receives in payment an "electronic" check drawn on Bank A. As this payment is made, Bank A's reserve account at a Federal Reserve Bank is reduced by $10,000. As a result, the Federal Reserve System's holdings of securities and the reserve accounts of banks are both reduced $10,000. The $10,000 reduction in Bank A's depost liabilities constitutes a decline in the money stock. *See illustration 11.*

Contraction Also Is a Cumulative Process

While Bank A may have regained part of the initial reduction in deposits from other banks as a result of interbank deposit flows, all banks taken together have $10,000 less in both deposits and reserves than they had before the Federal Reserve's sales of securities.

The amount of reserves freed by the decline in deposits, however, is only $1,000 (10 percent of $10,000). Unless the banks that lose the reserves and deposits had excess reserves, they are left with a reserve deficiency of $9,000. *See illustration 12.* Although they may borrow from the Federal Reserve Banks to cover this deficiency temporarily, sooner or later the banks will have to obtain the necessary reserves in some other way or reduce their needs for reserves.

One way for a bank to obtain the reserves it needs is by selling securities. But, as the buyers of the securities pay for them with funds in their deposit accounts in the same or other banks, the net result is a $9,000 decline in securities and deposits at all banks. *See illustration 13.* At the end of Stage 1 of the contraction process, deposits have been reduced by a total of $19,000 (the initial $10,000 resulting from the Federal Reserve's action plus the $9,000 in deposits extinguished by securities sales of Stage 1 banks). *See illustration 14.*

However, there is now a reserve deficiency of $8,100 at banks whose depositors drew down their accounts to purchase the securities from Stage 1 banks. As the new group of reserve-deficient banks, in turn, makes up this deficiency by selling securities or reducing loans, further deposit contraction takes place.

Thus, contraction proceeds through reductions in deposits and loans or investments in one stage after another until total deposits have been reduced to the point where the smaller volume of reserves is adequate to support them. The contraction multiple is the same as that which applies in the case of expansion. Under a 10 percent reserve requirement, a $10,000 reduction in reserves would ultimately entail reductions of $100,000 in deposits and $90,000 in loans and investments.

As in the case of deposit expansion, contraction of bank deposits may take place as a result of either sales of securities or reductions of loans. While some adjustments of both kinds undoubtedly would be made, the initial impact probably would be reflected in sales of government securities. Most types of outstanding loans cannot be called for payment prior to their due dates. But the bank may cease to make new loans or refuse to renew outstanding ones to replace those currently maturing. Thus, deposits built up by borrowers for the purpose of loan retirement would be extinguished as loans were repaid.

There is one important difference between the expansion and contraction processes. When the Federal Reserve System adds to bank reserves, expansion of credit and deposits *may* take place up to the limits permitted by the minimum reserve ratio that banks are required to maintain. But when the System acts to reduce the amount of bank reserves, contraction of credit and deposits *must* take place (except to the extent that existing excess reserve balances and/or surplus vault cash are utilized) to the point where the required ratio of reserves to deposits is restored. But the significance of this difference should not be overemphasized. Because excess reserve balances do not earn interest, there is a strong incentive to convert them into earning assets (loans and investments).

End of page 12. forward

Deposit Contraction

11 When the Federal Reserve Bank sells government securities, bank reserves decline. This happens because the buyer of the securities makes payment through a debit to a designated deposit account at a bank (Bank A), with the transfer of funds being effected by a debit to Bank A's reserve account at the Federal Reserve Bank. back

FEDERAL RESERVE BANK		BANK A	
Assets	**Liabilities**	**Assets**	**Liabilities**
U.S govt securities....-10,000	Reserve Accts. Bank A....-10,000	Reserves with F.R. Banks....-10,000	Customer deposts.....-10,000

This reduction in the customer deposit at Bank A may be spread among a number of banks through interbank deposit flows.

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12 The loss of reserves means that all banks taken together now have a reserve deficiency. back

Total reserves lost from deposit withdrawal 10,000
less: Reserves freed by deposit decline(10%). 1,000
equals: Deficiency in reserves against remaining deposits . . 9,000

Contraction - Stage 1

13 The banks with the reserve deficiencies (Stage 1 banks) can sell government securities to acquire reserves, but this causes a decline in the deposits and reserves of the buyers' banks. back

STAGE 1 BANKS	
Assets	**Liabilities**
U.S.government securities...-9,000 Reserves with F.R. Banks..+9,000	

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserve Accounts: Stage 1 banks.....+9,000 Other banks.....-9,000

OTHER BANKS	
Assets	**Liabilities**
Reserves with F.R. Banks . . -9,000	Deposits . . . . -9,000

---

14 As a result of the process so far, assets and total deposits of all banks together have declined 19,000. Stage 1 contraction has freed 900 of reserves, but there is still a reserve deficiency of 8,100. back

ALL BANKS	
Assets	**Liabilities**
Reserves with F.R. Banks . . -10,000 U.S. government securities . . -9,000 Total . . . . .-19,000	Deposits: Initial . . . . . -10,000 Stage 1 . . . . . -9,000 Total . . . . . -19,000

Further contraction must take place!

End of page 13. forward

Bank Reserves - How They Change

Money has been defined as the sum of transaction accounts in depository institutions, and currency and travelers checks in the hands of the public. Currency is something almost everyone uses every day. Therefore, when most people think of money, they think of currency. Contrary to this popular impression, however, *transaction deposits* are the most significant part of the money stock. People keep enough currency on hand to effect small face-to-face transactions, but they write checks to cover most large expenditures. Most businesses probably hold even smaller amounts of currency in relation to their total transactions than do individuals.

Since the most important component of money is transaction deposits, and since these deposits must be supported by reserves, the central bank's influence over money hinges

on its control over the total amount of reserves and the conditions under which banks can obtain them.

The preceding illustrations of the expansion and contraction processes have demonstrated how the central bank, by purchasing and selling government securities, can deliberately change aggregate bank reserves in order to affect deposits. But open market operations are only one of a number of kinds of transactions or developments that cause changes in reserves. Some changes originate from actions taken by the public, by the Treasury Department, by the banks, or by foreign and international institutions. Other changes arise from the service functions and operating needs of the Reserve Banks themselves.

The various factors that provide and absorb bank reserve balances, together with symbols indicating the effects of these developments, are listed on the opposite page. This tabulaton also indicates the nature of the balancing entries on the Federal Reserve's books. (To the extent that the impact is absorbed by changes in banks' vault cash, the Federal Reserve's books are unaffected.)

Independent Factors Versus Policy Action

It is apparent that bank reserves are affected in several ways that are independent of the control of the central bank. Most of these "independent" elements are changing more or less continually. Sometimes their effects may last only a day or two before being reversed automatically. This happens, for instance, when bad weather slows up the check collection process, giving rise to an automatic increase in Federal Reserve credit in the form of "float." Other influences, such as changes in the public's currency holdings, may persist for longer periods of time.

Still other variations in bank reserves result solely from the mechanics of institutional arrangements among the Treasury, the Federal Reserve Banks, and the depository institutions. The Treasury, for example, keeps part of its operating cash balance on deposit with banks. But virtually all disbursements are made from its balance in the Reserve Banks. As is shown later, any buildup in balances at the Reserve Banks prior to expenditure by the Treasury causes a dollar-for-dollar drain on bank reserves.

In contrast to these independent elements that affect reserves are the policy actions taken by the Federal Reserve System. The way System open market purchases and sales of securities affect reserves has already been described. In addition, there are two other ways in which the System can affect bank reserves and potential deposit volume directly; first, through loans to depository institutions, and second, through changes in reserve requirement percentages. A change in the required reserve ratio, of course, does not alter the dollar volume of reserves directly but does change the amount of deposits that a given amount of reserves can support.

Any change in reserves, regardless of its origin, has the same potential to affect deposits. Therefore, in order to achieve the net reserve effects consistent with its monetary policy objectives, the Federal Reserve System continuously must take account of what the

independent factors are doing to reserves and then, using its policy tools, offset or supplement them as the situation may require.

By far the largest number and amount of the System's gross open market transactions are undertaken to offset drains from or additions to bank reserves from non-Federal Reserve sources that might otherwise cause abrupt changes in credit availability. In addition, Federal Reserve purchases and/or sales of securities are made to provide the reserves needed to support the rate of money growth consistent with monetary policy objectives.

In this section of the booklet, several kinds of transactions that can have important week-to-week effects on bank reserves are traced in detail. Other factors that normally have only a small influence are described briefly on page 35.

Factors Changing Reserve Balances - Independent and Policy Actions

	FEDERAL RESERVE BANKS		
	Assets	**Liabilities**	
		Reserve balances	Other
Public actions			
Increase in currency holdings.....		-	+
Decrease in currency holdings.....		+	-
Treasury, bank, and foreign actions			
Increase in Treasury deposits in F.R. Banks.....		-	+
Decrease in Treasury deposits in F.R. Banks.....		+	-
Gold purchases (inflow) or increase in official valuation*..		+	-
Gold sales (outflows)*.....		-	+
Increase in SDR certificates issued*.....		+	-
Decrease in SDR certificates issued*.....		-	+
Increase in Treasury currency outstanding*.....		+	-
Decrease in Treasury currency outstanding*.....		-	+
Increase in Treasury cash holdings*.....		-	+
Decrease in Treasury cash holdings*.....		+	-
Increase in service-related balances/adjustments.....		-	+

Decrease in service-related balances/adjustments.....		+	-
Increase in foreign and other deposits in F.R. Banks.....		-	+
Decrease in foreign and other deposits in F.R. Banks....		+	-
Federal Reserve actions			
Purchases of securities.....	+	+	
Sales of securities.....	-	-	
Loans to depository institutions.....	+	+	
Repayment of loans to depository institutions.....	-	-	
Increase in Federal Reserve float.....	+	+	
Decrease in Federal Reserve float.....	-	-	
Increase in assets denominated in foreign currency	+	+	
Decrease in assets denominated in foreign currency	-	-	
Increase in other assets**.....	+	+	
Decrease in other assets**.....	-	-	
Increase in other liabilities**.....		-	+
Decrease in other liabilities**.....		+	-
Increase in capital accounts**.....		-	+
Decrease in capital accounts**.....		+	-
Increase in reserve requirements.....		-***	
Decrease in reserve requirements.....		+***	

* These factors represent assets and liabilities of the Treasury. Changes in them typically affect reserve balances through a related change in the Federal Reserve Banks' liability "Treasury deposits."
** Included in "Other Federal Reserve accounts" as described on page 35.
*** Effect on excess reserves. Total reserves are unchanged.
Note: To the extent that reserve changes are in the form of vault cash, Federal Reserve accounts are not affected. back

Forward

Changes in the Amount of Currency Held by the Public

Changes in the amount of currency held by the public typically follow a fairly regular intramonthly pattern. Major changes also occur over holiday periods and during the Christmas shopping season - times when people find it convenient to keep more pocket money on hand. (*See chart.*) The public acquires currency from banks by cashing checks. (6) When deposits, which are fractional reserve money, are exchanged for currency, which is 100 percent reserve money, the banking system experiences a net reserve drain. Under the assumed 10 percent reserve requirement, a given amount of bank reserves can support deposits ten times as great, but when drawn upon to meet currency demand, the exchange is one to one. A $1 increase in currency uses up $1 of reserves.

Suppose a bank customer cashed a $100 check to obtain currency needed for a weekend holiday. Bank deposits decline $100 because the customer pays for the currency with a check on his or her transaction deposit; and the bank's currency (vault cash reserves) is also reduced $100. *See illustration 15.*

Now the bank has less currency. It may replenish its vault cash by ordering currency from its Federal Reserve Bank - making payment by authorizing a charge to its reserve account. On the Reserve Bank's books, the charge against the bank's reserve account is offset by an increase in the liability item "Federal Reserve notes." *See illustration 16.* The reserve Bank shipment to the bank might consist, at least in part, of U.S. coins rather than Federal Reserve notes. All coins, as well as a small amount of paper currency still outstanding but no longer issued, are obligations of the Treasury. To the extent that shipments of cash to banks are in the form of coin, the offsetting entry on the Reserve Bank's books is a decline in its asset item "coin."

The public now has the same volume of money as before, except that more is in the form of currency and less is in the form of transaction deposits. Under a 10 percent reserve requirement, the amount of reserves required against the $100 of deposits was only $10, while a full $100 of reserves have been drained away by the disbursement of $100 in currency. Thus, if the bank had no excess reserves, the $100 withdrawal in currency causes a reserve deficiency of $90. Unless new reserves are provided from some other source, bank assets and deposits will have to be reduced (according to the contraction

process described on pages 12 and 13) by an additional $900. At that point, the reserve deficiency caused by the cash withdrawal would be eliminated.

When Currency Returns to Banks, Reserves Rise

After holiday periods, currency returns to the banks. The customer who cashed a check to cover anticipated cash expenditures may later redeposit any currency still held that's beyond normal pocket money needs. Most of it probably will have changed hands, and it will be deposited by operators of motels, gasoline stations, restaurants, and retail stores. This process is exactly the reverse of the currency drain, except that the banks to which currency is returned may not be the same banks that paid it out. But in the aggregate, the banks gain reserves as 100 percent reserve money is converted back into fractional reserve money.

When $100 of currency is returned to the banks, deposits and vault cash are increased. *See illustration 17.* The banks can keep the currency as vault cash, which also counts as reserves. More likely, the currency will be shipped to the Reserve Banks. The Reserve Banks credit bank reserve accounts and reduce Federal Reserve note liabilities. *See illustration 18.* Since only $10 must be held against the new $100 in deposits, $90 is excess reserves and can give rise to $900 of additional deposits(7).

To avoid multiple contraction or expansion of deposit money merely because the public wishes to change the composition of its money holdings, the effects of changes in the public's currency holdings on bank reserves normally are offset by System open market operations.

6The same balance sheet entries apply whether the individual physically cashes a paper check or obtains currency by withdrawing cash through an automatic teller machine. back

7Under current reserve accounting regulations, vault cash reserves are used to satisfy reserve requirements in a future maintenance period while reserve balances satisfy requirements in the current period. As a result, the impact on a bank's current reserve position may differ from that shown unless the bank restores its vault cash position in the current period via changes in its reserve balance. back

---

15 When a depositor cashes a check, both deposits and vault cash reserves decline. back

BANK A	
Assets	**Liabilities**

Vault cash reserves . . -100	Deposits . . . . -100
(*Required . . -10*)	
(*Deficit . . . . 90*)	

---

16 If the bank replenishes its vault cash, its account at the Reserve Bank is drawn down in exchange for notes issued by the Federal Reserve. back

FEDERAL RESERVE BANK

Assets	**Liabilities**
	Reserve accounts: Bank A . . . -100
	F.R. notes . . . +100

BANK A

Assets	**Liabilities**
Vault cash . . . . . +100	
Reserves with F.R. Banks . -100	

---

17 When currency comes back to the banks, both deposits and vault cash reserves rise. back

BANK A

Assets	**Liabilities**
Vault cash reserves . . +100	Deposits . . . . +100
(*Required . . . +10*)	
(*Excess . . . . +90*)	

---

18 If the currency is returned to the Federal reserve, reserve accounts are credited and Federal Reserve notes are taken out of circulation. back

FEDERAL RESERVE BANK

Assets	**Liabilities**
	Reserve accounts: Bank A . . +100
	F.R. notes . . . . . -100

BANK A	
Assets	**Liabilities**
Vault cash . . . . . -100	
Reserves with F.R. Banks . . . +100	

Changes in U.S. Treasury Deposits in Federal Reserve Banks

Reserve accounts of depository institutions constitute the bulk of the deposit liabilities of the Federal Reserve System. Other institutions, however, also maintain balances in the Federal Reserve Banks - mainly the U.S. Treasury, foreign central banks, and international financial institutions. In general, when these balances rise, bank reserves fall, and vice versa. This occurs because the funds used by these agencies to build up their deposits in the Reserve Banks ultimately come from deposits in banks. Conversely, recipients of payments from these agencies normally deposit the funds in banks. Through the collection process these banks receive credit to their reserve accounts.

The most important nonbank depositor is the U.S. Treasury. Part of the Treasury's operating cash balance is kept in the Federal Reserve Banks; the rest is held in depository institutions all over the country, in so-called "Treasury tax and loan" (TT&L) note accounts. (*See chart.*) Disbursements by the Treasury, however, are made against its balances at the Federal Reserve. Thus, transfers from banks to Federal Reserve Banks are made through regularly scheduled "calls" on TT&L balances to assure that sufficient funds are available to cover Treasury checks as they are presented for payment. (8)

Bank Reserves Decline as the Treasury's Deposits at the Reserve Banks Increase

Calls on TT&L note accounts drain reserves from the banks by the full amount of the transfer as funds move from the TT&L balances (via charges to bank reserve accounts) to Treasury balances at the Reserve Banks. Because reserves are not required against TT&L note accounts, these transfers do not reduce required reserves.(9)

Suppose a Treasury call payable by Bank A amounts to $1,000. The Federal Reserve Banks are authorized to transfer the amount of the Treasury call from Bank A's reserve account at the Federal Reserve to the account of the U.S. Treasury at the Federal Reserve. As a result of the transfer, both reserves and TT&L note balances of the bank are reduced. On the books of the Reserve Bank, bank reserves decline and Treasury deposits rise. *See illustration 19.* This withdrawal of Treasury funds will cause a reserve deficiency of $1,000 since no reserves are released by the decline in TT&L note accounts at depository institutions.

Bank Reserves Rise as the Treasury's Deposits at the Reserve Banks Decline

As the Treasury makes expenditures, checks drawn on its balances in the Reserve Banks are paid to the public, and these funds find their way back to banks in the form of deposits. The banks receive reserve credit equal to the full amount of these deposits although the corresponding increase in their required reserves is only 10 percent of this amount.

Suppose a government employee deposits a $1,000 expense check in Bank A. The bank sends the check to its Federal Reserve Bank for collection. The Reserve Bank then credits Bank A's reserve account and charges the Treasury's account. As a result, the bank gains both reserves and deposits. While there is no change in the assets or total liabilities of the Reserve Banks, the funds drawn away from the Treasury's balances have been shifted to bank reserve accounts. *See illustration 20.*

One of the objectives of the TT&L note program, which requires depository institutions that want to hold Treasury funds for more than one day to pay interest on them, is to allow the Treasury to hold its balance at the Reserve Banks to the minimum consistent with current payment needs. By maintaining a fairly constant balance, large drains from or additions to bank reserves from wide swings in the Treasury's balance that would require extensive offsetting open market operations can be avoided. Nevertheless, there are still periods when these fluctuations have large reserve effects. In 1991, for example, week-to-week changes in Treasury deposits at the Reserve Banks averaged only $56 million, but ranged from -$4.15 billion to +$8.57 billion.

8When the Treasury's balance at the Federal Reserve rises above expected payment needs, the Treasury may place the excess funds in TT&L note accounts through a "direct investment." The accounting entries are the same, but of opposite signs, as those shown when funds are transferred from TT&L note accounts to Treasury deposits at the Fed. back

9Tax payments received by institutions designated as Federal tax depositories initially are credited to reservable demand deposits due to the U.S. government. Because such tax payments typically come from reservable transaction accounts, required reserves are not

materially affected on this day. On the next business day, however, when these funds are placed either in a nonreservable note account or remitted to the Federal Reserve for credit to the Treasury's balance at the Fed, required reserves decline. back

End page 18. forward

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19 When the Treasury builds up its deposits at the Federal Reserve through "calls" on TT&L note balances, reserve accounts are reduced. back

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserve accounts: Bank A . . -1,000
	U.S. Treasury deposits . . +1,000

BANK A	
Assets	**Liabilities**
Reserves with F.R. Banks . . -1,000	Treasury tax and loan note account . . -1,000
(Required . . . . 0)	
(Deficit . . 1,000)	

---

20 Checks written on the Treasury's account at the Federal Reserve Bank are deposited in banks. As these are collected, banks receive credit to their reserve accounts at the Federal Reserve Banks. back

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserve accounts: Bank A . . +1,000
	U.S. Treasury deposits . . . -1,000

BANK A	
Assets	**Liabilities**
Reserves with F.R. Banks . .	Private deposits . . +1,000

+1,000
(*Required . . . +100*)
(*Excess . . . . . +900*)

End of page 19. forward

Changes in Federal Reserve Float

A large proportion of checks drawn on banks and deposited in other banks is cleared (collected) through the Federal Reserve Banks. Some of these checks are credited immediately to the reserve accounts of the depositing banks and are collected the same day by debiting the reserve accounts of the banks on which the checks are drawn. All checks are credited to the accounts of the depositing banks according to availability schedules related to the time it normally takes the Federal Reserve to collect the checks, but rarely more than two business days after they are received at the Reserve Banks, even though they may not yet have been collected due to processing, transportation, or other delays.

The reserve credit given for checks not yet collected is included in Federal Reserve "float."(10) On the books of the Federal Reserve Banks, balance sheet float, or statement float as it is sometimes called, is the difference between the asset account "items in process of collection," and the liability account "deferred credit items." Statement float is usually positive since it is more often the case that reserve credit is given before the checks are actually collected than the other way around.

Published data on Federal Reserve float are based on a "reserves-factor" framework rather than a balance sheet accounting framework. As published, Federal Reserve float includes statement float, as defined above, as well as float-related "as-of" adjustments.(11) These adjustments represent corrections for errors that arise in processing transactions related to Federal Reserve priced services. As-of adjustments do not change the balance sheets of either the Federal Reserve Banks or an individual bank. Rather they are corrections to the bank's reserve position, thereby affecting the calculation of whether or not the bank meets its reserve requirements.

An Increase in Federal Reserve Float Increases Bank Reserves

As float rises, total bank reserves rise by the same amount. For example, suppose Bank A receives checks totaling $100 drawn on Banks B, C, and D, all in distant cities. Bank A increases the accounts of its depositors $100, and sends the items to a Federal Reserve Bank for collection. Upon receipt of the checks, the Reserve Bank increases its own asset account "items in process of collection," and increases its liability account "deferred credit items" (checks and other items not yet credited to the sending bank's reserve

accounts). As long as these two accounts move together, there is no change in float or in total reserves from this source. *See illustration 21.*

On the next business day (assuming Banks B, C, and D are one-day deferred availability points), the Reserve Bank pays Bank A. The Reserve Bank's "deferred credit items" account is reduced, and Bank A's reserve account is increased $100. If these items actually take more than one business day to collect so that "items in process of collection" are not reduced that day, the credit to Bank A represents an addition to total bank reserves since the reserve accounts of Banks B, C, and D will not have been commensurately reduced.(12) *See illustration 22.*

A Decline in Federal Reserve Float Reduces Bank Reserves

Only when the checks are actually collected from Banks B, C, and D does the float involved in the above example disappear - "items in process of collection" of the Reserve Bank decline as the reserve accounts of Banks B, C, and D are reduced. *See illustration 23.*

On an annual average basis, Federal Reserve float declined dramatically from 1979 through 1984, in part reflecting actions taken to implement provisions of the Monetary Control Act that directed the Federal Reserve to reduce and price float. (*See chart.*) Since 1984, Federal Reserve float has been fairly stable on an annual average basis, but often fluctuates sharply over short periods. From the standpoint of the effect on bank reserves, the significant aspect of float is not that it exists but that its volume changes in a difficult-to-predict way. Float can increase unexpectedly, for example, if weather conditions ground planes transporting checks to paying banks for collection. However, such periods typically are followed by ones where actual collections exceed new items being received for collection. Thus, reserves gained from float expansion usually are quite temporary.

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10 Federal Reserve float also arises from other funds transfer services provided by the Fed, and automatic clearinghouse transfers. back

11 As-of adjustments also are used as one means of pricing float, as discussed on page 22, and for nonfloat related corrections, as discussed on page 35. back

12 If the checks received from Bank A had been erroneously assigned a two-day deferred availability, then neither statement float nor reserves would increase, although both should. Bank A's reserve position and published Federal Reserve float data are corrected for this and similar errors through as-of adjustments. back

---

21 When a bank receives deposits in the form of checks drawn on other banks, it can send them to the Federal Reserve Bank for collection. (Required reserves are not affected immediately because requirements apply to *net* transaction accounts, i.e., total transaction accounts minus both cash items in process of collection and deposits due from domestic depository institutions.) back

FEDERAL RESERVE BANK

Assets	Liabilities
Items in process of collection . . +100	Deferred credit items . . +100

BANK A

Assets	Liabilities
Cash items in process of collection . . +100	Deposits . . . . . +100

---

22 If the reserve account of the payee bank is credited before the reserve accounts of the paying banks are debited, total reserves increase. back

FEDERAL RESERVE BANK

Assets	Liabilities
	Deferred credit items . . -100
	Reserve account: Bank A . . +100

BANK A

Assets	Liabilities
Cash items in process of collection . . -100	
Reserves with F.R. Banks . . . +100	
(*Required* . . . . +10)	
(*Excess*. . . . . +90)	

---

23 But upon actual collection of the items, accounts of the paying banks are charged, and total reserves decline. back

FEDERAL RESERVE BANK

Assets	Liabilities
Items in process of collection . . . . . -100	Reserve accounts: Banks B, C, and D . . . . . -100

BANK B, C, and D

Assets	Liabilities
Reserves with F.R.Banks . . -100	Deposits . . . . . -100
(Required . . . -10)	
(Deficit . . . . . 90)	

Changes in Service-Related Balances and Adjustments

In order to foster a safe and efficient payments system, the Federal Reserve offers banks a variety of payments services. Prior to passage of the Monetary Control Act in 1980, the Federal Reserve offered its services free, but only to banks that were members of the Federal Reserve System. The Monetary Control Act directed the Federal Reserve to offer its services to all depository institutions, to charge for these services, and to reduce and price Federal Reserve float.(13) Except for float, all services covered by the Act were priced by the end of 1982. Implementation of float pricing essentially was completed in 1983.

The advent of Federal reserve priced services led to several changes that affect the use of funds in banks' reserve accounts. As a result, only part of the total balances in bank reserve accounts is identified as "reserve balances" available to meet reserve requirements. Other balances held in reserve accounts represent "service-related balances and adjustments (to compensate for float)." Service-related balances are "required clearing balances" held by banks that use Federal Reserve services while "adjustments" represent balances held by banks that pay for float with as-of adjustments.

An Increase in Required Clearing Balances Reduces Reserve Balances

Procedures for establishing and maintaining clearing balances were approved by the Board of Governors of the Federal Reserve System in February of 1981. A bank may be required to hold a clearing balance if it has no required reserve balance or if its required reserve balance (held to satisfy reserve requirements) is not large enough to handle its volume of clearings. Typically a bank holds both reserve balances and required clearing balances in the same reserve account. Thus, as required clearing balances are established or increased, the amount of funds in reserve accounts identified as reserve balances declines.

Suppose Bank A wants to use Federal Reserve services but has a reserve balance requirement that is less than its expected operating needs. With its Reserve Bank, it is determined that Bank A must maintain a required clearing balance of $1,000. If Bank A has no excess reserve balance, it will have to obtain funds from some other source. Bank

A could sell $1,000 of securities, but this will reduce the amount of total bank reserve balances and deposits. *See illustration 24.*

Banks are billed each month for the Federal Reserve services they have used with payment collected on a specified day the following month. All required clearing balances held generate "earnings credits" which can be used only to offset charges for Federal Reserve services.(14) Alternatively, banks can pay for services through a direct charge to their reserve accounts. If accrued earnings credits are used to pay for services, then reserve balances are unaffected. On the other hand, if payment for services takes the form of a direct charge to the bank's reserve account, then reserve balances decline. *See illustration 25.*

Float Pricing As-Of Adjustments Reduce Reserve Balances

In 1983, the Federal Reserve began pricing explicitly for float,(15) specifically "interterritory" check float, i.e., float generated by checks deposited by a bank served by one Reserve Bank but drawn on a bank served by another Reserve Bank. The depositing bank has three options in paying for interterritory check float it generates. It can use its earnings credits, authorize a direct charge to its reserve account, or pay for the float with an as-of adjustment. If either of the first two options is chosen, the accounting entries are the same as paying for other priced services. If the as-of adjustment option is chosen, however, the balance sheets of the Reserve Banks and the bank are not directly affected. In effect what happens is that part of the total balances held in the bank's reserve account is identified as being held to compensate the Federal reserve for float. This part, then, cannot be used to satisfy either reserve requirements or clearing balance requirements. Float pricing as-of adjustments are applied two weeks after the related float is generated. Thus, an individual bank has sufficient time to obtain funds from other sources in order to avoid any reserve deficiencies that might result from float pricing as-of adjustments. If all banks together have no excess reserves, however, the float pricing as-of adjustments lead to a decline in total bank reserve balances.

Week-to-week changes in service-related balances and adjustments can be volatile, primarily reflecting adjustments to compensate for float. (*See chart.*) Since these changes are known in advance, any undesired impact on reserve balances can be offset easily through open market operations.

13The Act specified that fee schedules cover services such as check clearing and collection, wire transfer, automated clearinghouse, settlement, securities safekeeping, noncash collection, Federal Reserve float, and any new services offered. back

14"Earnings credits" are calculated by multiplying the actual average clearing balance held over a maintenance period, up to that required plus the clearing balance band, times

a rate based on the average federal funds rate. The clearing balance band is 2 percent of the required clearing balance or $25,000, whichever amount is larger. back

15While some types of float are priced directly, the Federal Reserve prices other types of float indirectly, for example, by including the cost of float in the per-item fees for the priced service. back

End of page 22. back

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24 When Bank A establishes a required clearing balance at a Federal Reserve Bank by selling securities, the reserve balances and deposits of other banks decline. back

BANK A

Assets	Liabilities
U.S. government securities . . -1,000	
Reserve account with F.R. Banks:	
Required clearing balance . . +1000	

FEDERAL RESERVE BANK

Assets	Liabilities
	Reserve accounts:
	Required clearing balances Bank A . . . . +1000
	Reserve balances:
	Other banks . . . . . -1000

OTHER BANKS

Assets	Liabilities
Reserve accounts with F.R. Banks:	
Reserve balances . . . . -1,000	Deposits . . . . . -1,000
(Required . . . -100)	
(Deficit . . . . . 900)	

---

25 When Bank A is billed monthly for Federal Reserve services used, it can pay for these services by having earnings credits applied and/or by authorizing a direct charge to

its reserve account. Suppose Bank A has accrued earnings credits of $100 but incurs fees of $125. Then both methods would be used. On the Federal Reserve Bank's books, the liability account "earnings credits due to depository institutions" declines by $100 and Bank A's reserve account is reduced by $25. Offsetting these entries is a reduction in the Fed's (other) asset account "accrued service income." On Bank A's books, the accounting entries might be a $100 reduction to its asset account "earnings credit due from Federal Reserve Banks" and a $25 reduction in its reserve account, which are offset by a $125 decline in its liability "accounts payable." While an individual bank may use different accounting entries, the net effect on reserves is a reduction of $25, the amount of billed fees that were paid through a direct charge to Bank A's reserve account. back

FEDERAL RESERVE BANK	
Assets	**Liabilities**
Accrued service income . . . . . -125	Earnings credits due to depository institutions . . . . . -100
	Reserve accounts: Bank A . . -25

BANK A	
Assets	**Liabilities**
Earnings credits due from F.R. Banks . . -100	Accounts payable . . . . . -125
Reserves with F.R. Banks . . . . . -25	

Changes in Loans to Depository Institutions

Prior to passage of the Monetary Control Act of 1980, only banks that were members of the Federal Reserve System had regular access to the Fed's "discount window." Since then, all institutions having deposits reservable under the Act also have been able to borrow from the Fed. Under conditions set by the Federal Reserve, loans are available under three credit programs: adjustment, seasonal, and extended credit.(16) The average amount of each type of discount window credit provided varies over time. (*See chart.*)

When a bank borrows from a Federal Reserve Bank, it borrows reserves. The acquisition of reserves in this manner differs in an important way from the cases already illustrated. Banks normally borrow adjustment credit only to avoid reserve deficiencies or overdrafts.

not to obtain excess reserves. Adjustment credit borrowings, therefore, are reserves on which expansion has already taken place. How can this happen?

In their efforts to accommodate customers as well as to keep fully invested, banks frequently make loans in anticipation of inflows of loanable funds from deposits or money market sources. Loans add to bank deposits but not to bank reserves. Unless excess reserves can be tapped, banks will not have enough reserves to meet the reserve requirements against the new deposits. Likewise, individual banks may incur deficiencies through unexpected deposit outflows and corresponding losses of reserves through clearings. Other banks receive these deposits and can increase their loans accordingly, but the banks that lost them may not be able to reduce outstanding loans or investments in order to restore their reserves to required levels within the required time period. In either case, a bank may borrow reserves temporarily from its Reserve Bank.

Suppose a customer of Bank A wants to borrow $100. On the basis of the managements's judgment that the bank's reserves will be sufficient to provide the necessary funds, the customer is accommodated. The loan is made by increasing "loans" and crediting the customer's deposit account. Now Bank A's deposits have increased by $100. However, if reserves are insufficient to support the higher deposits, Bank A will have a $10 reserve deficiency, assuming requirements of 10 percent. *See illustration 26.* Bank A may temporarily borrow the $10 from its Federal Reserve Bank, which makes a loan by increasing its asset item "loans to depository institutions" and crediting Bank A's reserve account. Bank A gains reserves and a corresponding liability "borrowings from Federal Reserve Banks." *See illustration 27.*

To repay borrowing, a bank must gain reserves through either deposit growth or asset liquidation. *See illustration 28.* A bank makes payment by authorizing a debit to its reserve account at the Federal Reserve Bank. Repayment of borrowing, therefore, reduces both reserves and "borrowings from Federal Reserve Banks." *See illustration 29.*

Unlike loans made under the seasonal and extended credit programs, adjustment credit loans to banks generally must be repaid within a short time since such loans are made primarily to cover needs created by temporary fluctuations in deposits and loans relative to usual patterns. Adjustments, such as sales of securities, made by some banks to "get out of the window" tend to transfer reserve shortages to other banks and may force these other banks to borrow, especially in periods of heavy credit demands. Even at times when the total volume of adjustment credit borrowing is rising, some individual banks are repaying loans while others are borrowing. In the aggregate, adjustment credit borrowing usually increases in periods of rising business activity when the public's demands for credit are rising more rapidly than nonborrowed reserves are being provided by System open market operations.

Discount Window as a Tool of Monetary Policy

Although reserve expansion through borrowing is initiated by banks, the amount of reserves that banks can acquire in this way ordinarily is limited by the Federal Reserve's

administration of the discount window and by its control of the rate charged banks for adjustment credit loans - the discount rate.(17) Loans are made only for approved purposes, and other reasonably available sources of funds must have been fully used. Moreover, banks are discouraged from borrowing adjustment credit too frequently or for extended time periods. Raising the discount rate tends to restrain borrowing by increasing its cost relative to the cost of alternative sources of reserves.

Discount window administration is an important adjunct to the other Federal Reserve tools of monetary policy. While the privilege of borrowing offers a "safety valve" to temporarily relieve severe strains on the reserve positions of individual banks, there is generally a strong incentive for a bank to repay borrowing before adding further to its loans and investments.

16Adjustment credit is short-term credit available to meet temporary needs for funds. Seasonal credit is available for longer periods to smaller institutions having regular seasonal needs for funds. Extended credit may be made available to an institution or group of institutions experiencing sustained liquidity pressures. The reserves provided through extended credit borrowing typically are offset by open market operations. back

17Flexible discount rates related to rates on money market sources of funds currently are charged for seasonal credit and for extended credit outstanding more than 30 days. back

---

26 A bank may incur a reserve deficiency if it makes loans when it has no excess reserves. back

BANK A

Assets	Liabilities
Loans . . . . . +100	Deposits . . . . . +100
Reserves with F. R. Banks . . no change	
(*Required . . . . +10*)	
(*Deficit . . . . . 10*)	

---

27 Borrowing from a Federal Reserve Bank to cover such a deficit is accompanied by a direct credit to the bank's reserve account. back

FEDERAL RESERVE BANK

Assets	Liabilities
Loans to depository	Reserve accounts: Bank A . . +10

institution:
Bank A . . . . . +10

BANK A

Assets	Liabilities
Reserves with F.R. Banks . . +10	Borrowings from F.R.Banks . . +10

No further expansion can take place on the new reserves because they are all needed against the deposits created in (26).

---

28 Before a bank can repay borrowings, it must gain reserves from some other source. back

BANK A

Assets	Liabilities
Securities . . . . . -10	
Reserves with F.R. Banks . . . +10	

---

29 Repayment of borrowings from the Federal Reserve Bank reduces reserves. back

FEDERAL RESERVE BANK

Assets	Liabilities
Loans to depository institutions: Bank A . . . . . -10	Reserve accounts: Bank A . . . -10

BANK A

Assets	Liabilities
Reserves with F.R. Bank . . -10	Borrowings from F.R. Bank . . -10

Changes in Reserve Requirements

Thus far we have described transactions that affect the volume of bank reserves and the impact these transactions have upon the capacity of the banks to expand their assets and

deposits. It is also possible to influence deposit expansion or contraction by changing the required minimum ratio of reserves to deposits.

The authority to vary required reserve percentages for banks that were members of the Federal Reserve System (member banks) was first granted by Congress to the Federal Reserve Board of Governors in 1933. The ranges within which this authority can be exercised have been changed several times, most recently in the Monetary Control Act of 1980, which provided for the establishment of reserve requirements that apply uniformly to all depository institutions. The 1980 statute established the following limits:

On transaction accounts	
first $25 million	*3%*
above $25 million	*8% to 14%*
On nonpersonal time deposits	*0% to 9%*

The 1980 law initially set the requirement against transaction accounts over $25 million at 12 percent and that against nonpersonal time deposits at 3 percent. The initial $25 million "low reserve tranche" was indexed to change each year in line with 80 percent of the growth in transaction accounts at all depository institutions. (For example, the low reserve tranche was increased from $41.1 million for 1991 to $42.2 million for 1992.) In addition, reserve requirements can be imposed on certain nondeposit sources of funds, such as Eurocurrency liabilities.(18) (Initially the Board set a 3 percent requirement on Eurocurrency liabilities.)

The Garn-St. Germain Act of 1982 modified these provisions somewhat by exempting from reserve requirements the first $2 million of total reservable liabilities at each depository institution. Similar to the low reserve tranche adjustment for transaction accounts, the $2 million "reservable liabilities exemption amount" was indexed to 80 percent of annual increases in total reservable liabilities. (For example, the exemption amount was increased from $3.4 million for 1991 to $3.6 million for 1992.)

The Federal Reserve Board is authorized to change, at its discretion, the percentage requirements on transaction accounts above the low reserve tranche and on nonpersonal time deposits within the ranges indicated above. In addition, the Board may impose differing reserve requirements on nonpersonal time deposits based on the maturity of the deposit. (The Board initially imposed the 3 percent nonpersonal time deposit requirement only on such deposits with original maturities of under four years.)

During the phase-in period, which ended in 1984 for most member banks and in 1987 for most nonmember institutions, requirements changed according to a predetermined schedule, without any action by the Federal Reserve Board. Apart from these legally prescribed changes, once the Monetary Control Act provisions were implemented in late 1980, the Board did not change any reserve requirement ratios until late 1990. (The original maturity break for requirements on nonpersonal time deposits was shortened several times, once in 1982, and twice in 1983, in connection with actions taken to

deregulate rates paid on deposits.) In December 1990, the Board reduced reserve requirements against nonpersonal time deposits and Eurocurrency liabilities from 3 percent to zero. Effective in April 1992, the reserve requirement on transaction accounts above the low reserve tranche was lowered from 12 percent to 10 percent.

When reserve requirements are lowered, a portion of banks' existing holdings of required reserves becomes excess reserves and may be loaned or invested. For example, with a requirement of 10 percent, $10 of reserves would be required to support $100 of deposits. *See illustration 30.* But a reduction in the legal requirement to 8 percent would tie up only $8, freeing $2 out of each $10 of reserves for use in creating additional bank credit and deposits. *See illustration 31.*

An increase in reserve requirements, on the other hand, absorbs additional reserve funds, and banks which have no excess reserves must acquire reserves or reduce loans or investments to avoid a reserve deficiency. Thus an increase in the requirement from 10 percent to 12 percent would boost required reserves to $12 for each $100 of deposits. Assuming banks have no excess reserves, this would force them to liquidate assets until the reserve deficiency was eliminated, at which point deposits would be one-sixth less than before. *See illustration 32.*

Reserve Requirements and Monetary Policy

The power to change reserve requirements, like purchases and sales of securities by the Federal Reserve, is an instrument of monetary policy. Even a small change in requirements - say, one-half of one percentage point - can have a large and widespread impact. Other instruments of monetary policy have sometimes been used to cushion the initial impact of a reserve requirement change. Thus, the System may sell securities (or purchase less than otherwise would be appropriate) to absorb part of the reserves released by a cut in requirements.

It should be noted that in addition to their initial impact on excess reserves, changes in requirements alter the expansion power of every reserve dollar. Thus, such changes affect the leverage of all subsequent increases or decreases in reserves from any source. For this reason, changes in the total volume of bank reserves actually held between points in time when requirements differ do not provide an accurate indication of the Federal Reserve's policy actions.

Both reserve balances and vault cash are eligible to satisfy reserve requirements. To the extent some institutions normally hold vault cash to meet operating needs in amounts exceeding their required reserves, they are unlikely to be affected by any change in requirements.

18 The 1980 statute also provides that "under extraordinary circumstances" reserve requirements can be imposed at any level on any liability of depository institutions for as long as six months; and, if essential for the conduct of monetary policy, supplemental requirements up to 4 percent of transaction accounts can be imposed. back

30 Under a 10 percent reserve requirement, $10 of reserves are needed to support each $100 of deposits. back

BANK A

Assets		Liabilities	
Loans and investments	90	Deposits	100
Reserves	10		
(Required	*10)*		
(Excess	*0)*		

31 With a reduction in requirements from 10 percent to 8 percent, fewer reserves are required against the same volume of deposits so that excess reserves are created. These can be loaned or invested. back

BANK A

Assets		Liabilities	
Loans and investments	90	Deposits	100
Reserves	10		
(Required	*8)*		
(Excess	*2)*		

FEDERAL RESERVE BANK

Assets	Liabilities
No change	No change

There is no change in the total amount of reserves.

32 With an increase in requirements from 10 percent to 12 percent, more reserves are required against the same volume of deposits. The resulting deficiencies must be covered by liquidation of loans or investments... back

BANK A

Assets		Liabilities	
Loans and investments	90	Deposits	100
Reserves	10		

(*Required. . . . . 12*)
(*Deficit . . . . . 2*)

FEDERAL RESERVE BANK	
Assets	**Liabilities**
No change	No change

...because the total amount of bank reserves remains unchanged.

Changes in Foreign-Related Factors

The Federal Reserve has engaged in foreign currency operations for its own account since 1962. In addition, it acts as the agent for foreign currency transactions of the U.S. Treasury, and since the 1950s has executed transactions for customers such as foreign central banks. Perhaps the most publicized type of foreign currency transaction undertaken by the Federal Reserve is intervention in foreign exchange markets. Intervention, however, is only one of several foreign-related transactions that have the potential for increasing or decreasing reserves of banks, thereby affecting money and credit growth.

Several foreign-related transactions and their effects on U.S. bank reserves are described in the next few pages. Included are some but not all of the types of transactions used. The key point to remember, however, is that the Federal Reserve routinely offsets any undesired change in U.S. bank reserves resulting from foreign-related transactions. As a result, such transactions do not affect money and credit growth in the United States.

Foreign Exchange Intervention for the Federal Reserve's Own Account

When the Federal Reserve intervenes in foreign exchange markets to sell dollars for its own account,(19) it acquires foreign currency assets and reserves of U.S. banks initially rise. In contrast, when the Fed intervenes to buy dollars for its own account, it uses foreign currency assets to pay for the dollars purchased and reserves of U.S. banks initially fall.

Consider the example where the Federal Reserve intervenes in the foreign exchange markets to sell $100 of U.S. dollars for its own account. In this transaction, the Federal Reserve buys a foreign-currency-denominated deposit of a U.S. bank held at a foreign commercial bank,(20) and pays for this foreign currency deposit by crediting $100 to the U.S. bank's reserve account at the Fed. The Federal Reserve deposits the foreign currency proceeds in its account at a Foreign Central Bank, and as this transaction clears, the foreign bank's reserves at the Foreign Central Bank decline. *See illustration 33.* Initially, then, the Fed's intervention sale of dollars in this example leads to an increase in Federal

Reserve Bank assets denominated in foreign currencies and an increase in reserves of U.S. banks.

Suppose instead that the Federal Reserve intervenes in the foreign exchange markets to buy $100 of U.S. dollars, again for its own account. The Federal Reserve purchases a dollar-denominated deposit of a foreign bank held at a U.S. bank, and pays for this dollar deposit by drawing on its foreign currency deposit at a Foreign Central Bank. (The Federal Reserve might have to sell some of its foreign currency investments to build up its deposits at the Foreign Central Bank, but this would not affect U.S. bank reserves.) As the Federal Reserve's account at the Foreign Central Bank is charged, the foreign bank's reserves at the Foreign Central Bank increase. In turn, the dollar deposit of the foreign bank at the U.S. bank declines as the U.S bank transfers ownership of those dollars to the Federal Reserve via a $100 charge to its reserve account at the Federal Reserve. *See illustration 34.* Initially, then, the Fed's intervention purchase of dollars in this example leads to a decrease in Federal Reserve Bank assets denominated in foreign currencies and a decrease in reserves of U.S. banks.

As noted earlier, the Federal Reserve offsets or "sterilizes" any undesired change in U.S. bank reserves stemming from foreign exchange intervention sales or purchases of dollars. For example, Federal Reserve Bank assets denominated in foreign currencies rose dramatically in 1989, in part due to significant U.S. intervention sales of dollars. (*See chart.*) Total reserves of U.S. banks, however, declined slightly in 1989 as open market operations were used to "sterilize" the initial intervention-induced increase in reserves.

Monthly Revaluation of Foreign Currency Assets

Another set of accounting transactions that affects Federal Reserve Bank assets denominated in foreign currencies is the monthly revaluation of such assets. Two business days prior to the end of the month, the Fed's foreign currency assets are increased if their market value has appreciated or decreased if their value has depreciated. The offsetting accounting entry on the Fed's balance sheet is to the "exchange-translation account" included in "other F.R. liabilities." These changes in the Fed's balance sheet do not alter bank reserves directly. However, since the Federal Reserve turns over its net earnings to the Treasury each week, the revaluation affects the amount of the Fed's payment to the Treasury, which in turn influences the size of TT&L calls and bank reserves. (See explanation on pages 18 and 19.

Foreign-Related Transactions for the Treasury

U.S. intervention in foreign exchange markets by the Federal Reserve usually is divided between its own account and the Treasury's Exchange Stabilization Fund (ESF) account. The impact on U.S. bank reserves from the intervention transaction is the same for both - sales of dollars add to reserves while purchases of dollars drain reserves. *See illustration*

35. Depending upon how the Treasury pays for, or finances, its part of the intervention, however, the Federal Reserve may not need to conduct offsetting open market operations.

The Treasury typically keeps only minimal balances in the ESF's account at the Federal Reserve. Therefore, the Treasury generally has to convert some ESF assets into dollar or foreign currency deposits in order to pay for its part of an intervention transaction. Likewise, the dollar or foreign currency deposits acquired by the ESF in the intervention typically are drawn down when the ESF invests the proceeds in earning assets.

For example, to finance an intervention sale of dollars (such as that shown in illustration 35), the Treasury might redeem some of the U.S. government securities issued to the ESF, resulting in a transfer of funds from the Treasury's (general account) balances at the Federal Reserve to the ESF's account at the Fed. (On the Federal Reserve's balance sheet, the ESF's account is included in the liability category "other deposits.") The Treasury, however, would need to replenish its Fed balances to desired levels, perhaps by increasing the size of TT&L calls - a transaction that drains U.S. bank reserves. The intervention and financing transactions essentially occur simultaneously. As a result, U.S. bank reserves added in the intervention sale of dollars are offset by the drain in U.S. bank reserves from the TT&L call. *See illustrations 35 and 36.* Thus, no Federal Reserve offsetting actions would be needed if the Treasury financed the intervention sale of dollars through a TT&L call on banks.

Offsetting actions by the Federal Reserve would be needed, however, if the Treasury restored deposits affected by foreign-related transactions through a number of transactions involving the Federal Reserve. These include the Treasury's issuance of SDR or gold certificates to the Federal Reserve and the "warehousing" of foreign currencies by the Federal Reserve.

SDR certificates. Occasionally the Treasury acquires dollar deposits for the ESF's account by issuing certificates to the Federal Reserve against allocations of Special Drawing Rights (SDRs) received from the International Monetary Fund.(21) For example, $3.5 billion of SDR certificates were issued in 1989, and another $1.5 billion in 1990. This "monetization" of SDRs is reflected on the Federal Reserve's balance sheet as an increase in its asset "SDR certificate account" and an increase in its liability "other deposits (ESF account)."

If the ESF uses these dollar deposits directly in an intervention sale of dollars, then the intervention-induced increase in U.S. bank reserves is not altered. *See illustrations 35 and 37.* If not needed immediately for an intervention transaction, the ESF might use the dollar deposits from issuance of SDR certificates to buy securities from the Treasury, resulting in a transfer of funds from the ESF's account at the Federal Reserve to the Treasury's account at the Fed. U.S. bank reserves would then increase as the Treasury spent the funds or transferred them to banks through a direct investment to TT&L note accounts.

Gold stock and gold certificates. Changes in the U.S. monetary gold stock used to be an important factor affecting bank reserves. However, the gold stock and gold certificates issued to the Federal Reserve in "monetizing" gold, have not changed significantly since the early 1970s. (*See chart.*)

Prior to August 1971, the Treasury bought and sold gold for a fixed price in terms of U.S. dollars, mainly at the initiative of foreign central banks and governments. Gold purchases by the Treasury were added to the U.S. monetary gold stock, and paid for from its account at the Federal Reserve. As the sellers deposited the Treasury's checks in banks, reserves increased. To replenish its balance at the Fed, the Treasury issued gold certificates to the Federal Reserve and received a credit to its deposit balance.

Treasury sales of gold have the opposite effect. Buyers' checks are credited to the Treasury's account and reserves decline. Because the official U.S. gold stock is now fully "monetized," the Treasury currently has to use its deposits to retire gold certificates issued to the Federal Reserve whenever gold is sold. However, the value of gold certificates retired, as well as the net contraction in bank reserves, is based on the official gold price. Proceeds from a gold sale at the market price to meet demands of domestic buyers likely would be greater. The difference represents the Treasury's profit, which, when spent, restores deposits and bank reserves by a like amount.

While the Treasury no longer purchases gold and sales of gold have been limited, increases in the official price of gold have added to the value of the gold stock. (The official gold price was last raised from $38.00 to $42.22 per troy ounce, in 1973.)

Warehousing. The Treasury sometimes acquires dollar deposits at the Federal Reserve by "warehousing" foreign currencies with the Fed. (For example, $7 billion of foreign currencies were warehoused in 1989.) The Treasury or ESF acquires foreign currency assets as a result of transactions such as intervention sales of dollars or sales of U.S government securities denominated in foreign currencies. When the Federal Reserve warehouses foreign currencies for the Treasury,(22) "Federal Reserve Banks assets denominated in foreign currencies" increase as do Treasury deposits at the Fed. As these deposits are spent, reserves of U.S. banks rise. In contrast, the Treasury likely will have to increase the size of TT&L calls - a transaction that drains reserves - when it repurchases warehoused foreign currencies from the Federal Reserve. (In 1991, $2.5 billion of warehoused foreign currencies were repurchased.) The repurchase transaction is reflected on the Fed's balance sheet as declines in both Treasury deposits at the Federal Reserve and Federal Reserve Bank assets denominated in foreign currencies.

Transactions for Foreign Customers

Many foreign central banks and governments maintain deposits at the Federal Reserve to facilitate dollar-denominated transactions. These "foreign deposits" on the liability side of the Fed's balance sheet typically are held at minimal levels that vary little from week to week. For example, foreign deposits at the Federal Reserve averaged only $237 million in 1991, ranging from $178 million to $319 million on a weekly average basis. Changes in foreign deposits are small because foreign customers "manage" their Federal Reserve balances to desired levels daily by buying and selling U.S. government securities. The extent of these foreign customer "cash management" transactions is reflected, in part, by large and frequent changes in marketable U.S. government securities held in custody by the Federal Reserve for foreign customers. (*See chart.*) The net effect of foreign customers' cash management transactions usually is to leave U.S. bank reserves unchanged.

Managing foreign deposits through sales of securities. Foreign customers of the Federal Reserve make dollar-denominated payments, including those for intervention sales of dollars by foreign central banks, by drawing down their deposits at the Federal Reserve. As these funds are deposited in U.S. banks and cleared, reserves of U.S. banks rise. *See illustration 38.* However, if payments from their accounts at the Federal Reserve lower balances to below desired levels, foreign customers will replenish their Federal Reserve deposits by selling U.S. government securities. Acting as their agent, the Federal Reserve usually executes foreign customers' sell orders in the market. As buyers pay for the securities by drawing down deposits at U.S. banks, reserves of U.S. banks fall and offset the increase in reserves from the disbursement transactions. The net effect is to leave U.S. bank reserves unchanged when U.S. government securities of customers are sold in the market. *See illustrations 38 and 39.* Occasionally, however, the Federal Reserve executes foreign customers' sell orders with the System's account. When this is done, the rise in reserves from the foreign customers' disbursement of funds remains in place. *See illustration 38 and 40.* The Federal reserve might choose to execute sell orders with the System's account if an increase in reserves is desired for domestic policy reasons.

Managing foreign deposits through purchases of securitites. Foreign customers of the Federal Reserve also receive a variety of dollar denominated payments, including proceeds from intervention purchases of dollars by foreign central banks, that are drawn on U.S. banks. As these funds are credited to foreign deposits at the Federal Reserve, reserves of U.S. banks decline. But if receipts of dollar-denominated payments raise their deposits at the Federal Reserve to levels higher than desired, foreign customers will buy U.S. government securities. The net effect generally is to leave U.S. bank reserves unchanged when the U.S. government securities are purchased in the market.

Using the swap network. Occasionally, foreign central banks acquire dollar deposits by activating the "swap" network, which consists of reciprocal short-term credit arrangements between the Federal Reserve and certain foreign central banks. When a

foreign central bank draws on its swap line at the Federal Reserve, it immediately obtains a dollar deposit at the Fed in exchange for foreign currencies, and agrees to reverse the exchange sometime in the future. On the Federal Reserve's balance sheet, activation of the swap network is reflected as an increase in Federal Reserve Bank assets denominated in foreign currencies and an increase in the liability category "foreign deposits." When the swap line is repaid, both of these accounts decline. Reserves of U.S. banks will rise when the foreign central bank spends its dollar proceeds from the swap drawing. *See illustration 41*. In contrast, reserves of U.S. banks will fall as the foreign central bank rebuilds its deposits at the Federal Reserve in order to repay a swap drawing.

The accounting entries and impact of U.S. bank reserves are the same if the Federal Reserve uses the swap network to borrow and repay foreign currencies. However, the Federal Reserve has not activated the swap network in recent years.

19Overall responsibility for U.S. intervention in foreign exchange markets rests with the U.S Treasury. Foreign exchange transactions for the Federal Reserve's account are carried out under directives issued by the Federal Reserve's Open Market Committee within the general framework of exchange rate policy established by the U.S. Treasury in consultation with the Fed. They are implemented at the Federal Reserve Bank of New York, typically at the same time that similar transactions are executed for the Treasury's Exchange Stabilization Fund. back

20Americans traveling to foreign countries engage in "foreign exchange" transactions whenever they obtain foreign coins and paper currency in exchange for U.S. coins and currency. However, most foreign exchange transactions do not involve the physical exchange of coins and currency. Rather, most of these transactions represent the buying and selling of foreign currencies by exchanging one bank deposit denominated in one currency for another bank deposit denominated in another currency. For ease of exposition, the examples assume that U.S. banks and foreign banks are the market participants in the intervention transactions, but the impact on reserves would be the same if the U.S. or foreign public were involved. back

21SDRs were created in 1970 for use by governments in official balance of payments transactions. back

22Technically, warehousing consists of two parts: the Federal Reserve's agreement to purchase foreign currency assets from the Treasury or ESF for dollar deposits now, and the Treasury's agreement to repurchase the foreign currencies sometime in the future. back

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33 When the Federal Reserve intervenes to sell dollars for its own account, it pays for a foreign-currency-denominated deposit of a U.S. bank at a foreign commercial bank by crediting the reserve account of the U.S. bank, and acquires a foreign currency asset in the form of a deposit at a Foreign Central Bank. The Federal Reserve, however, will offset the increase in U.S. bank reserves if it is inconsistent with domestic policy objectives. back

FEDERAL RESERVE BANK

Assets	Liabilities
Deposits at Foreign Central Bank . . +100	Reserves: U.S. bank . . +100

U. S. BANK

Assets	Liabilities
Reserves with F.R. Bank . . +100	
Deposits at foreign bank . . -100	

FOREIGN BANK

Assets	Liabilities
Reserves with Foreign Central Bank . . -100	Deposits of U.S. bank . . -100

FOREIGN CENTRAL BANK

Assets	Liabilities
	Deposits of F.R. Banks . . . +100
	Reserves of foreign bank . . . -100

---

34 When the Federal Reserve intervenes to buy dollars for its own account, it draws down its foreign currency deposits at a foreign Central Bank to pay for a dollar-denominated deposit of a foreign bank at a U.S. bank, which leads to a contraction in reserves of the U.S. bank. This reduction in reserves will be offset by the Federal Reserve if it is inconsistent with domestic policy objectives. back

FEDERAL RESERVE BANK

Assets	Liabilities
Deposits at Foreign Central Bank . . -100	Reserves: U. S. bank . . -100

U. S. BANK

Assets	Liabilities

Reserves with F.R. Bank . . -100 Deposits of foreign bank . . -100

FOREIGN BANK	
Assets	**Liabilities**
deposits at U.S. bank . . . -100	
Reserves with Foreign Central Bank . +100	

FOREIGN CENTRAL BANK	
Assets	**Liabilities**
	Deposits of F.R. Banks . . -100
	Reserves of foreign bank . . +100

---

35 In an intervention sale of dollars for the U.S. Treasury, deposits of the ESF at the Federal Reserve are used to pay for a foreign currency deposit of a U.S. bank at a foreign bank, and the foreign currency proceeds are deposited in an account at a Foreign Central Bank. U.S. bank reserves increase as a result of this intervention transaction. back

ESF	
Assets	**Liabilities**
Deposits at F.R. Bank . . . . -100	
Deposits at Foreign Central Bank . . +100	

U. S. Treasury	
Assets	**Liabilities**
No change	No change

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserves: U.S. bank . . . +100
	Other deposits: ESF . . . -100

U. S. BANK	
Assets	**Liabilities**
Reserves with F.R. Bank . . . +100	
Deposits at foreign bank . . . -100	

FOREIGN BANK	
Assets	**Liabilities**
Reserves with Foreign Central Bank . -100	Deposits of U.S. bank .

-100

FOREIGN CENTRAL BANK	
Assets	**Liabilities**
	Deposits of ESF . . . +100
	Reserves of foreign bank . . -100

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36 Concurrently, the Treasury must finance the intervention transaction in (35). The Treasury might build up deposits in the ESF's account at the Federal Reserve by redeeming securities issued to the ESF, and replenish its own (general account) deposits at the Federal Reserve to desired levels by issuing a call on TT&L note accounts. This set of transactions drains reserves of U.S. banks by the same amount as the intervention in (35) added to U.S. bank reserves. back

ESF	
Assets	**Liabilities**
U.S govt. securities . . . -100	
Deposits at F.R. Banks . . +100	

U. S. Treasury	
Assets	**Liabilities**
TT&L accts . . . . . -100	Securities issued ESF . . . -100
Deposits at F.R. Banks . . . net 0	
(from U.S bank . . +100)	
(to ESF . . . . . -100)	

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserves: U.S. bank . . . -100
	Treas. deps: . . . . net 0
	(from U.S. bank . +100)
	(to ESF. . . . . -100)
	Other deposits: ESF . . . . +100

U. S. BANK	
Assets	**Liabilities**
Reserves with F.R. Bank . . -100	TT&L accts . . . . . -100

---

37 Alternatively, the Treasury might finance the intervention in (35) by issuing SDR certificates to the Federal Reserve, a transaction that would not disturb the addition of

U.S. bank reserves in intervention (35). The Federal Reserve, however, would offset any undesired change in U.S. bank reserves. back

ESF	
Assets	**Liabilities**
Deposits at F.R. Banks . . +100	SDR certificates issued to F.R. Banks . . . . . +100
U. S. Treasury	
Assets	**Liabilities**
No change	No change
FEDERAL RESERVE BANK	
Assets	**Liabilities**
SDR certificate account . . +100	Other deposits: ESF . . . +100
U. S. BANK	
Assets	**Liabilities**
No change	No change

---

38 When a Foreign Central Bank makes a dollar-denominated payment from its account at the Federal Reserve, the recipient deposits the funds in a U.S. bank. As the payment order clears, U.S. bank reserves rise. back

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserves: U.S. bank . . . +100
	Foreign deposits . . . . -100
U. S. BANK	
Assets	**Liabilities**
Reserves with F.R. Banks . . +100	Deposits . . . . . +100
FOREIGN CENTRAL BANK	
Assets	**Liabilities**
Deposits at F.R. Banks . . . . -100	Accounts payable . . . . . -100

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39 If a decline in its deposits at the Federal Reserve lowers the balance below desired levels, the Foreign Central Bank will request that the Federal Reserve sell U.S. government securities for it. If the sell order is executed in the market, reserves of U.S. banks will fall by the same smount as reserves were increased in (38). back

FEDERAL RESERVE BANK	
Assets	**Liabilities**
	Reserves: U.S. bank . . . . -100
	Foreign deposits . . . . . +100

U. S. BANK	
Assets	**Liabilities**
Reserves with F.R. Banks . . . -100	Deposits of securities buyer . . . -100

FOREIGN CENTRAL BANK	
Assets	**Liabilities**
Deposits at F.R. Banks . . +100	
U.S. govt. securities . . -100	

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40 If the sell order is executed with the Federal Reserve's account, however, the increase in reserves from (38) will remain in place. The Federal Reserve might choose to execute the foreign customer's sell order with the System's account if an increase in reserves is desired for domestic policy reasons.

FEDERAL RESERVE BANK	
Assets	**Liabilities**
U.S. govt. securities . . . . +100	Foreign deposits . . . . +100

U. S. Bank	
Assets	**Liabilities**
No change	No change

FOREIGN CENTRAL BANK	
Assets	**Liabilities**
Deposits at F.R. Banks . . . +100	
U.S. govt. securities . . . . . -100	

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41 When a Foreign Central Bank draws on a "swap" line, it receives a credit to its dollar deposits at the Federal Reserve in exchange for a foreign currency deposit credited to the Federal Reserve's account. Reserves of U.S. banks are not affected by the swap drawing transaction, but will increase as the Foreign Central Bank uses the funds as in (38). back

FEDERAL RESERVE BANK	
Assets	**Liabilities**
deposits at Foreign Central Bank . . +100	Foreign deposits . . . . +100
U. S. Bank	
Assets	**Liabilities**
No change	No change
FOREIGN CENTRAL BANK	
Assets	**Liabilities**
Deposits at F.R. Banks . . . +100	Deposits of F.R. Banks . . . +100

Federal Reserve Actions Affecting Its Holdings of U. S. Government Securities

In discussing various factors that affect reserves, it was often indicated that the Federal Reserve offsets undesired changes in reserves through open market operations, that is, by buying and selling U.S. government securities in the market. However, outright purchases and sales of securities by the Federal Reserve in the market occur infrequently, and typically are conducted when an increase or decrease in another factor is expected to persist for some time. Most market actions taken to implement changes in monetary policy or to offset changes in other factors are accomplished through the use of transactions that change reserves temporarily. In addition, there are off-market transactions the Federal Reserve sometimes uses to change its holdings of U.S. government securities and affect reserves. (Recall the example in illustrations 38 and 40.) The impact on reserves of various Federal Reserve transactions in U.S. government and federal agency securities is explained below. *(See table for a summary.)*

Outright transactions. Ownership of securities is transferred permanently to the buyer in an outright transaction, and the funds used in the transaction are transferred permanently to the seller. As a result, an outright purchase of securities by the Federal Reserve from a dealer in the market adds reserves permanently while an outright sale of securities to a dealer drains reserves permanently. The Federal Reserve can achieve the same net effect on reserves through off-market transactions where it executes outright sell and purchase orders from customers internally with the System account. In contrast, there is no impact

on reserves if the Federal Reserve fills customers' outright sell and purchase orders in the market.

Temporary transactions. Repurchase agreements (RPs), and associated matched sale-purchase agreements (MSPs), transfer ownership of securities and use of funds temporarily. In an RP transaction, one party sells securities to another and agrees to buy them back on a specified future date. In an MSP transaction, one party buys securities from another and agrees to sell them back on a specified future date. In essence, then, and RP for one party in the transaction works like an MSP for the other party.

When the Federal Reserve executes what is referred to as a "System RP," it acquires securities in the market from dealers who agree to buy them back on a specified future date 1 to 15 days later. Both the System's portfolio of securities and bank reserves are increased during the term of the RP, but decline again when the dealers repurchase the securities. Thus System RPs increase reserves only temporarily. Reserves are drained temorarily when the Fed executes what is known as a "System MSP." A System MSP works like a System RP, only in the opposite directions. In a system MSP, the Fed sells securities to dealers in the market and agrees to buy them back on a specified day. The System's holdings of securities and bank reserves are reduced during the term of the MSP, but both increase when the Federal Reserve buys back the securities.

Impact on reserves of Federal Reserve transactions in U.S. government and federal agency securities

Federal Reserve Transactions	Reserve Impact
Outright purchase of Securities	
- From dealer in market	Permanent increase
- To fill customer sell orders	Permanent increase
(If customer buy orders filled in market)	(No impact)
Outright Sales of Securites	
- To dealer in market	Permanent decrease
- To fill customer buy orders internally	Permanent decrease
(If customer buy orders filled in market)	(No impact)
Repurchase Agreements (RPs)	
- With dealer in market in System RP	Temporary increase
Matched Sale-Purchase Agreements (MSPs)	
- With dealer in market in a system MSP	Temporary decrease
- To fill customer RP orders internally	No impact*
(If customer RP orders passed to market as customer related RPs)	(Temporary increase*)
Redemption of Maturing Securities	
- Replace total amount maturing	No impact

- Redeem part of amount maturing	Permanent decrease
- Buy more than amount maturing**	Permanent increase**

*Impact based on assumption that the amount of RP orders done internally is the same as on the prior day.

**The Federal Reserve currently is prohibited by law from buying securities directly from the Treasury, except to replace maturing issues.

The Federal Reserve also uses MSPs to fill foreign customers' RP orders internally with the System account. Considered in isolation, a Federal Reserve MSP transaction with customers would drain reserves temporarily. However, these transactions occur every day, with the total amount of RP orders being fairly stable from day to day. Thus, on any given day, the Fed both buys back securities from customers to fulfill the prior day's MSP, and sells them about the same amount of securities to satisfy that day's agreement. As a result, there generally is little or no impact on reserves when the Fed uses MSPs to fill customer RP orders internally with the System account. Sometimes, however, the Federal Reserve fills some of the RP orders internally and the rest in the market. The part that is passed on to the market is known as a "customer-related RP." The Fed ends up repurchasing more securities from customers to complete the prior day's MSP than it sells to them in that day's MSP. As a result, customer-related RPs add reserves temporarily.

Maturing securities. As securities held by the Federal Reserve mature, they are exchanged for new securities. Usually the total amount maturing is replaced so that there is no impact on reserves since the Fed's total holdings remain the same. Occasionally, however, the Federal Reserve will exchange only part of the amount maturing. Treasury deposits decline as payment for the redeemed securities is made, and reserves fall as the Treasury replenishes its deposits at the Fed through TT&L calls. The reserve drain is permanent. If the Fed were to buy more than the amount of securities maturing directly from the Treasury, then reserves would increase permanently. However, the Federal Reserve currently is prohibited by law from buying securities directly from the Treasury, except to replace maturing issues.

Miscellaneous Factors Affecting Bank Reserves

The factors described below normally have negligible effects on bank reserves because changes in them either occur very slowly or tend to be balanced by concurrent changes in other factors. But at times they may require offsetting action.

Treasury Currency Outstanding

Treasury currency outstanding consists of coins, silver certificates and U.S. notes originally issued by the Treasury, and other currency originally issued by commercial banks and by Federal Reserve Banks before July 1929 but for which the Treasury has redemption responsibility. Short-run changes are small, and their effects on bank reserves are indirect.

The amount of Treasury currency outstanding currently increases only through issuance of new coin. The Treasury ships new coin to the Federal Reserve Banks for credit to Treasury deposits there. These deposits will be drawn down again, however, as the Treasury makes expenditures. Checks issued against these deposits are paid out to the public. As individuals deposit these checks in banks, reserves increase. (See explanation on pages 18 and 19.)

When any type of Treasury currency is retired, bank reserves decline. As banks turn in Treasury currency for redemption, they receive Federal Reserve notes or coin in exchange or a credit to their reserve accounts, leaving their total reserves (reserve balances and vault cash) initially unchanged. However, the Treasury's deposits in the Reserve Banks are charged when Treasury currency is retired. Transfers from TT&L balances in banks to the Reserve Banks replenish these deposits. Such transfers absorb reserves.

Treasury Cash Holdings

In addition to accounts in depository institutions and Federal Reserve Banks, the Treasury holds some currency in its own vaults. Changes in these holdings affect bank reserves just like changes in the Treasury's deposit account at the Reserve Banks. When Treasury holdings of currency increase, they do so at the expense of deposits in banks. As cash holdings of the Treasury decline, on the other hand, these funds move into bank deposits and increase bank reserves.

Other Deposits in Reserve Banks

Besides U.S. banks, the U.S. Treasury, and foreign central banks and governments, there are some international organizations and certain U.S. government agencies that keep funds on deposit in the Federal Reserve Banks. In general, balances are built up through transfers of deposits held at U.S. banks. Such transfers may take place either directly, where these customers also have deposits in U.S. banks, or indirectly by the deposit of funds acquired from others who do have accounts at U.S. banks. Such transfers into "other deposits" drain reserves.

When these customers draw on their Federal Reserve balances (say, to purchase securities), these funds are paid to the public and deposited in U.S. banks, thus increasing bank reserves. Just like foreign customers, these "other" customers manage their balances at the Federal Reserve closely so that changes in their deposits tend to be small and have minimal net impact on reserves.

Nonfloat-Related Adjustments

Certain adjustments are incorporated into published data on reserve balances to reflect nonfloat-related corrections. Such a correction might be made, for example, if an individual bank had mistakenly reported fewer reservable deposits than actually existed and had held smaller reserve balances than necessary in some past period. To correct for this error, a nonfloat-related as-of adjustment will be applied to the bank's reserve position. This essentially results in the bank having to hold higher balances in its reserve account in the current and/or future periods than would be needed to satisfy reserve requirements in those periods. Nonfloat-related as-of adjustments affect the allocation of funds in bank reserve accounts but not the total amount in these accounts as reflected on Federal Reserve Bank and individual bank balance sheets. Published data on reserve balances, however, are adjusted to show only those reserve balances held to meet the current and/or future period reserve requirements.

Other Federal Reserve Accounts

Earlier sections of this booklet described the way in which bank reserves increase when the Federal Reserve purchases securities and decline when the Fed sells securities. The same results follow from any Federal Reserve expenditure or receipt. Every payment made by the Reserve Banks, in meeting expenses or acquiring any assets, affects deposits and bank reserves in the same way as does payment to a dealer for government securities. Similarly, Reserve Bank receipts of interest on loans and securities and increases in paid-in capital absorb reserves.

End of page 35. back

The Reserve Multiplier - Why It Varies

The deposit expansion and contraction associated with a given change in bank reserves, as illustrated earlier in this booklet, assumed a fixed reserve-to-deposit multiplier. That multiplier was determined by a uniform percentage reserve requirement specified for transaction accounts. Such an assumption is an oversimplification of the actual relationship between changes in reserves and changes in money, especially in the short-run. For a number of reasons, as discussed in this section, the quantity of reserves associated with a given quantity of transaction deposits is constantly changing.

One slippage affecting the reserve multiplier is variation in the amount of excess reserves. In the real world, reserves are not always fully utilized. There are always some excess reserves in the banking system, reflecting frictions and lags as funds flow among thousands of individual banks.

Excess reserves present a problem for monetary policy implementation only because the amount changes. To the extent that new reserves supplied are offset by rising excess reserves, actual money growth falls short of the theoretical maximum. Conversely, a reduction in excess reserves by the banking system has the same effect on monetary expansion as the injection of an equal amount of new reserves.

Slippages also arise from reserve requirements being imposed on liabilities not included in money as well as differing reserve ratios being applied to transaction deposits according to the size of the bank. From 1980 through 1990, reserve requirements were imposed on certain nontransaction liabilities of all depository institutions, and before then on all deposits of member banks. The reserve multiplier was affected by flows of funds between institutions subject to differing reserve requirements as well as by shifts of funds between transaction deposits and other liabilities subject to reserve requirements. The extension of reserve requirements to all depository institutions in 1980 and the elimination of reserve requirements against nonpersonal time deposits and Eurocurrency liabilities in late 1990 reduced, but did not eliminate, this source of instability in the reserve multiplier. The deposit expansion potential of a given volume of reserves still is affected by shifts of transaction deposits between larger institutions and those either exempt from reserve requirements or whose transaction deposits are within the tranche subject to a 3 percent reserve requirement.

In addition, the reserve multiplier is affected by conversions of deposits into currency or vice versa. This factor was important in the 1980s as the public's desired currency holdings relative to transaction deposits in money shifted considerably. Also affecting the multiplier are shifts between transaction deposits included in money and other transaction accounts that also are reservable but not included in money, such as demand deposits due to depository institutions, the U.S. government, and foreign banks and official institutions. In the aggregate, these non-money transaction deposits are relatively small in comparison to total transaction accounts, but can vary significantly from week to week.

A net injection of reserves has widely different effects depending on how it is absorbed. Only a dollar-for-dollar increase in the money supply would result if the new reserves were paid out in currency to the public. With a uniform 10 percent reserve requirement, a $1 increase in reserves would support $10 of additional transaction accounts. An even larger amount would be supported under the graduated system where smaller institutions are subject to reserve requirements below 10 percent. But, $1 of new reserves also would support an additional $10 of certain reservable transaction accounts that are not counted as money. (*See chart below.*) Normally, an increase in reserves would be absorbed by some combination of these currency and transaction deposit changes.

All of these factors are to some extent predictable and are taken into account in decisions as to the amount of reserves that need to be supplied to achieve the desired rate of monetary expansion. They help explain why short-run fluctuations in bank reserves often are disproportionate to, and sometimes in the opposite direction from, changes in the deposit component of money.

Money Creation and Reserve Management

Another reason for short-run variation in the amount of reserves supplied is that credit expansion - and thus deposit creation - is variable, reflecting uneven timing of credit demands. Although bank loan policies normally take account of the general availability of funds, the size and timing of loans and investments made under those policies depend largely on customers' credit needs.

In the real world, a bank's lending is not normally constrained by the amount of excess reserves it has at any given moment. Rather, loans are made, or not made, depending on the bank's credit policies and its expectations about its ability to obtain the funds necessary to pay its customers' checks and maintain required reserves in a timely fashion. In fact, because Federal Reserve regulations in effect from 1968 through early 1984 specified that average required reserves for a given week should be based on average deposit levels two weeks earlier ("lagged" reserve accounting), deposit creation actually preceded the provision of supporting reserves. In early 1984, a more "contemporaneous" reserve accounting system was implemented in order to improve monetary control.

In February 1984, banks shifted to maintaining average reserves over a two-week reserve maintenance period ending Wednesday against average transaction deposits held over the two-week computation period ending only two days earlier. Under this rule, actual transaction deposit expansion was expected to more closely approximate the process explained at the beginning of this booklet. However, some slippages still exist because of short-run uncertainties about the level of both reserves and transaction deposits near the close of reserve maintenance periods. Moreover, not all banks must maintain reserves according to the contemporaneous accounting system. Smaller institutions are either exempt completely or only have to maintain reserves quarterly against average deposits in one week of the prior quarterly period.

On balance, however, variability in the reserve multiplier has been reduced by the extension of reserve requirements to all institutions in 1980, by the adoption of contemporaneous reserve accounting in 1984, and by the removal of reserve requirements against nontransaction deposits and liabilities in late 1990. As a result, short-term changes in total reserves and transaction deposits in money are more closely related now than they were before. (*See charts on this page.*) The lowering of the reserve requirement against transaction accounts above the 3 percent tranche in April 1992 also should contribute to stabilizing the multiplier, at least in theory.

Ironically, these modifications contributing to a less variable relationship between changes in reserves and changes in transaction deposits occurred as the relationship between transactions money (M1) and the economy deteriorated. Because the M1 measure of money has become less useful as a guide for policy, somewhat greater attention has shifted to the broader measures M2 and M3. However, reserve multiplier relationships for the broader monetary measures are far more variable than that for M1.

Although every bank must operate within the system where the total amount of reserves is controlled by the Federal Reserve, its response to policy action is indirect. The individual bank does not know today precisely what its reserve position will be at the time the proceeds of today's loans are paid out. Nor does it know when new reserves are being supplied to the banking system. Reserves are distributed among thousands of banks, and the individual banker cannot distinguish between inflows originating from additons to reserves through Federal reserve action and shifts of funds from other banks that occur in the normal course of business.

To equate short-run reserve needs with available funds, therefore, many banks turn to the money market - borrowing funds to cover deficits or lending temporary surpluses. When the demand for reserves is strong relative to the supply, funds obtained from money market sources to cover deficits tend to become more expensive and harder to obtain, which, in turn, may induce banks to adopt more restrictive loan policies and thus slow the rate of deposit growth.

Federal Reserve open market operations exert control over the creation of deposits mainly through their impact on the availability and cost of funds in the money market. When the total amount of reserves supplied to the banking system through open market operations falls short of the amount required, some banks are forced to borrow at the Federal Reserve discount window. Because such borrowing is restricted to short periods, the need to repay it tends to induce restraint on further deposit expansion by the borrowing bank. Conversely, when there are excess reserves in the banking system, individual banks find it easy and relatively inexpensive to acquire reserves, and expansion in loans, investments, and deposits is encouraged.

David F. Capps
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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, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A. Defendant,	Case No. **CV-07-38202** **AFFIDAVIT OF DAVID F. CAPPS**

State of Idaho)
) ss:
County of Idaho)

I, David F. Capps, having been duly sworn upon oath, do hereby depose and state:

1. That I am the Plaintiff in this action.

2. That I am over 18 years of age.

3. That I am a resident of Idaho County, State of Idaho.

4. That on or about the 29th day of May 2008, I sent the PLAINTIFF'S SECOND SET OF INTERROGATORIES, REQUEST FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS to the attorney for the Defendant.
5. That included in that set of interrogatories was a request for production of the original agreement between the Plaintiff and MBNA America Bank, N.A.
6. That the Defendant answered the second set of interrogatories on or about the 30th day of June 2008.
7. That the original agreement was not included in the responses from the Defendant.
8. That the original agreement is not on file with the court.
9. That the original agreement has not been entered into evidence.
10. That any copy of an alleged agreement on the record is not an exact duplicate of the original agreement.
11. That any copy of an alleged agreement has different terms and conditions from that in the original agreement.
12. That I hereby object to the use of an agreement other than the original. Further deponent sayeth not.

Dated this 11 TH day of July 2008.

David F. Capps

CERTIFICATE OF SERVICE

I, Miriam G. Carroll, do hereby certify, under penalty of perjury, that I FAXED and also mailed by Certified Mail # 7006 2150 0003 4550 2710 A true and correct copy of this Affidavit this 11TH day of July 2008 to the attorney for the Defendant at the following address:

Alec. T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

Miriam G. Carroll

Miriam G. Carroll

NOTARY PUBLIC

I hereby certify that the above named person appeared before me this 11th day of July 2008.

Signature of Notary

My Commission expires on 2/12/11

SEAL

SALLY J. ROY
NOTARY
PUBLIC
STATE OF IDAHO

DOCKETED

IDAHO COUNTY DISTRICT COU...
FILED
AT 11:30 O'CLOCK A .M.
JUL 22 2008
ROSE E. GEHRING
CLERK OF DISTRICT COURT
Jan Hall 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,

v.

FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.,

Defendant.

Case No.: CV 07-38202

MEMORANDUM DECISION AND ORDER

FIA Card Services ("FIA") asks me to reconsider my Order entered April 29, 2008, in which I compelled FIA to respond to David F. Capps' Interrogatory Request Number five and Requests for Production of Documents Numbers three, four, and five.

Mr. Capps' Interrogatory Request Number Five states:

INTERROGATORY REQUEST NUMBER 5: Please identify each record-keeping system within the Defendant's system of records, by individual system or category, describing each record-keeping system with reasonable particularity, together with a description of the nature, custody, condition, category and location, of any kind of documents (including writings, drawings, graphs, charges, photographs, phone records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) that are in the possession, custody, or control of the Defendant that contain, reference or identify the ACCOUNT.

Mr. Capps' Requests for Production of Documents numbers three, four, and five state:

REQUEST FOR PRODUCTION OF DOCUMENT NO. 3: Please produce, or make available for copying, all documents regarding any and all communications relating to any and all studies made by FIA or MBNA America Bank, N.A.,

regarding bill stuffers; including the number, or percentage, of customers reading material included in the same envelope as the monthly statement.

REQUEST FOR PRODUCTION OF DOCUMENT NO. 4: Please produce, or make available for copying, all documents regarding any and all studies made by or for FIA or MBNA America Bank, N.A. regarding bill stuffers: Including the number, or percentage, of customers reading material included in the same envelope as the monthly statement.

REQUEST FOR PRODUCTION OF DOCUMENT NO. 5: Please produce, or make available for copying, all documents regarding any and all studies used or referenced by FIA or MBNA America Bank, N.A., from whatever source, regarding bill stuffers; including the number, or percentage, of customers reading material included in the same envelope as the monthly statement.

I. CONTENTIONS

1. FIA contends that it should not be ordered to respond to Mr. Capps' Interrogatory Request Number five because it is vague, ambiguous, unduly burdensome and irrelevant. Specifically, FIA contends that Mr. Capps has not defined what is meant by "record-keeping system" or "system of records" nor articulated how such information is relevant.

2. Mr. Capps contends that the term "record-keeping system" or "system of records" is not a vague or ambiguous term as it is clearly defined in Merriam-Webster's Dictionary and is standard nomenclature of financial institutions such as FIA. Mr. Capps further contends that the requested information is relevant as it goes to his affirmative defense that FIA is not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure and lacks standing.

3. FIA contends that it should not be ordered to respond to Mr. Capps' Requests for Production of Documents Numbered three, four, and five relating to information on studies of bill studies. The argument being that such

documents are irrelevant due to FIA's alleged statutory right to unilaterally amend a credit card agreements by sending amended agreements via mail with a periodic statements or other material.

4. Mr. Capps contends that such documents are relevant because they demonstrate that Mr. Capps' had inadequate notice of the proposed arbitration amendment to the Account Agreement.

II. STANDARD OF REVIEW

The decision to grant or deny FIA Card Services' request for reconsideration rests in my sound discretion. *Carnell v. Barker Mgmt. Inc.*, 137 Idaho 322, 329, 48 P.3d 651, 658 (Idaho 2002).

III. DISCUSSION

1. *Is Mr. Capps' Interrogatory Request No. 5 vague, ambiguous, unduly burdensome and irrelevant?*

FIA reasserts in its motion for reconsideration the argument it initially made in opposition to the motion to compel discovery, namely that the term "record-keeping system" as used in Mr. Capps' Interrogatory Request No. 5 is vague or ambiguous. Mr. Capps contends that such term is not ambiguous or vague because it is defined in Merriam-Webster's Dictionary and is standard nomenclature for financial institutions.

While Meriam Webster's does not define the term "record-keeping system" it does individually define the words "record," "keep," and "system." The word "record" is defined as "to set down in writing : furnish written evidence of;" the word "keep" is defined as "preserve; maintain,"and the word "system" is defined as "an organized or established procedure" *Meriam Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary (last visited July 2,

2008). Putting these definitions together it is clear what is meant when Mr. Capps requests disclosure of anything in FIA Card Services' record-keeping system that contains, references, or identifies the account in question. What FIA must disclose is anything in its organized or established system of preserving or maintaining written evidence or writings that contains, references or identifies the account at issue.

The term "record-keeping system" should not be confusing to FIA Card Services as the term is standard nomenclature for financial institutions. *See e.g. OCC Advisory Letter Regarding Electronic Record Keeping, AL 2004-9* (June 21, 2004). A term that is standard nomenclature and clearly defined cannot be considered vague or ambiguous.

I thus turn to the second predicate upon which FIA Card services argues it should not be compelled to answer Mr. Capps' Interrogatory Request No. 5—the irrelevancy of the information requested. FIA believes that Mr. Capps requested the information in Interrogatory Request No. 5 for the purpose of proving Mr. Capps' claim of fraud, but that the information requested is irrelevant to a claim of fraud. *Motion for Reconsideration and to Stay Order Compelling Discovery* at 2.

In his Memorandum in Opposition to Defendant's Motion for Reconsideration, Mr. Capps explains that the information requested relates not to his claim of fraud, but to his affirmative defenses that FIA Card Services "lacks standing" and "is not a real party in interest under Rule 17(a) of the Idaho Rules of Civil Procedure" *Opposition to Defendant's Motion for Reconsideration* at 2. The information additionally relates to Mr. Capps' claim that FIA Card Services is acting in the capacity as a collection agent who has failed to properly register in Idaho. *Id.* at 3. 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. Because Mr. Capps' Interrogatory Request No. 5 is not vague, ambiguous, or unduly burdensome, and because it requests relevant information to Mr. Capps' defenses, I will not reverse my prior order compelling FIA Card Services to answer this interrogatory request.

2. *Are Mr. Capps' Requests for Production Nos. 3, 4, and 5 irrelevant because FIA has a statutory right to unilaterally amend a credit card agreement via mail with a periodic statement or other materials sent to Mr. Capps.*

Mr. Capps' Requests for Production Nos. 3, 4, and 5 all relate to studies on bill stuffing. Mr. Capps argues that such information is relevant because it demonstrates that the overwhelming majority of people do not read material included in bill stuffers, which thereby proves that by sending the arbitration clause amendment to the credit card agreement in the same envelope as Mr. Capps' periodic statement of account, FIA Failed to provide Mr. Capps with adequate legal notice of the amendment. *Opposition to Defendant's Motion for Reconsideration* at 3-8.

FIA, on the other hand, contends that it is irrelevant what the bill stuffing studies reveal since Delaware law specifically provides that a bank may unilaterally amend a credit card agreement by providing notice to a cardholder, and that such notice may be provided by sending the amendment to the cardholder "in the same envelope with a periodic statement or as part of the periodic statement." *Motion for Reconsideration and to Stay Order Compelling Discovery* at 3 (citing 5 Del. C. § 952(a)).

The standard for determining whether material is properly discoverable or not is found in Rule 26(b)(1) of the Idaho Rules of Civil Procedure. It states:

> Scope of Discovery in General:
>
> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Idaho Rule of Civil Procedure 26(b)(1).

Pursuant to this standard, the information relating to bill stuffing studies is properly discoverable material because it is reasonably calculated to lead to the discovery of admissible evidence regarding whether or not Mr. Capps actually received the Arbitration Amendment to the Account Agreement that was allegedly sent in the same envelope as Mr. Capps' monthly statement.

I recognize that Mr. Capps would like to use the information from the bill stuffing studies to support his claim of fraud against FIA; specifically, to prove that FIA knew from the bill stuffing studies that sending the Amendment in the same envelope as Mr.

Capps' monthly statement would not provide him with adequate legal notice. However, this issue of how the information from the bill stuffing studies can properly be used is a matter for another day. All that needs to be determined in this motion is whether or not the information on the bill stuffing studies should be discoverable at all. To which the answer is yes because the information is reasonably calculated to lead to the discovery of admissible evidence, namely whether or not Mr. Capps actually received the Arbitration Amendment to the Agreement. I therefore confirm my initial order compelling FIA to respond to Mr. Capps' Requests for Production Nos. 3, 4, & 5 relating to Bill Stuffing Studies.

IV. ORDER

FIA Card Services' Motion to Reconsider and Stay My April 29, 2008 Order Compelling Discovery is denied. FIA Card Services shall answer Mr. Capps' Interrogatory Request No. 3 and Requests for Production of Documents Nos. 3, 4, and 5.

It is so ordered, this the 22 day of July, 2008

John Bradbury

JOHN BRADBURY
DISTRICT JUDGE

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,

v.

FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.,

Defendant.

Case No.: CV 07-38202

MEMORANDUM DECISION AND ORDER

This matter comes before me on FIA Card Services' Motion for Summary Judgment.

BACKGROUND and DISCUSSION

FIA Card Services ("FIA") filed a motion for summary judgment on its breach of contract and account stated claims. In regards to the breach of contract claim, FIA argues that a contract was formed by FIA's issuance of and Mr. Capps' use of a credit card. FIA further argues that this contract agreement was breached when Mr. Capps' failed to make the requested payments set forth in monthly statements mailed to Mr. Capps. FIA finally argues that Mr. Capps admitted the existence of this contract and its subsequent default by his failing to respond to the Requests for Admission sent to him.

In regards to the Account Stated claim, FIA argues that a new account stated contract was formed by Mr. Capps' failure to object to the charges claimed to be due in

the monthly statements sent to Mr. Capps by FIA. FIA further argues that Mr. Capps has admitted to the existence of an account stated by failing to respond to the discovery requests submitted to him.

I held a hearing on FIA's motion for Summary Judgment on June 26, 2008. Subsequent to this hearing, an order was issued permitting Mr. Capps to amend his responses to the discovery requests. Accordingly, FIA's arguments in its motion for summary judgment that Mr. Capps has admitted by default the existence of a contract and its breach as well as an account stated contract, no longer bear validity.

Mr. Capps has since amended his discovery responses. He admits that he received by mail the statements of his account. *Opposition to Motion for Summary Judgment* at 14; Answer to Request for Admission No. 2. Nonetheless, he specifically denies that by he agreed to pay FIA by virtue of opening a credit card account with them. *Opposition to Motion for Summary Judgment* at 14; Answer to Request for Admission No. 1. He further denies that he owes FIA the claimed amount due and owing. *Opposition to Motion for Summary Judgment* at 14-15; Answer to Request for Admission Nos. 3 & 4. Finally, he denies that he has no defense to the payment of the amount shown as owing on the statements of account. *Opposition to Motion for Summary Judgment* at 16; Answer to Request for Admission No. 6. Mr. Capps has based his answers to these requests for admission on an unsigned Affidavit of Walker F. Todd, on a Second Amended and Restated Pooling and Servicing Agreement dated October 20, 2007 ("Pooling and Service Agreement"), and on the MBNA Credit Card Master Note Trust Prospectus dated October 11, 2005 ("Trust Prospectus"), which documents Mr. Capps attached as exhibits to his Affidavit in Support of his Opposition for Summary Judgment.

At the hearing held June 26, 2008 regarding the Motion for Summary Judgment, and in its reply Brief to Mr. Capps' Opposition to the Motion for Summary Judgment, FIA questioned the admissibility of the unsigned Walker F. Todd Affidavit as well as the Pooling and Service Agreement and the Trust Prospectus. *See Reply Memorandum in Support of Summary Judgment* at 1-3. Thus, the first issue to be determined is whether or not the unsigned affidavit, the Pooling and Service Agreement, or the Trust Prospectus are admissible evidence that should be considered in determining whether or not to grant FIA's Motion for Summary Judgment.

A. Admissibility of Mr. Walker Todd's Affidavit, the Pooling and Service Agreement, and the Trust Prospectus.

a. Standard of Review

Once the party moving for summary judgment establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show that a genuine issue of material fact does exist. *Robert v. Goss,* 144 Idaho 225, 226 (2007). The non-moving party must come forward with evidence by way of affidavit, deposition, or otherwise, which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. *Id.* Affidavits submitted in support or opposition of summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Idaho Rule of Civil Procedure 56(e). The summary judgment affidavit requirements are not satisfied by an affidavit that is conclusory, based on hearsay, or not supported by personal knowledge. *Posey v. Ford Motor Credit Co.,* 141 Idaho 477, 483 (2005).

b. Admissibility of the unsigned Affidavit of Walker F. Todd

The Affidavit of Walker F. Todd attached to Mr. Capps' Affidavit cannot be considered because it fails to meet the summary judgment criteria established in I.R.C.P. 56(e) and because it is not signed or notarized. Generally, an affidavit must be sworn to in person before a notary public or other officer empowered to administer oaths and have the affiant's signature attached in order for it to be valid. *Roberson v. Ocwen Federal Bank FSB*, 553 S.E.2d 162, 165 (2001); Am.Jur. Affidavits § 9. Mr. Todd's affidavit is neither signed nor notarized.

It is insufficient that Mr. Todd's affidavit is attached to the signed and notarized affidavit of Mr. Capps. The information contained in the affidavit is not based on Mr. Capps' personal knowledge as required by I.R.C.P. 56(e). Mr. Capps alleges that the contents of Mr. Todd's affidavit were "verified with [Mr. Capps'] personal knowledge from conversation with Mr. Todd," but this conclusory allegation alone falls short of proving personal knowledge. *Post Hearing Memorandum* at 10. Mr. Capps provides no details of when or where the conversation with Mr. Todd took place or what the specific subject matter of the conversation was. Thus, Mr. Capps has failed to lay the foundation demonstrating his personal knowledge of the contents of Mr. Todd's affidavit.

Assuming that the affidavit was based on personal knowledge, it still does not qualify for consideration as it contains inadmissible hearsay for which no hearsay exception has been established. Mr. Capps argues that Mr. Todd's affidavit qualifies for the Idaho Rule of Evidence 803(24) "catchall" hearsay exception, which applies to:

> a statement not specifically covered by any of the [other hearsay] exceptions but having equivalent circumstantial guarantees of

trustworthiness, if the court determines that (A) the statement is offered as evidence of material fact; (B) the statement is a more probative point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

I.R.E. 803(24).

I may not admit hearsay evidence under this catchall provision unless the five requirements outlined in the rule are carefully and strictly followed and recorded as these requirements ensure that the hearsay statement has been evaluated for relevancy, need, and reliability. *State v. Giles*, 115 Idaho 984, 987 (1989).

Although Mr. Capps claims that Mr. Todd's statements qualify for the hearsay exception under I.R.E. Rule 803(24), he provides no evidence or argument--other than a conclusory allegation that he has verified the content of the statements with personal knowledge--regarding the statements' relevancy, need, and reliability. *Post Hearing Memorandum* at 9-10. Without clearly laying a foundation as to the relevancy, need, and reliability of Mr. Todd's statements, I may not admit them under the Rule 803(24) hearsay exception.

Because Mr. Todd's affidavit is not signed or notorized, is hearsay, and is not based on personal knowledge it may not be considered in this summary judgment motion.

c. Admissibility of The Pooling and Service Agreement and the Trust Prospectus.

The Pooling and Service Agreement as well as the Trust Prospectus, Exhibits 1 and 2 of Mr. Capps' Affidavit in Support of Opposition to Motion for Summary Judgment ("Exhibits") may not be considered because they are not based on the personal knowledge of Mr. Capps and because they contain inadmissible hearsay.

Mr. Capps contends that the exhibits fall within the Idaho Rule of Evidence 803(24) "catchall" exception to the hearsay rule which covers those statements "not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness." I cannot admit the exhibits under this exception because Mr .Capps has failed to adequately argue or demonstrate why the exhibits qualify for this exception. As explained above, before I can admit evidence under the catchall hearsay exception, a record must be established regarding the statement's relevancy, need, and reliability. *State v. Giles*, 115 Idaho 984, 987 (1989). Mr. Capps provides no such record; he merely conclusorily claims that the exhibits offered as evidence "are probative" and "are in the interest of justice" to admit. *Post Hearing Memorandum* at 9. Without anything more than such conclusory claims, the statements are not admissible.

Mr. Capps additionally argues that Exhibit 1, the Trust Prospectus qualifies for the 803(8) public record hearsay exception, which provides:

> Public Records or Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there

was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. . . .

I.R.E. 803(8).

Mr. Capps alleges that "EXHIBIT 1 is a public record maintained by the Securities and Exchange Commission and is admissible under Rule 803(8) of the exceptions to the hearsay rule." *Post Hearing Memorandum* at 9. Mr. Capps explains in great detail the process by which he retrieved the Trust Prospectus document from the website of the securities exchange commission. *Affidavit in support of his Opposition to the Motion for Summary Judgment* at 1-2. Nevertheless, the attached Trust Prospectus is not admissible because it is not certified as required by the Idaho Rules of Civil Procedure. I.R.C.P. 56(e) (requiring documents attached to an affidavit in support or opposition to a motion for summary judgment to be "sworn or certified."). Additionally problematic is the Trust Prospectus' lack of authentication, a prerequisite to admission of evidence under the hearsay rule. *Article II Gun Shop Inc., v. Gonzales,* 441 F.3d 492, 496 (7th Cir. 2006).

Idaho Rule of Evidence 901 addresses authentication. It states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." I.R.E. 901(a). It then provides for illustrative purposes examples of how different documents may be authenticated. Example number seven relates to public records; it states "Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public

record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." I.R.E. 901(b)(7).

Mr. Capps claims that the Trust Prospectus is properly authenticated according to 901(b)(7) because it is a public record as testified to in his Affidavit. *Affidavit in Support of Opposition to Motion for Summary Judgment* at 2; *Post Hearing Memorandum* at 10. Although a report such as the Trust Prospectus may be authenticated by an affidavit, such affidavit must establish that the report is a public report and that it is kept in a public office where reports of that type are kept. *Article II Gun Shop, Inc. v. Gonzales,* 441 F.3d at 495. Mr. Capps is incompetent to establish such facts because he is not an agent of the securities exchange commission and not authorized to testify as to the types of reports kept by the Securities Exchange Commission or as to the place where such reports are kept. *Compare Article II Gun Shop, Inc. v. Gonzales,* 441 F.3d at 495-496 (holding that a document was properly authenticated as a public record when attached to an affidavit of an agent of the public agency who kept the document as a public record).

Because Exhibits 1 and 2--the Pooling and Service Agreement and the Trust Prospectus--contain hearsay and fail to qualify for either the catchall hearsay exception or the public records hearsay exception, they may not be considered by me in determining the motion for summary judgment. *See Posey v. Ford Motor Credit Co.,* 141 Idaho 477, 483 (2005) (holding that certain sections of an affidavit and attached documents to the affidavits were inadmissible evidence that should not be considered by the court in the summary judgment motion because they contained inadmissible hearsay that did not qualify for the business record or any other hearsay exception). Although these exhibits

may be rendered admissible by presentation of an adequate foundation, such foundation has not been shown through Mr. Capps' affidavit.

d. Conclusion

Without a proper foundation being laid to establish Mr. Capps' personal knowledge and without qualifying for an exception to the hearsay rule, the affidavit of Walker F. Todd, the Pooling and Service Agreement, and the Trust Prospectus may not be considered. I.R.C.P. 56(e) clearly requires affidavits in opposition to summary judgment to be made on personal knowledge, to set forth facts as would be admissible in evidence, and to show affirmatively that the affiant is competent to testify to the matters stated therein. These requirements have not been met.

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 Service 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 Service 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.

B. Does FIA Card Services Have Standing and is it a Real Party in Interest?

In his Memorandum in Opposition to Motion for Summary Judgment, Mr. Capps argues that FIA lacks standing and is not a real party in interest because Mr. Capps' credit card account has been assigned along with the receivables on his account to the Master Trust. *Opposition to Motion for Summary Judgment* at 2-8. Specifically, Mr. Capps cites the Pooling and Service Agreement in support of his claim that "MBNA, through BA Credit Card Funding LLC, assigned both the Receivables and the Account involved in this action to the BA Credit Card Trust II." *Id.* at 4.

In its reply brief, FIA contends that these exact issues "relating to securitization and the Idaho Collection Agency Act, have previously been extensively briefed and decided in *Citibank (South Dakota) N.A. v. Miriam Carroll,* CV 06-37067 (2nd Dist. Idaho, December 10, 2007)." *Reply Memorandum in Support of Summary Judgment* at 3. FIA Card Services accordingly requests this court to take judicial notice of the pleadings and Memorandum Decision and Order entered in that case. Mr. Capps, on the other hand, contends that judicial notice is improper because the Pooling and Service Agreement at issue in *Citibank v. Carroll,* varies substantively from the Pooling and Service Agreement at issue in this case.

Despite my decision that they are not admissible, I have reviewed in full the Second Amended and Restated Pooling and Service 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.

To be entitled to bring an action, a party must have standing to sue. In order to have standing, a plaintiff must allege or demonstrate "an injury in fact and a substantial

likelihood that the judicial relief requested will prevent or redress the claimed injury." *Bowles v. Pro Indiviso, Inc.* 132 Idaho 371, 375, 973 P.3d 142, 146 (Idaho 1999). A crucial inquiry in determining standing is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers on his behalf. *Miles v. Idaho Power Co.,* 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).

Mr. Capps contends that FIA Card Services lacks standing because it transferred the credit card receivables ("receivables") on his account to the Master Trust. FIA Card Services posits that even if it does not own the receivables, it has standing to collect Mr. Capps' credit card debt because it still owns Mr. Capps' account.

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 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. FIA's obligation to the Master Trust to transfer the money collected does not

affect Mr. Capps' contractual relationship with and obligation to FIA. I therefore conclude that FIA has standing to bring this suit to collect the credit card debt owed by Mr. Capps on the account. *Id.*

As owner of the Account, FIA also qualifies as a Real Party in Interest. Rule 17(a) of the Idaho Rules of Civil Procedure states that "[e]very action shall be prosecuted in the name of the real party in interest." Mr. Capps' contention that FIA Card Services fails to be the real party in interest is predicated upon the assertion that both the receivables and the account have been assigned to the BA Master Credit Card Trust II, therefore making the Trustee of the Master Trust, not FIA the real party in interest. *Opposition to Motion for Summary Judgment* at 4. Because I have concluded that the accounts have not been transferred, Mr. Capps' argument against FIA qualifying as a real party in interest necessarily fails. *Citibank (South Dakota) N.A. v. Miriam Carroll,* CV 06-37067 (2nd Dist. Idaho, December 10, 2007)

In addition to the standing and real party in interest defenses, Mr. Capps raised the following defenses in his opposition to FIA's Motion for Summary Judgment: that FIA is acting in the capacity of a credit collector and has failed to properly register in Idaho as required by the Idaho Collection Agency Act ("ICAA"), and that some or all of the FIA's counterclaims are barred by the doctrine of unclean hands; breach of contract; estoppel, laches, and waiver, contributory or comparative negligence, and failure to mitigate damages.

C. The Other Defenses

a. FIA failed to obtain a permit as required under the Idaho Collection Agency Act ("ICAA").

The Idaho Collection Agency Act prohibits persons from "engage[ing], either directly or indirectly in [Idaho] in the business of collecting or receiving payment for others of any account, bill, claim or other indebtedness" without first obtaining a permit. Idaho Code § 26-2223. An exemption is provided, however, for regulated lenders or those acting on behalf of regulated lenders. Idaho Code § 26-2239. Regulated Lender is defined as "a person authorized to make, or take assignment of, regulated consumer loans, as a regular business under section 28-46-301 Idaho Code. Idaho Code § 28-41-301(37).

Idaho Code section 28-46-301 states:

(1) The administrator shall receive and act on all applications for licenses to make regulated consumer loans under this act. Applications shall be filed in the manner prescribed by the administrator and shall contain such information as the administrator may reasonably require. Unless a person is exempt under federal law or under this section or has first obtained a license from the administrator authorizing him to make regulated consumer loans, he shall not engage in the business of:

(a) Making regulated consumer loans; or

(b) Taking assignments of an undertaking direct collection of payments from or enforcement of rights against debtors arising from regulated consumer loans.

(2) Any "supervised" financial organization," as defined in section 28-41-301(45), Idaho Code, or any person organized, chartered, or holding an authorization certification under the laws of another state to engage in

making loans and receiving deposits, including a savings, share, certificate, or deposit account and who is subject to supervision by an official or agency of the other state, shall be exempt from the licensing requirements of this section. . . .

Idaho Code § 28-46-301.

Mr. Capps contends that FIA fails to qualify as a "regulated lender" because it does not accept deposits, including savings, share, certificate or deposit accounts. *Opposition to Motion for Summary Judgment* at 7. He bases this argument on a misinterpretation of Idaho Code sections 28-46-301 and 28-41-301(37). FIA is not required, as Mr. Capps' contends, to accept deposits in order to qualify a regulated lender. The "accepting deposits" criteria only comes into play in a situation in which a person seeks exemption from the Idaho regulated consumer loan licensing requirement by virtue of being charted and supervised by an official or agency of another State. Idaho Code § 28-46-301. Mr. Capps has failed to prove that FIA falls under this category. Therefore, Mr. Capps has failed to prove that FIA is an unregulated lender required by the ICAA to obtain a permit before engaging in collection activity.

b. Unclean Hands, Breach of Contract, Estoppel, Laches, Waiver, Contributory or comparative negligence, and failure to mitigate Damages.

Mr. Capps' claimed defenses of unclean hands, breach of contract, estoppel, laches, waiver, contributory or comparative negligence, and failure to mitigate damages are based upon alleged information found in the Trust Prospectus and the Service and Pooling Agreement. As explained previously, these documents are inappropriate for my

consideration. Without referring to these documents Mr. Capps' defenses provided in his opposition to FIA's motion for summary judgment are conclusory and unsubstantiated by fact. *Id.* Idaho Rule of Civil Procedure 56(e) prohibits the party adverse to a motion for summary judgment from resting "upon the mere allegations or denials of that party's pleading." The adverse party is required to set forth *specific* facts, by affidavit or otherwise, showing that there is a genuine issue for trial." I.R.C.P. 56(e) (emphasis added). Mr. Capps has not set forth such specific facts. I therefore deny his claims his unclean hands, breach of contract, estoppel, laches, waiver, contributory or comparative negligence, and failure to mitigate damage defenses to FIA's Motion for Summary Judgment.

D. Additional Affidavits and Issues Raised for the First Time in Mr. Capps' Post Hearing Memorandum

At the hearing held on June 26, 2008, you granted Mr. Capps leave to submit a Post Hearing Memorandum to further articulate the issue of how the Trust Prospectus and Pooling and Service Agreement documents demonstrate that FIA no longer owns the account in question. Mr. Capps timely submitted a memorandum on July 1, 2008. However, as part of this memorandum Mr. Capps attached a new exhibit—Modern Money Mechanics. He additionally raised a litany of issues beyond the scope of how the Trust Prospectus and Pooling and Service Agreement demonstrate that FIA no longer owns the account. FIA has filed an objection to this superfluous material. *Reply and Objection to Plaintiff's Post Hearing Memorandum* at 1-2.

Mr. Capps was granted permission to brief only one specific issue. It would be unfair to FIA for me to consider information in the briefing outside of this scope.

Fairness demands that the new exhibit and the briefing on the extraneous issues should not be considered.

CONCLUSION

1. The Walker F. Todd Affidavit, the Pooling and Service Agreement, and the Trust Prospectus should not be considered in deciding the summary judgment motion because such documents fail to meet the I.R.C.P. 56(e) requirements. They contain hearsay for which no hearsay exception has been established and they fail to be based on personal knowledge.

2. Mr. Capps' has failed to adequately prove his defenses.

   a. FIA does have standing and is a real party in interest because it only transferred the receivables to Mr. Capps' account to the Master Trust, retaining ownership of the account itself.

   b. FIA does not have to register under the Idaho Collection Agency Act before engaging in collection activities on Mr. Capps' account because FIA is a regulated lender exempt from the ICAA.

   c. Mr. Capps' defenses of unclean hands, breach of contract, estoppel, laches, waiver, contributory or comparative negligence, and failure to mitigate damages are based upon information in the Affidavit of Walker F. Todd, the Trust Prospectus, and the Pooling and Servicing Agreement which documents are not admissible in determining this motion for summary judgment. Accordingly these defenses fail to be substantiated issues of fact.

d. I cannot in fairness to FIA consider information that Mr. Capps provided in his Post-Hearing Memorandum that exceeds the scope of the specific issue of whether the Pooling and Service Agreement and Trust Prospectus prove that FIA fails to own the account.

e. Given the absence of any material issues of fact, FIA's motion for Summary Judgment should be granted.

ORDER

FIA's motion for summary judgment is GRANTED.

It is so ordered, this the 25 day of July, 2008

JOHN BRADBURY
DISTRICT JUDGE

David F. Capps
104 Jefferson Drive
Kamiah, ID 83536
208-935-7962
FAX: 208-926-4169
Plaintiff, *in propria persona*

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

DAVID F. CAPPS, Plaintiff, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-07-38202** **MOTION FOR RECONSIDERATION**

COMES NOW the Plaintiff, David F. Capps, (hereinafter "Capps") and submits his MOTION FOR RECONSIDERATION pursuant to Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure as follows:

INTRODUCTION

Reconsideration is an important aspect of the judicial process. It allows the parties to more fully brief the court as to the exact nature of the issues, the law involved, and to submit facts for the consideration of the court that may have been previously overlooked. "A rehearing or reconsideration in the trial court usually involves new or

additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be." See *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (Idaho 1990).

FIA Card Services, N.A., (hereinafter "FIA") was granted Summary Judgment on the 28th day of July 2008 on Counts II and III of its Counterclaims. Count II alleges a Breach of Contract, and Count III alleges that an Account Stated has been created. Capps hereby denies those claims and provides the following facts and memorandum of law in rebuttal of the claims made by FIA:

COUNT II – BREACH OF CONTRACT

The three basic elements of a Breach of Contract cause of action are: (1) the existence of an enforceable contract; (2) acts of the other party that constitute a breach of the contract; and, (3) damages to the non-breaching party resulting from the breaching party's conduct. The burden of proof is on the party claiming the breach, in this case: FIA. Alleging facts is not sufficient, those facts must be proven.

Placing the original contract into evidence proves the existence of a contract. FIA also needs to prove that the contract is enforceable. FIA has failed to place the original contract on the court record. Capps has provided an affidavit dated the 11th day of July 2008, based on personal knowledge that the original agreement between the parties was requested in discovery, and was not supplied by FIA. An affidavit, with further details is provided with this MOTION FOR RECONSIDERATION.

FIA has provided what they refer to as a "governing agreement", which is not the original agreement, is not a duplicate of the original agreement, and has no legal basis as being anything agreed to by the parties. Without the original agreement on the court record, there is no proof that any changes were made according to the terms and conditions of the original contract, or that any other contract, governing or otherwise, was authorized and agreed to by the parties. In *MBNA America Bank, N.A. v. McGoldrick*, Idaho Supreme Court slip decisions, Docket No. 34055, (July 1st 2008) (attached), the issue was over an alleged arbitration provision, which MBNA claims to have added to the cardholder agreement. The court stated,

> "The district court found that McGoldrick's original cardholder agreement "did not have an arbitration provision, but gave MBNA the right to change the agreement under certain circumstances." There was no evidence admitted during the trial as to what those circumstances were or as to whether MBNA complied with them. Absent that evidence, MBNA failed to prove that it amended McGoldrick's original cardholder agreement to add a provision requiring mandatory arbitration, and it therefore failed to prove that there was an agreement to arbitrate. The order of the district court confirming the arbitration award is reversed."

The same basic conditions are present in this case. FIA has failed to prove the existence of a contract by not placing the original contract on the court record. Without the original agreement on the court record, there is no proof that the alleged contract is enforceable, and no substantial and competent evidence upon which the jury can make that determination.

The second element of a Breach of Contract cause of action is to prove the acts of the other party that constitute a breach of the contract. Without the terms and conditions of the original contract on the court record, there is no proof that Capps breached any of the terms or conditions of the contract. The alleged governing agreement, which is not a

duplicate of the original, cannot be used as a substitute for the original without proof that a substitute agreement was authorized and agreed to by the parties in the original agreement. In *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738 (2000), the court stated,

> "The burden of proving the existence of a contract and fact of its breach is upon the plaintiff, and once those facts are established, the defendant has the burden of pleading and proving affirmative defenses, which legally excuse performance. See *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991)."

FIA claims that a contract exists, but has provided no original contract as proof of any such agreement. Under Rule 1002 of the Idaho Rules of Evidence, the original cardholder agreement is required.

> "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

Under Rule 1003, Idaho Rules of Evidence,

> "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

FIA has presented no evidence or testimony proving that the cardholder agreement offered by FIA was in fact a duplicate of the original cardholder agreement. Under Rule 1004 of the Idaho Rules of Evidence,

> "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 proponent lost or destroyed them in bad faith; or
> (2) Original 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 the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be 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."

FIA has presented no evidence proving that the original contract was lost or destroyed, nor has FIA proved that the original is not obtainable or that the opposing party has possession of the original contract.

In *Roberson v. Ocwen Federal Bank FSB*, 250 Ga.App. 350 (2001), to which this court has referred,

[2] "A party can prove by testimony and other secondary evidence the existence and terms of a written executed contract when the loss or destruction of the original written contract has been sufficiently accounted for to establish the contract and the reason for its unavailability after the exercise of diligence to produce it. *Gen. Ins. Svcs. V. Marcola*, 231 Ga.App. 144, 148(5)(b), 497 S.E.2d 679 (1998).

FIA has presented no testimony or any other evidence to prove the existence, and/or the terms and conditions of the original agreement, its loss or destruction or any diligence in attempting to locate the original agreement.

FIA has provided no testimony proving that the contents of the alleged governing agreement are identical to the terms and conditions in the original contract, or that the submitted agreement is an exact duplicate of the original. The writing, which is the original contract, is an essential element of FIA's proof of the existence of an enforceable contract and the conditions of an alleged breach. Such proof is not on the court record.

FIA claims that said account was due and payable within thirty (30) days after receipt of a statement of account. FIA has failed to prove that such a condition actually exists in the original agreement. The third element of a Breach of Contract cause of action is damages to the non-breaching party resulting from the breaching party's conduct. FIA has failed to allege any damages in Count II, and without both claim and

proof of damages, there is no cause of action. If any element of a claim fails, the entire claim fails. FIA has failed to prove any of the three basic elements of a Breach of Contract cause of action.

COUNT III – ACCOUNT STATED

The three basic elements of an Account Stated cause of action are: (1) the parties engaged in prior dealings out of which the account arose; (2) at the time the account was presented, the debtor had a prior liability to pay; and, (3) the alleged debtor either expressly or implicitly promised to pay the balance of the account stated. The burden of proof is on the party claiming the Account Stated, in this case: FIA. Alleging facts is not sufficient, those facts must be proven.

FIA has presented copies of alleged statements, which may indicate prior dealings between the parties. The sufficiency of these alleged statements is for a jury to decide. FIA also claims that the final balance owing has been ascertained and Capps has received statements evidencing that amount. No evidence has been presented by FIA proving that Capps had a prior liability to pay on the account. The original contract, including the exact terms and conditions that were agreed to between the parties, would be required to prove any liability. Without the original contract, such liability cannot be established. FIA has not placed the original contract on the court record.

FIA claims that Capps has impliedly agreed with FIA that such amount is due and owing as evidenced by Capps' failure to object to the charges within a reasonable time. That statement is not true. Capps objected to the amount of the charges some eighteen (18) months before the alleged final balance was ascertained as evidenced by the attached dispute letter dated the 23rd day of December 2004, sent by Capps to FIA's predecessor,

MBNA via Comerica Bank Bankcard Services, who originally owned the account. In addition, a second dispute letter dated the 3rd day of November 2006 was sent to MBNA regarding the alleged account, also attached. Under Regulation Z, Title 12, CFR, section 226.13(d)(1), once MBNA was notified of a dispute, the consumer had no legal obligation to pay until the alleged dispute was resolved. MBNA has been notified twice regarding disputes over the amount of the alleged account and to date, the dispute has not been resolved, and to this date, there has been no liability on the part of Capps in regards to the alleged account. Nothing has become due and owing, or payable under Title 12, CFR, section 226.13(d)(1).

In *Barnes v. Huck*, 97 Idaho 173, 540 P.2d 1352 (1975), the court clearly reiterated the conditions of an account stated cause of action in Idaho.

> In *O'Harrow v. Salmon River Uranium Development, Inc.* 84 Idaho 427, 430-31, 373 P.2d 336, 338 (1962) this court addressed itself to what constituted an "account stated," and said the following: "To constitute an account stated the transaction must be understood by the parties as a final adjustment of the respective demands between them and the amount due. An account stated becomes a new contract which exhibits the state of account between the parties and the balance owing one to the other, and *two things must appear, first a mutual examination of the claims of each other by the parties; and second, that there is a mutual agreement between them as to the correctness of the allowance and disallowance of the respective items or claims and the balance as struck upon the final adjustment of the whole account and demands on both sides.* (Cite omitted.) An account stated must receive the assent of both parties; the minds of the parties must meet for an account becomes stated only by reason of acquiescence in its correctness." (Emphasis in original.)

As is apparent from the attached affidavit and dispute letters, a mutual examination of the claims of each other has not taken place. The dispute letter sent by Capps dated the 23rd day of December 2004 has not been investigated, nor have any of the claims been addressed. The second dispute letter was sent after Capps had a chance to examine the account and the related issues more closely, questioning certain aspects of

the accounting and requesting certain assurances regarding the account and what had been done with it. There is no mutual agreement as to the correctness of any allowances, or disallowances, and there has been no balance struck upon as a final adjustment of the whole account. None of the conditions specified as an account stated by the Supreme Court of Idaho have been met in this case. There is no meeting of the minds on the amount due or as to the correctness of any statement. FIA has failed to prove at least two of the essential elements of an account stated cause of action. FIA has also failed to prove that Capps had an obligation to pay at the time the alleged account was presented. Capps had objected to the amount of the charges and the balance due well before the alleged balance was ascertained and presented.

While FIA may question the effectiveness of the dispute letter sent by Capps, that issue is for the jury to decide and constitutes a genuine issue of a material fact. In *Riggs v. Colis*, 107 Idaho 1028, 695 P.2d 413 (1985) the Court of Appeals of Idaho held,

> "In considering such evidence, it is well recognized that the facts are to be liberally construed in favor of the party opposing the motion and he is given the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Huyck v. Hecla Mining Company*, 101 Idaho 299, 612 P.2d 142 (1980). Further, the Idaho Supreme Court has held that even though there are no genuine issues of material facts between the parties a motion for summary judgment must be denied, when the case is to be tried to a jury, if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable men might reach different conclusions. *Riverside Development Company v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982)."

Capps has demanded a jury trial in both his original Complaint and in his Amended Complaint.

CONCLUSION

FIA has moved for summary judgment on two causes of action: Breach of Contract; and Account Stated. None of the three basic elements of a Breach of Contract

cause of action have been proven by FIA. The original contract has not been placed on the court record to prove the existence of an enforceable contract. No specific terms of the original contract have been placed on the court record to prove that a breach has taken place. No claim for damages has been made, and no proof of any damages has been placed on the court record. Summary Judgment on a Breach of Contract cause of action is not appropriate and should be DENIED.

The requisite conditions for an Account Stated cause of action are also not present in this case. There has been no examination of Capps' claims, no attempt at adjustments or reconciliation of the account on the part of FIA, even after a second dispute letter and request from Capps. The accounting was disputed some 18 months before FIA presented what it considers to be a final accounting, and after an examination of FIA's claims, Capps sent another letter (dated November 3rd 2006) disputing the accounting. There is no meeting of the minds as required under the standards established by the Supreme Court of Idaho in account stated causes of action. Since this case is for the jury to decide, the court may not weigh the evidence, but must deny the Motion for Summary Judgment due to the existence of evidence of disputed facts. The attached affidavit is pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure.

Dated this 5TH day of August 2008.

David F. Capps

CERTIFICATE OF MAILING

I, Miriam G. Carroll, hereby certify, under penalty of perjury, that I mailed a true and correct copy of this MOTION FOR CONSIDERATION to the attorney for the Defendant this 5TH day of August 2008 by Certified Mail #7006 2150 0003 4550 3458 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

Miriam G. Carroll

Miriam G. Carroll

David F. Capps
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Kamiah, ID 83536
208-935-7962
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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, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-2007-38202** **AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION**

County: Idaho)
) ss:
State: Idaho)

I, David F. Capps, being duly sworn, do hereby depose, and if called upon to testify, would testify as follows:

1. That I am over the age of 18 years of age.

2. That I am a party to the above titled action.

3. That I am making this affidavit based on my personal knowledge of the facts stated herein.

4. That on or about the 26th day of December 2004 I mailed a dispute letter to Comerica Bank Bankcard Services in regards to account 5490-9979-6011-1014 by Certified Mail # 7003 0500 0005 3302 4888.

5. That the attached letter dated the 23rd day of December 2004 is a true and correct copy of the letter I mailed to Comerica Bank Bankcard Services.

6. That Comerica Bank Bankcard Services received the letter on or about the 3rd day of January 2005 as evidenced by the attached copy of the Certified Mail Domestic Return Receipt.

7. That the letter disputed the amount of the debt shown on the December 14th 2004 statement.

8. That the letter included a request for additional documentary evidence of indebtedness of the account charges, which includes copies of the account charges and entries that made Comerica Bank Bankcard services arrive at the recent balance shown on my statement.

9. That Comerica Bank Bankcard Services failed to provide the requested information within the time limits established under Title 15, U.S.C. Section 1666 *et seq.*

10. That on or about the 3rd day of November 2006 I mailed a letter to MBNA America Bank, N.A. in regards to account 5490-9979-6011-1014 by Certified Mail # 7005 1160 0002 7630 3722.

11. That MBNA America Bank, N.A. received the letter on or about the 7th day of November 2006 as evidenced by the attached copy of the Certified Mail Domestic Return Receipt.

12. That the attached letter dated the 3rd day of November 2006 is a true and correct copy of the letter I mailed to MBNA America Bank, N.A.

13. That the letter questions the nature and extent of any finance charges.

14. That the letter also states, "I have reason to believe that your company has failed to properly credit me for all revenues received by you related to this account."

15. That I have received no response from MBNA America Bank regarding this letter.

16. That there I have not agreed to any amount stated relating to this account.

17. That there are unresolved issues regarding interest, finance charges, amounts of revenues received by Comerica Bank Bankcard Services, MBNA America Bank, N.A., and/or FIA Card Services, N.A., which were not credited to my account.

18. That on or about the 8th day of February 2008, I requested the original contract in my first set of Interrogatories, Requests for Admissions and Requests for Production of Documents as follows: **REQUEST FOR PRODUCTION OF DOCUMENT NO. 2**: Please produce, or make available for copying, the original contract bearing the date and signature of both parties regarding the ACCOUNT.

19. That I received a response to my first set of Interrogatories, Requests for Admission and Requests for Production of Documents dated the 10th day of March 2008.

20. That the response to my request for the original contract was as follows:

RESPONSE: The original application is no longer available for the ACCOUNT.

21. That the original contract was not included in the documents provided.

22. That FIA Card Services, N.A, offered no reason for the lack of an original contract.

23. That no original contract has been provided since that time.

Further deponent sayeth not.

Dated this 5TH day of August 2008.

David F. Capps

NOTARY PUBLIC

Subscribed and sworn before me this 5th Day of August, 2008

Signature of Notary Public for Idaho

I reside in Ada County, Idaho.

My commission expires 4-21-2014

MY COMMISSION EXPIRES
April 21, 2014
BONDED THRU NOTARY PUBLIC UNDERWRITERS

CINDY J. CHILDERS
Notary Public
State of Idaho

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

Comerica Bank Bankcard Services
P.O. Box 15026
Wilmington, DE 19850-5026

December 23, 2004

RE: Billing Inquiry on Account # 5490-9979-6011-1014
Amount in Dispute: $10,617.94

Dear Comerica Bank Bankcard Services:

I am writing regarding the above account. I believe that my most recent statement, December 14, 2004 is inaccurate.

I am disputing the above amount because I believe that you failed to credit my account for prepayments you agreed to credit on the statement dated December 14, 2004. It was my understanding that when I entered into the agreement with you that you would accept my signed note(s) or other similar instrument(s) as money, credit or payment for previous account transactions, and then reflect those credits in the statement dated December 14, 2004. They do not appear in the statement and I am wondering why. The amount of the credits on the prepayments of money or credit accepted by you should be the approximate amount that I list above. I am making this billing inquiry since I am uncertain of all the dates of the prepaid credits, charges and also since there may be additional credits that I am entitled to. Please provide me with a written explanation why these credits are not showing.

I am requesting that you provide me with an acknowledgement of this billing error and complete a full investigation by sending me a written explanation report related to the subject matter of this billing error.

I am also requesting additional documentary evidence of indebtedness of the account charges, which includes copies of the account charges and entries that made you arrive at the recent balance shown on my statement.

I am exercising my right to withhold the disputed amount until you comply. Thank you for your time and consideration in this matter. If you have any questions please contact me immediately, but make sure your questions reference an acknowledgement to this billing error dispute.

Sincerely,

David F. Capps

MBNA America Bank, N.A.
P.O. Box 15026
Wilmington, DE 19850-5026

November 3, 2006

RE NOTICE AND DEMAND FOR VALIDATION AND ADEQUATE ASSURANCE OF PERFORMANCE – A/C# 5490-9979-6011-1014

Dear Sir/Madame:

I recently received a communication from your company related to the account listed above. Please regard this letter as a formal written Notice and Demand to MBNA America Bank, N.A. for adequate assurance of performance with respect to the above listed account.

In preparation for this Notice and Demand, I have conducted a full and complete investigation into this matter, and I am of the opinion that MBNA America Bank, N.A. may be in breach of the terms and conditions of the alleged Credit Card Agreement, by its failure to provide either adequate and valuable consideration, or full disclosure of the material terms and conditions of the alleged original agreement, including the nature and extent of any finance charges assessed on the above account. In addition, I have reason to believe that your company has failed to properly credit me for all revenues received by you related to this account. In the event that the application or other evidence of this account was monetized, securitized and/or sold, please provide me with certified copies of all underlying documentation regarding said transactions.

This Notice and Demand should not be perceived as a refusal to pay any valid debt. However, I have questions regarding the validity of the debt you are alleging in the attached billing statement, and in order to determine the validity of your presentment, and continue payment on the above-listed account, I will require certain information to confirm your claim in this matter. To that end, please forward the attached affidavit to the appropriate person in your organization for review and execution. Upon receipt of the signed, sworn affidavit, I will arrange for payments to resume on the above noted account. In the event that you are unable or unwilling to provide me adequate assurance of performance on this account, please send me a billing statement or other communication indicating a zero balance due on the account.

Please restrict all communications with me regarding this matter to writing, and understand that all communications, acts or omissions may be used in litigation, including the filing of grievances and the initiation of investigations at the Federal Trade Commission and other government bodies regarding your non-compliance with the Fair Credit Reporting Act, Fair and Accurate Credit Transaction Act of 2003, and other state and federal laws. Your failure to respond to this Notice and Demand within thirty (30) days will be construed as a waiver of any and all claims regarding the above-listed account, and will act as a confirmation that no further action will be taken on your part with respect to the subject account. No further payments will be made on the account, and the account cannot be sold, assigned, forwarded or otherwise transferred for purposes of the collection of a debt.

Respectfully,

David F. Capps
Certified mail #7005 1160 0002 7630 3722

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

COMERICA BANK
BANKCARD SERVICES
P.O. BOX 15026
WILMINGTON DE
19850-5026

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature

X CHRIS COVERDALE ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

JAN 03 2005

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Copy from service label)* 7003 0500 0005 3302 4888

PS Form 3811, July 1999 Domestic Return Receipt 102595-99-M-1789

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

MBNA AMERICA BANK
P.O. BOX 15026
WILMINGTON, DE
19850-5026

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Austin ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* | C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

NOV - 7 2005

3. Service Type
■ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Transfer from service label)* 7005 1160 0002 7630 3722

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 34055

MBNA AMERICA BANK, N.A.,	)	
	)	Boise, June 2008 Term
Plaintiff-Respondent,	)	
	)	2008 Opinion No. 93
v.	)	
	)	Filed: July 1, 2008
JOHN L. McGOLDRICK,	)	
	)	Stephen W. Kenyon, Clerk
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County. The Hon. George D. Carey, District Judge.

The judgment of the district court is reversed.

Belnap, Curtis & Williams, PLLC, Boise, for appellant. R. Wade Curtis argued.

Wilson & McColl, Boise, for respondent. Alec T. Pechota argued.

EISMANN, Chief Justice.

This is an appeal from a judgment confirming an arbitration award. Because the plaintiff failed to prove that the parties had entered into an agreement to arbitrate, we reverse the judgment.

I. FACTS AND PROCEDURAL HISTORY

John McGoldrick opened a credit card account with MBNA America Bank, N.A., (MBNA) on July 8, 1994. After a billing dispute arose, MBNA submitted its claim against McGoldrick to arbitration. He filed a written objection, contending that there was no valid arbitration agreement between him and MBNA and that he would not submit to arbitration. MBNA proceeded with the arbitration, and on February 5, 2003, it obtained an award against McGoldrick in the sum of $22,889.57.

On December 10, 2003, MBNA filed this action for confirmation of the arbitration award. It contemporaneously moved to have the arbitration award confirmed. McGoldrick appeared *pro se*, raising various defenses and asking to have the arbitration award vacated. McGoldrick also filed an affidavit in opposition, asserting that there was no agreement to arbitrate. The district court treated the motion for confirmation as a motion for summary judgment and denied it on the ground that there were genuine issues of material fact.

On April 19, 2004, McGoldrick moved to vacate the arbitration award. MBNA responded with an affidavit of its counsel, who attached to his affidavit copies of an MBNA credit card agreement and documents related to the arbitration. It then moved again to confirm the award. The district court treated the motions as cross motions for summary judgment and denied them on the ground that there was a genuine issue of material fact as to whether there was an agreement to arbitrate.

On March 1, 2005, MBNA again moved to confirm the arbitration award. It supported this motion with the affidavit of one of its assistant vice presidents Ken Ballinger. He averred that attached to his affidavit was a true and correct copy of McGoldrick's cardholder agreement. The copy of the attached credit card agreement did not contain an agreement to arbitrate, but it did include a provision permitting MBNA to amend the agreement. Ballinger also stated that on or about December 20, 1999, MBNA mailed to McGoldrick and other MBNA cardholders written notification that MBNA was amending the cardholder agreements to add a mandatory arbitration provision; that the notification informed the cardholders that they could opt out by providing MBNA with written notification by January 25, 2000; and that MBNA did not receive timely notification from McGoldrick that he elected to opt out of the arbitration provision. McGoldrick responded by again moving to vacate the arbitration award. He supported his motion with an affidavit in which he stated that he had never received notice of the amendment to add an arbitration clause to his cardholder agreement. The district court again treated the motions as motions for summary judgment and held that the competing affidavits created a genuine issue of material fact as to whether there was a valid arbitration agreement between MBNA and McGoldrick.

The matter was tried to the district court on June 8, 2006. At the beginning of the trial, the district court announced that the factual matters to be tried were whether there was an agreement to arbitrate and, if so, whether the arbitration provision was procedurally

unconscionable. After the trial, the district court issued written findings of fact and conclusions of law. It found that McGoldrick's original cardholder agreement included a provision giving MBNA the right to amend the agreement under certain circumstances; that in late 1999 MBNA mailed McGoldrick and other cardholders written notifications that it was amending their cardholder agreements to add a mandatory arbitration provision; that MBNA allowed them to reject the amendments by giving written notification by a specified time; that McGoldrick received the written notification of the amendment in the mail and did not give written notice that he was rejecting the amendment. The court confirmed the arbitration award. It entered judgment in favor of MBNA against McGoldrick in the sum of $42,046.36, which included the arbitration award, pre-judgment interest, court costs and attorney fees. McGoldrick timely appealed. After he filed the appeal, McGoldrick retained counsel to represent him on the appeal.

II. ISSUES ON APPEAL

1. Is the district court's finding that there was an agreement to arbitrate supported by substantial and competent evidence?
2. Is either party entitled to an award of attorney fees on appeal?

III. ANALYSIS

A. Is the District Court's Finding that There Was an Agreement to Arbitrate Supported by Substantial and Competent Evidence?

The original cardholder agreement between McGoldrick and MBNA did not include an arbitration provision. At the commencement of the trial, the district court stated that the factual issues to be tried were "whether there was an agreement to arbitrate, and alternatively, whether the arbitration provision, if any, was procedurally unconscionable." After the trial, the court found that MBNA amended McGoldrick's cardholder agreement in December 1999 when it mailed him written notification that it was adding a mandatory arbitration provision to his cardholder agreement and he failed to timely reject the amendment. McGoldrick contends that the court's finding is not supported by substantial and competent evidence because MBNA did not offer his original cardholder agreement into evidence.

"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).

In his opening brief, McGoldrick argued, among other things, that without the original cardholder agreement there was no evidence of "how to give notice of the amendment and what choice of law controls the contract." He also stated that "MBNA must prove the predicate that the contract being amended has a provision authorizing amendment, the manner and circumstances for such amendment and how notice of the amendment is to be given."

MBNA responded by asserting that its right to amend the cardholder agreement had been established pursuant to Rule 56(d) of the Idaho Rules of Civil Procedure.[1] In its order denying MBNA's third motion to confirm the arbitration award, which the district court treated as a motion for summary judgment, the court listed "facts [that] are now in the record." The list included, "The agreement, which was on an MBNA-prepared form not subject to negotiation, did not include an arbitration provision, but it did provide MBNA with the right to change the agreement under certain circumstances." Rule 56(d) provides that if a motion for summary judgment is denied, the trial court can "make an order specifying the facts that appear without substantial controversy . . . . Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." MBNA argues that under Rule 56(d) it was not required to offer evidence at trial regarding the fact that McGoldrick's cardholder agreement provided that MBNA could amend it.

In his reply brief, McGoldrick countered by arguing that even if MBNA had the right to change his cardholder agreement "under certain circumstances," the court "did not specify under what circumstances MBNA could amend the original agreement between the parties." Therefore, MBNA was required to prove the provisions in the original agreement "by which an

---

[1] That Rule provides:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

amendment could be effectuated and under what circumstances. MBNA had to prove that it properly amended the agreement with an arbitration clause."

The district court did not refer to Rule 56(d) in its order denying MBNA's third motion for confirmation, which the court treated as a motion for summary judgment, nor did it state that the facts were deemed established and need not be proven at trial.[2] Assuming that the district court's list of facts "in the record" constituted a list of established facts under Rule 56(d), the court merely found that McGoldrick's cardholder agreement could be amended "under certain circumstances." The court did not specify what those circumstances were. At trial, MBNA did not offer any evidence as to what those circumstances were, nor did its witness testify that the procedures it followed were in accordance with the cardholder agreement or applicable law. Absent evidence as to what those circumstances were or that it complied with the applicable requirements for amendment, MBNA did not prove that it amended the cardholder agreement.

MBNA argues that "the terms of the original agreement, including the right to amend, were . . . found by the district court on February 21, 2006." This assertion is incorrect. On March 1, 2005, MBNA filed its third motion to confirm the arbitration award, and it supported the motion with the Ballinger affidavit. In his affidavit, Ballinger stated that a true and correct copy of the cardholder agreement for McGoldrick's account was attached to the affidavit as Exhibit 1. Although there was no "Exhibit 1" attached to the affidavit, there was an "Exhibit A" consisting of two documents. The first was entitled "Credit Card Agreement Additional Terms and Conditions," and the second was entitled "Credit Card Agreement." In its order denying summary judgment, the district court did not state that those documents constituted the terms of McGoldrick's cardholder agreement. Indeed, the document entitled "Credit Card Agreement Additional Terms and Conditions" included an arbitration provision. Had the court found that Exhibit A to Ballinger's affidavit was a true copy of McGoldrick's cardholder agreement, it would not have denied the motion for confirmation on the ground that there was an issue of fact as to whether there was "a valid arbitration agreement between the plaintiff and the defendant."

MBNA contends that during argument on its third motion for confirmation of the arbitration award, McGoldrick admitted that Exhibit A to the Ballinger affidavit was a true and correct copy of the original cardholder agreement. During that argument, McGoldrick stated:

---

[2] To avoid confusion, a trial court should clearly state that it is deeming the specified facts as established pursuant to Rule 56(d).

"Plaintiff has submitted a copy of the parties' original agreement, marked as Exhibit A. This version is the only agreement recognized by defendant, and it contains no arbitration clause." The only facts deemed established under Rule 56(d) are those that the trial court specifies in its order as being without substantial controversy. The Rule states, "Upon the trial of the action *the facts so specified shall be deemed established*, and the trial shall be conducted accordingly." (Emphasis added.) Facts that could have been, but were not, so specified are not deemed established.

Next, MBNA contends that McGoldrick offered the Ballinger affidavit into evidence during the trial. He questioned MBNA's witness about an exhibit to that affidavit, but he did not offer either the affidavit or the exhibit into evidence.

Finally, MBNA points to McGoldrick's cross-examination of its witness during which the witness stated that the verbiage of MBNA's several cardholder agreements is the same. The following exchange occurred:

> Q. (BY MR. MCGOLDRICK) Is that [an exhibit to Ballinger's affidavit] a copy of the original agreement containing the same terms and conditions that were in effect at the time the account was opened?
>
> A. This is a copy of one of several MBNA credit card agreements. This particular one does not – I don't see it containing the arbitration clause, so this may very well be the one that would have been sent to you back in July of 1994 when you opened the account.
>
> Not all of the agreements look the same. The verbiage from agreement to agreement is consistent, but the appearance of the agreements may vary depending upon the particular affinity group that the card is associated with.
>
> Q. Obviously, the terms and conditions can't be the same if there is changes made. Do you have any idea how many revisions have been made to this agreement since 1994?
>
> A. I do not.

MBNA argues that the circumstances under which it could amend McGoldrick's original cardholder agreement were established because its witness testified that the verbiage in the various MBNA credit card agreements is consistent. That testimony does not establish the circumstances under which MBNA could amend the agreements. Testimony that "the verbiage from agreement to agreement is consistent" does not by itself establish what the verbiage in any agreement is. MBNA did not offer the verbiage of any cardholder agreement into evidence at the trial.

In finding that MBNA had amended McGoldrick's cardholder agreement, the district court also relied upon various statutes enacted in the state of Delaware. There was no evidence presented during the trial, however, showing that Delaware law applied to this case.

The district court found that McGoldrick's original cardholder agreement "did not have an arbitration provision, but gave MBNA the right to change the agreement under certain circumstances." There was no evidence admitted during the trial as to what those circumstances were or as to whether MBNA complied with them. Absent that evidence, MBNA failed to prove that it amended McGoldrick's original cardholder agreement to add a provision requiring mandatory arbitration, and it therefore failed to prove that there was an agreement to arbitrate. The order of the district court confirming the arbitration award is reversed. Because of our resolution of this issue, we will not address the remaining issues that McGoldrick raised to challenge the confirmation of the arbitration award.

B. Is Either Party Entitled to an Award of Attorney Fees on Appeal?

MBNA requests an award of attorney fees on appeal pursuant to Idaho Code §§ 12-120(3) and 12-121. Since it is not the prevailing party on appeal, it is not entitled to an award of attorney fees under either of those statutes.

McGoldrick requests an award of attorney fees on appeal "pursuant to Idaho Code Sections 12-120 and 12-121." "If the party is claiming that a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies." *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003). Because Idaho Code § 12-120 has differing subsections, merely citing the statute without specifying the portion of the statute upon which the claim for attorney fees is based is not sufficient. *Appel v. LePage*, 135 Idaho 133, 138, 15 P.3d 1141, 1146 (2000). Because McGoldrick has not specified the portion of Section 12-120 upon which he relies, he cannot recover attorney fees under that statute, assuming it is applicable.

Attorney fees can be awarded on appeal under Idaho Code § 12-121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Cole v. Esquibel*, ___ Idaho ___, ___, 182 P.3d 709, 713 (2008). We do not find that MBNA defended this appeal frivolously, unreasonably, or without foundation.

IV. CONCLUSION

The judgment is reversed and this case is remanded with instructions to dismiss the complaint with prejudice. We award costs on appeal, but not attorney fees, to the appellant.

Justices BURDICK, J. JONES, W. JONES and HORTON **CONCUR**.

David F. Capps
104 Jefferson Drive
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, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK N.A., Defendant,	Case No. **CV-07-38202** **MOTION FOR CONTINUANCE UNDER RULE 56(f)**

COMES NOW the Plaintiff, David F. Capps (hereinafter "Capps"), and submits his MOTION FOR CONTINUANCE UNDER RULE 56(f) as follows:

RULE 56(f)

Rule 56(f) of the Idaho Rules of Civil Procedure states:

> "**When affidavits are unavailable in summary judgment proceedings.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

As stated in the attached affidavit, the Plaintiff is unable to obtain affidavits authenticating the Pooling and Servicing Agreement and laying the foundation for having

the Pooling and Servicing Agreement entered into evidence in this case because the Pooling and Servicing Agreement is an internal document of the Defendant. Only personnel within FIA Card Services, N.A. have personal first hand knowledge of the document's creation and authenticity. In addition, Capps is also seeking affidavits in regard to the Prospectus regarding authentication and a foundation allowing the Prospectus to be entered into evidence in this case.

Capps therefore requests that this court continue the hearing on his Motion for Reconsideration to allow him to obtain the required affidavits in regard to the Pooling and Servicing Agreement and the Prospectus through discovery. The documents are essential to prove his affirmative defenses in this hearing on reconsideration of the court's recent summary judgment order.

Capps also requests leave of the court to provide supplemental briefing regarding the affirmative defenses in reconsideration once the affidavits have been obtained and the opportunity to enter the Pooling and Servicing Agreement and the Prospectus into evidence.

In the alternative, Capps requests that this court vacate its order of summary judgment and refuse the application for judgment pursuant to Rule 56(f) of the Idaho Rules of Civil Procedure.

Dated this _____ day of August 2008.

_____

David F. Capps

CERTIFICATE OF MAILING

I, Miriam G. Carroll, hereby certify, under penalty of perjury, that I mailed a true and correct copy of the Plaintiff's MOTION FOR CONTINUANCE UNDER RULE 56(f) to the attorney for the Defendant this _____ day of August 2008 by Certified Mail #_____ at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

_____
Miriam G. Carroll

David F. Capps
104 Jefferson Drive
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, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-2007-38202** **AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE UNDER RULE 56(F)**

County: Idaho)
) ss:
State: Idaho)

I, David F. Capps, being duly sworn, do hereby depose, and if called upon to testify, would testify as follows:

1. That I am over the age of 18 years of age.

2. That I am a party to the above titled action.

3. That I am making this affidavit based on my personal knowledge of the facts stated herein.
4. That to the best of my knowledge, the Second Amended and Restated Pooling and Servicing Agreement, dated as of October 20, 2006 is an internal document to FIA Card Services, N.A.
5. That I have no personal knowledge as to the creation or authenticity of the copy of the Second Amended and Restated Pooling and Servicing Agreement OR THE Prospectus currently in my possession.
6. That I am unable, by affidavit, to create the authentication and legal foundation to have the Second Amended and Restated Pooling and Servicing Agreement and/or the Prospectus entered into evidence.
7. That I believe that there are individuals at FIA that have the first hand knowledge to authenticate and lay the foundation to have the Second Amended and Restated Pooling and Servicing Agreement entered into evidence.
8. That, based on the copy in my possession, the information contained therein is essential evidence in my affirmative defenses in this case.
9. That I would be seriously prejudiced by not being able to obtain this evidence.
10. That, to the best of my knowledge, the Prospectus was created by FIA Card Services, N.A. or its former corporate entity, MBNA America Bank, N.A.
11. That I believe that there are individuals at FIA that have the first hand knowledge to authenticate and lay the foundation to have the Prospectus dated October 11,2005 entered into evidence.

12. That, based on the copy in my possession, the information contained therein is essential evidence in my affirmative defenses in this case.

13. That I would be seriously prejudiced by not being able to obtain this evidence.

Further, deponent sayeth not.

Dated this 5TH day of August 2008

David F. Capps

NOTARY PUBLIC
Subscribed and sworn before me this 5TH Day of August, 2008

Signature of Notary Public for Idaho

I reside in Idaho County, Idaho.

My commission expires 2/11/11

SALLY J. ROY NOTARY PUBLIC STATE OF IDAHO

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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	)	Case No. CV-07-38202 MOTION TO DISMISS

The Defendant, by and through its counsel of record, hereby submits its Motion to Dismiss pursuant to I.R.C.P. 12(b)(6).

I.

COURSE OF PROCEEDINGS

On or about October 11, 2007, Plaintiff filed his Amended Complaint and Demand for Jury Trial. In said Complaint, Plaintiff asserted the following claims against Defendant: violation of Plaintiff's right to trial by jury (Article 1, Section 7, Constitution of the State of Idaho); negligence; and fraud. Each of Plaintiff's claims is predicated on the allegation that Defendant proceeded to obtain an arbitration award (See Exhibit A to Defendant's Answer and Counterclaim) knowing there

was never an agreement to arbitrate. Further, Plaintiff claims damages in the amount of $15,448.35 - - the exact amount obtained in arbitration - - on each count. On January 30, 2008, Defendant filed its Answer and Counterclaim. In said Counterclaim, Defendant sought to confirm its arbitration award, or in the alternative, to recover under its claims for breach of contract and account stated.

On May 19, 2008, Defendant filed its Motion for Summary Judgment, and relating pleadings, as to its claims for breach of contract and account stated. After extensive briefing and argument, the Court entered its Memorandum Decision and Order on July 28, 2008, in which the Court granted Defendant's Motion for Summary Judgment.

II.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Taylor v. Maile*, 127 P.3d 156, 160 (Idaho 2005). Upon a rule 12(b)(6) motion to dismiss for failure to state a claim, the complaint must be viewed in the light most favorable to the plaintiff, it must be given the benefit of every reasonable intendment, and every doubt must be resolved in its favor. *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (Idaho 1975).

III.

ARGUMENT

"Idaho's version of the Uniform Arbitration Act clearly makes a distinction between an arbitration determination and a judgment." *Bingham County Comm'n v. Interstate Elec. Co.*, 108 Idaho 181, 182, 697 P.2d 1195, 1196 (Idaho Ct. App. 1985). An "arbitrator's award is not self-

enforcing." *Id.* at 183. "Such an award requires the imprimatur of a court to be enforced." *Id.* "The award becomes enforceable when a court enters judgment on the award." *Id.*

As established in Defendant's Counterclaim, an arbitration award was entered in favor of Defendant for the sum of $15,448.35. As a result of the arbitration determination, Plaintiff claims damages in the amount of $15,448.35 on each count. However, an "arbitrator's award is not self-enforcing." *Id.* at 183. This was only an arbitration determination, NOT a judgment. Further, at this time, there is no need for Defendant to pursue confirmation of its award, as the Court has granted Defendant's Motion for Summary Judgment as to its claims for breach of contract and account stated. Thus, Plaintiff has no cause of action for damages as a result of the award letter.

IV.

CONCLUSION

Plaintiff's claims (violation of the right to trial by jury, negligence and fraud) must be dismissed.

DATED this 11 day of August, 2008.

WILSON & McCOLL

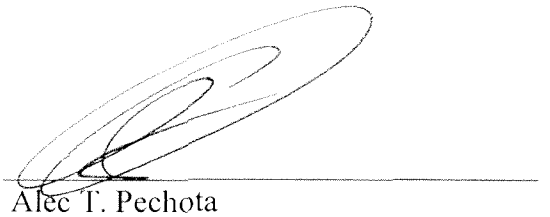
By _____
ALEC T. PECHOTA
Attorney for Plaintiff

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.

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 11 day of Auguat, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536



Alec T. Pechota

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.

David F. Capps
104 Jefferson Dr.
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, vs. FIA CARD SERVICES, N.A., f/k/a/ MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-07-38202** **SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f)**

COMES NOW the Plaintiff, David F. Capps (hereinafter "Capps"), and submits his SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(F) as follows:

I.

RULE 56(f) I.R.C.P.

Rule 56(f) of the Idaho Rules of Civil Procedure states:

"Rule 56(f). Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance

to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The attached affidavit establishes the conditions present under Rule 56(f) for this court to continue Capps' Motion for Reconsideration. This court may also compel discovery so that Capps may obtain the needed affidavits to have the Pooling and Servicing Agreement admitted as evidence in reconsideration. This court also has the option of admitting the previously submitted copy of the Pooling and Servicing Agreement under Rule 1004(3) of the Idaho Rules of Evidence. In addition, this court may vacate the summary judgment entered on July 28, 2008 under Rule 56(f), or may vacate the summary judgment pursuant to Capps' Motion for Reconsideration.

II.

MOTION TO COMPEL DISCOVERY

Capps has requested a certified copy of the Pooling and Servicing Agreement with affidavits appropriate to have the document admitted as evidence. FIA has objected to the request based on the concept that because of the summary judgment under reconsideration, the document and the information contained therein is not relevant, and refused to supply the requested document. As established in the attached affidavit, the document is relevant and essential to justify Capps' opposition. The document is also internal to FIA and Capps has no other means to obtain the document with affidavits appropriate to have the document entered as evidence. Capps therefore moves this court to compel FIA to produce the Pooling and Servicing Agreement with affidavits appropriate to have the document entered as evidence.

III.

REQUEST TO ADMIT THE EXISTING DOCUMENT AS EVIDENCE

In the alternative, Capps requests that this court admit the previously submitted Pooling and Servicing Agreement as evidence under Rule 1004(3) of the Idaho Rules of Evidence. Rule 1004 states:

> "**Rule 1004.** Admissibility of other evidence of contents.
> The original is not required, and other evidence of contents of a writing, recording, or photograph is admissible if: ... (3) Original in possession of opponent. At a time when 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;"

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.

IV.

REQUEST TO VACATE SUMMARY JUDGMENT

Capps is seriously prejudiced by FIA's refusal to provide the Pooling and Servicing Agreement. The document is an essential element of Capps' affirmative defense that FIA "lacks standing" and that FIA "is not a real party in interest under Rule 17(a), I.R.C.P." When the party seeking summary has possession of a document essential to the opposing party's defense, and the moving party refuses to provide the document, summary judgment should be refused. In

addition, under Rule 1008(c) of the Idaho Rules of Evidence, the issue of whether the contents of the Pooling and Servicing Agreement previously offered correctly reflects the contents of the original Pooling and Servicing Agreement represents a genuine issue over a material fact which is for the jury to decide, and as such, the summary judgment issued by this court would subsequently become inappropriate and should be vacated.

CONCLUSION

Several options are available to the court at this time. Capps moves this court for a continuance and an order compelling FIA to produce a certified copy of the requested Pooling and Servicing Agreement with affidavits sufficient for the document to be admitted as evidence. In the alternative, Capps requests that this court admit the previously submitted Pooling and Servicing Agreement under Rule 1004 of the Idaho Rules of Evidence. As an additional alternative, Capps moves this court to vacate the summary judgment of July 28, 2008 on the grounds that there are genuine issues of material facts which are for the jury to weigh and decide.

Dated this 11TH day of September, 2008.

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

CERTIFICATE OF SERVICE

I, Miriam G. Carroll, hereby certify, under penalty of perjury, that I mailed a true and correct copy of this SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) to the attorney for the Defendant this 11TH day of September, 2008 by Certified Mail # 7006 2150 0003 4550 3175 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

Miriam G. Carroll

Miriam G. Carroll

David F. Capps
104 Jefferson Drive
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, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-2007-38202** **AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE UNDER Rule 56(F)**

County: Idaho)
) ss:
State: Idaho)

I, David F. Capps, being duly sworn, do hereby depose, and if called upon to testify, would testify as follows:

1. That I am over the age of 18 years of age.

2. That I am a party to the above titled action.

3. That I am making this affidavit based on my personal knowledge of the facts stated herein.
4. That I have raised an affirmative defense to Defendant FIA Card Services, N.A.'s counterclaims based on a lack of standing.
5. That I have raised an affirmative defense to Defendant FIA Card Services, N.A.'s counterclaims based on Rule 17(a) of the Idaho Rules of Civil Procedure that FIA is not a real party in interest.
6. That a document, identified as the Pooling and Servicing Agreement, is essential to my affirmative defenses identified above.
7. That the document is internal to FIA Card Services, N.A.
8. That I have no other means of obtaining the document with certification and affidavits suitable to have the document entered as evidence in this lawsuit.
9. That I have requested this document in discovery.
10. That FIA Card Services, N.A. has objected to the production of this document.
11. That FIA Card Services, N.A. has refused to produce this document
12. That I am severely prejudiced in my affirmative defenses identified above by FIA Card Services, N.A.'s refusal to produce this document.

Further deponent sayeth not.

Dated this 17TH day of September, 2008.

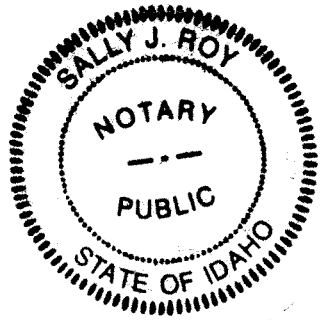
David F. Capps

NOTARY PUBLIC
Subscribed and sworn before me this 11th Day of September, 2008

Signature of Notary Public for Idaho

I reside in Idaho County, Idaho.

My commission expires 2/11/11



David F. Capps
104 Jefferson Dr.
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, vs. FIA CARD SERVICES, N.A. f/k/a MBNA AMERICA BANK, N.A., Defendant,	Case No. **CV-07-38202** **MOTION TO SHOW CAUSE**

COMES NOW the Plaintiff, David F. Capps (hereinafter "Capps"), and moves this court to order FIA Card Services, N.A. (hereinafter "FIA") to SHOW CAUSE why it should not be held in CONTEMPT OF COURT for failure to properly comply with this court's order of July 22, 2008, compelling discovery.

I.

INTERROGATORY NO. 5

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, this court has 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."

FIA's response was:

> "**RESPONSE:** *All the business records are kept electronically in MBNA's Customer Information System notes. When a particular purchase is made, the merchant sends an electronic notation to MBNA, which is electronically entered into MBNA's mainframe. Thereafter, a copy of the receipt is provided to MBNA to compare to the electronic merchant submissions as a fraud check. At the end of each billing cycle, a copy of the electronic data compilation is printed in the form of a billing statement, which contains a form with which a cardholder can dispute any charge appearing on their current billing statement within (60) days.* ***If no dispute as to a particular charge is received from the cardholder within (60) days of a purchase, the merchant's receipt is destroyed. Thus, the billing statements issued to the cardholder contain a history of all charges to an account. Any other phone calls related to the account, letters sent by MBNA to a cardholder with respect to a particular account, or any other account activity is notated in the Customer Information System notes by a trained MBNA employee contemporaneous to the transaction when it occurs.***"

While FIA's response may identify a record-keeping system, identified as a Customer Information System, the response makes no mention of any other record-keeping systems that reference or identify the ACCOUNT as defined in the Interrogatories. From briefing and this court's statements, it should have been clear to FIA that the record-keeping systems sought relate to the ownership of the account in question – not what MBNA may have kept in its customer service files. In addition, the response provided is not correct in its content. The response claims

that "Thereafter, a copy of the receipt is provided to MBNA to compare to the electronic merchant submissions as a fraud check." Capps has several merchant accounts where credit card transactions involving FIA and MBNA are processed. Capps has also reviewed the merchant account agreement. None of the merchant agreements require, or even allow a merchant to send a physical copy of the receipt to MBNA. The merchants keep the merchant receipts. MBNA does not receive, nor does MBNA keep, even temporarily, any physical copies merchant receipts. In the case of a fraud complaint, MBNA has the contractual ability to request a copy of the receipt from the merchant, but these receipts are not provided to MBNA under any other circumstances. FIA's response is a false statement – a misrepresentation of the actual process being used by MBNA and FIA.

FIA's response also does not include any of the other record-keeping systems that may be used to determine ownership of the account. If FIA actually owns the account in question, the account will appear in asset – liability statements, balance sheets, ledgers, and the financial records supporting income and cash flow statements, and owner's equity statements. All of these statements are normally prepared under the Generally Accepted Accounting Practices [GAAP] and the Financial Accounting Standards Board publications FAS-125, and as of the year 2000, FAS-140. These financial statements will demonstrate whether the account in question is "on the books" or whether the account has been "removed from the books". When an account is sold it is removed from the books of the company because the account is no longer owned as an asset and the company is no longer "at risk" for the account as a liability. Possession of the asset and the associated liability are distinct characteristics and evidence of ownership of the account. FIA's response is materially false, does not include the requested information and is evasive and

incomplete. Under Rule 37(a)(3) of the Idaho Rules of Civil Procedure, an evasive or incomplete answer is to be treated as a failure to answer.

II.

REQUESTS FOR PRODUCTION OF DOCUMENT NO. 3, 4 & 5.

Capps' Request for Production of Document No. 3 specifically requested any and all communications relating to any and all studies made by FIA or MBNA America Bank, N.A. regarding bill stuffers; including the number, or percentage, of customers reading material included in the same envelope as the monthly statement. (Emphasis added).

FIA's response was: "Defendant is not in possession of any studies regarding bill stuffers." The subject of communications was not addressed in the response. The bill stuffer program has been in use for a number of years. It is inconceivable that no studies of any kind have been done or that there have been no communications of any kind regarding the subject of bill stuffers. At this point in time, any and all information regarding bill stuffers would be archived and would have been done by MBNA. Such archives may not be in the possession of FIA, but they are certainly accessible by them and under their control. FIA's response is evasive and incomplete. Under Rule 37(a)(3) of the Idaho Rules of Civil Procedure, an evasive or incomplete answer is to be treated as a failure to answer.

FIA's response to Request for Production of Document No. 4 & 5 was: "See response to Request No. 3." Request for Production of Document No. 5 specifically requests "all documents regarding any and all studies used or referenced by FIA or MBNA America Bank, N.A., from whatever source, regarding bill stuffers; including the number, or percentage, of customers reading material included in the same envelope as the monthly statement." It is inconceivable that bill stuffers were never mentioned in any memo, correspondence, communication or other

document as defined in the Interrogatories. MBNA and FIA both use bill stuffers. These bill stuffers had to be authorized by someone. That authorization would be based on some kind of study, a cost analysis if nothing else. Such a document would fall under the definition provided in the Request or in the definitions provided with the discovery Requests. FIA's Response is evasive and incomplete. Under Rule 37(a)(3) of the Idaho Rules of Civil Procedure, an evasive or incomplete answer is to be treated as a failure to answer.

FIA has failed to answer the Requests as ordered by this court. Capps therefore moves this court to order FIA to SHOW CAUSE why it should not be held in CONTEMPT OF COURT.

Dated this 11TH day of September, 2008.

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

CERTIFICATE OF SERVICE

I, Miriam G. Carroll, hereby certify, under penalty of perjury, that I mailed a true and correct copy of this MOTION TO SHOW CAUSE to the attorney for the Defendant this 11TH day of September, 2008, by Certified Mail # 7006 2150 0003 4550 3175 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

Miriam G. Carroll

Miriam G. Carroll

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,

v.

FIA CARD SERVICES N.A., fka MBNA AMERICA BANK, N.A.,

Defendant.

Case No.: CV-07-38202

DECISION AND ORDER

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.

IT IS SO ORDERED, this the 28 day of October, 2008

JOHN BRADBURY
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I, the undersigned, a Deputy Clerk of the above entitled Court, do hereby certify that a copy of this document, was mailed or delivered on date mailed, to the following persons:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536

[✓] U.S. Mail
[ ] Overnight Mail
[ ] Fax
[ ] Hand Delivery

Alec T. Pechota
Wilson & McColl
420 W. Washington
PO Box 1544
Boise, ID 83701

[✓] U.S. Mail
[ ] Overnight Mail
[ ] Fax
[ ] Hand Delivery

ROSE GEHRING, CLERK

By: Kathy Johnson
Deputy Clerk

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,

v.

FIA CARD SERVICES N.A., fka MBNA AMERICA BANK, N.A.,

Defendant.

Case No.: CV-07-38202

MEMORANDUM DECISION AND ORDER

This matter comes before me on a motion by FIA Card Services (FIA) to dismiss Mr. Capps' complaint.

I. CONTENTIONS

FIA moves for dismissal of Mr. Capps' complaint on the basis that he fails to state a claim upon which relief can be granted, pursuant to Idaho Rule of Civil Procedure 12(b)(6). Specifically, FIA argues that the arbitration award letter at issue does not authorize recovery of the arbitrated amount unless it is confirmed by a court, and thus it can not be characterized as a form of damage or injury for which the court can fashion a remedy. Moreover, FIA argues that since it was granted summary judgment on its counterclaims, any issues related to the arbitration award are moot.

Mr. Capps argues that an arbitration award is a form of damage before the award is confirmed by the courts. Mr. Capps further contends that legal research costs in the amount of $278.72 related to the arbitration proceedings are a form of damages.

II. FACTS

Mr. Capps entered into a credit card agreement with MBNA America Bank N.A., now known as FIA Card Services, N.A. at some point prior to August, 2002. An account was created for Mr. Capps, and an account number assigned. By July, 2005, the balance claimed to be due and owing on the account was $12,459.74, and no payments had been received from Mr. Capps since December, 2005.

In 2007, FIA sought to recover the amount it believed to be outstanding on the account by arbitration before the National Arbitration Forum (NAF). On June 13, 2007 the arbitrator awarded FIA $15,448.35. On August 8, 2007, before FIA filed judicial confirmation of the award, Mr. Capps brought suit against both FIA and the NAF alleging fraud, negligence, conspiracy, and civil rights violations. NAF sought to remove the matter to the federal district court, where the claims against NAF were dismissed.

Mr. Capps filed an amended complaint against FIA, alleging that by pursuing arbitration, FIA violated his constitutional right to a jury trial, and that in so doing, committed the torts of negligence and fraud by misrepresentation. Mr. Capps seeks money damages in the amount of $25,000.00 on each count. FIA filed a counterclaim against Mr. Capps, arguing for confirmation of the arbitration award, breach of contract, and account stated. FIA then moved for summary judgment on Counts II and III of its counterclaim (Breach of Contract and Account Stated, respectively.) After oral argument, I granted FIA's motion. *Memorandum Decision and Order*, Idaho County Case No.

CV07-38202 (July 28, 2008). Upon reconsideration, I vacated that portion of the order granting summary judgment on Count III.

III. DISCUSSION

A. Mr. Capps' enjoyed no right to a jury trial prior to the initiation of an action in a properly constituted court.

The Constitution of the State of Idaho holds inviolate the right to a trial by jury in "criminal cases" and "civil actions." Const. Art. I, § 7. A civil action is commenced upon the filing of a complaint with the court. Idaho R. Civ. Pro. 3.

The Constitution requires the State to provide for trials by jury, but it does not require private citizens to provide a jury when they attempt to resolve disputes outside the courts. Until a complaint is filed, no right to a jury trial exists, because no court has jurisdiction. Mr. Capps had no right to a jury trial until an action was commenced and FIA had no obligation to provide a jury in a non-judicial proceeding.

B. Mr. Capps fails to satisfy the elements of either negligence or fraud, and thus the complaint fails state a claim upon which relief can be granted.

A motion to dismiss for failure to state a claim should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Gardner v. Hollifield,* 96 Idaho 609, 611 (1975). In deciding a motion to dismiss under Idaho Rule of Civil Procedure 12(b)(6), I am required to consider the complaint in the light most favorable to the plaintiff and resolve every doubt in the plaintiff's favor. *Id.*

Here there is no doubt. Inasmuch as Mr. Capps' complaint arises from an arbitration award that was never confirmed, he suffered no damages sufficient to state a claim for relief.

The elements of a common law negligence claim are "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 583 (1976) citing Prosser, *Law of Torts* § 30 (4th ed. 1971). The nine elements of fraud by misrepresentation, each of which must be proven, include "consequent and proximate injury." *Lettunich v. Key Bank Nat'l Ass'n,* 141 Idaho 362, 368 (2005).

Arbitration awards are not self-enforcing. *Bingham County Comm'n v. Interstate Elec. Co.*, 108 Idaho 181, 182 (Idaho Ct. App. 1985). While the scope of judicial review of arbitration awards is restricted to determinations of whether the grounds for relief stated in the Uniform Arbitration Act, Idaho Code section 7-901, *et seq.*, exist, the mere drafting of a letter purporting to award one party a sum of money does not entitle the prevailing party to that sum. Rather, the award must be confirmed by a court before it is enforceable. *Bingham County Comm'n*, 108 Idaho at 182. Absent judicial confirmation, the arbitrator's award is meaningless, and FIA can not – and more importantly *has not* attempted to – collect the amount apportioned them. Any loss claimed by Mr. Capps is therefore inchoate, which means, necessarily, that the damages for fraud and negligence have yet accrue.

Even if Mr. Capps is able to demonstrate that the costs of $278.72 are fairly chargeable as damages, his claim must fail for a second reason. Both his negligence and fraud claims rely on FIA's alleged duty not to violate Mr. Capps constitutional right to a trial by jury. *Pl. Amended Complaint*, pp. 2-3. FIA was not encumbered by such a duty.

The right to a jury trial only exists in the context of a criminal prosecution or a civil action. No action was commenced in this case. Even if an action had been commenced, the duty to guarantee a jury trial is not upon FIA, but rather upon the court. Absent proof that a duty existed, neither the negligence nor the fraud claim can provide grounds for relief. FIA can not breach a duty it did not owe Mr. Capps.

IV. CONCLUSION

Mr. Capps' claims rest on the vagaries of future events rather than actual injury. While it is reasonable to assume that FIA would have sought to confirm the arbitration award as provided by law, the fact is that the award was never confirmed. Absent judicial confirmation, the award letter did not entitle FIA to collect the amount awarded. Mr. Capps can not prove the necessary elements of causes of action, and thus his action must fail.

Likewise, Mr. Capps can not recover damages for a right that does not exist. The Constitutional provision requiring trials by jury is applicable to the State, not to private citizens. The duty to provide a jury trial is incumbent upon the court, not upon the adverse party.

V. ORDER

FIA's motion is GRANTED. The plaintiff's claims are hereby DISMISSED.

IT IS SO ORDERED, this the 28 day of October, 2008

JOHN BRADBURY
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I, the undersigned, a Deputy Clerk of the above entitled Court, do hereby certify that a copy of this document, was mailed or delivered on date mailed, to the following persons:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536

[✓] U.S. Mail
[ ] Overnight Mail
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Alec T. Pechota
Wilson & McColl
420 W. Washington
PO Box 1544
Boise, ID 83701

[✓] U.S. Mail
[ ] Overnight Mail
[ ] Fax
[ ] Hand Delivery

ROSE GEHRING, CLERK

By: _____
Deputy Clerk

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,

v.

FIA CARD SERVICES N.A., fka MBNA AMERICA BANK, N.A.,

Defendant.

Case No.: CV-07-38202

MEMORANDUM DECISION AND ORDER

This matter comes before me on David F. Capps' motion to reconsider my decision and order granting FIA Card Service's motion for summary judgment on its counterclaims for Breach of Contract and Account Stated. Additionally, Mr. Capps filed a motion for a continuance pursuant to Idaho Rule of Civil Procedure 56(f).

I. FACTS

Mr. Capps entered into a credit card agreement with MBNA America Bank N.A., now known as FIA Card Services, N.A. some time prior to August, 2002. An account was created for Mr. Capps, and an account number assigned. On December 14, 2004, the amount shown owing on the account was $10,617.94. Mr. Capps sent a letter to Comerica Bank Bankcard Services (Comerica serviced the account) on December 23, 2004, disputing the balance. By July, 2005, the balance claimed to be due and owing on the account was $12,459.74, and no payments had been received from Mr. Capps since

December, 2005. In December, 2006, Mr. Capps sent another letter, this one to MBNA America Bank, questioning the validity of the amount claimed.

In 2007, FIA sought to recover the amount it believed to be outstanding on the account by arbitration before the National Arbitration Forum (NAF). On June 13, 2007 the arbitrator awarded FIA $15,448.35. On August 8, 2007, before FIA filed for judicial confirmation of the award, Mr. Capps brought suit against both FIA and the NAF alleging fraud, negligence, conspiracy, and civil rights violations. NAF removed the claims against it to federal district court, where they were dismissed.

Mr. Capps filed an amended complaint against FIA, alleging the torts of negligence and fraud by misrepresentation and that by pursuing arbitration, FIA violated his constitutional right to a jury trial. FIA filed a counterclaim against Mr. Capps, arguing for confirmation of the arbitration award, breach of contract, and account stated. FIA then moved for summary judgment for breach of contract and account stated. After oral argument, I granted FIA's motion. *Memorandum Decision and Order*, Idaho County Case No. CV07-38202 (July 28, 2008). Mr. Capps now seeks reconsideration.

II. CONTENTIONS

Mr. Capps contends that I erred in granting summary judgment in favor of FIA Card Services (FIA) on its counterclaim for breach of contract. Mr. Capps contends that there remain genuine issues of material facts regarding the existence of a contract because the original credit agreement was not entered into the court record by FIA. Mr. Capps also argues on reconsideration that I erred in granting summary judgment on FIA's counterclaim for account stated. He claims that there was no mutual agreement about the final amount owing.

FIA contends that the contract was formed when a credit card was issued to Mr. Capps and he used it perform financial transactions. Moreover, FIA argues that the existence of the original agreement is unnecessary to demonstrate the existence of a contract because the contractual obligation arises not from a written agreement, but from Mr. Capps conduct in utilizing the card. FIA filed no response to the Account Stated argument.

With respect to his Rule 56(f) motion, Mr. Capps argues that he is prejudiced by FIA's alleged refusal to provide a certified copy of the Pooling and Servicing Agreements and with affidavits suitable to authenticate the document. FIA contends that a motion brought pursuant to Rule 56(f) must be brought prior to the hearing on summary judgment, and as such, Mr. Capps' motion for continuance is untimely.

III. DISCUSSION

A. Summary judgment claims.

1. **Summary judgment in favor of FIA on its Breach of Contract claim was appropriate as adequate evidence exists to demonstrate the existence of a contractual obligation.**

A valid contract requires a meeting of the minds for consideration evinced by a manifestation of mutual intent to contract. *Inland Title Co. v. Comstock,* 116 Idaho 701, 703, 779 P.2d 15, 17 (1989). This manifestation takes the form of an offer and acceptance. *Id.* An offer "is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.,* 136 Idaho 233, 237 (2001), *quoting* RESTATEMENT (SECOND) CONTRACTS § 24 (1981). A contract implied in fact exists where there is no express

agreement but the parties' conduct evinces an agreement. *Barry v. Pacific West Constr., Inc.*, 140 Idaho 827, 834, (2004).

The issuance of a credit card is an offer to contract, and the offer is accepted when the cardholder uses the card. *Davis v. Discover Bank,* 627 S.E.2d 819, 820-21 (Ga.Ct. App. 2006); *Jones v. Citibank South Dakota, N.A.*, 235 S.W.3d 333 (Tex. App. 2007); *Feder v. Fortunoff,* 123 Misc.2d 857, 860, 474 N.Y.S.2d 937 (N.Y. Sup. Ct. 1984); *Citibank South Dakota N.A. v. Santoro*, 150 P.3d 429 (Or. Ct. App. 2006). Each individual credit card transaction may be fairly understood to be the formation of a unilateral contract between the card holder and card issuer by which the cardholder promises to repay the debt and the card issuer performs by reimbursing the merchant who has accepted the credit card payment in lieu of cash. *See, e.g.*, *In re Anastas*, 94 F.3d 1280, 1285 (9th Cir. 1996).

Mr. Capps admits to receiving an offer of credit and establishing an account. (Pl. Answer to Counterclaims ¶ 4). The statements of account submitted by FIA show that transactions were made. Whether an executed agreement between the issuer and holder of the card is in evidence is thus immaterial, insofar as the *existence* of a contract is concerned.

In arguing that FIA must place the original contract in the record, Mr. Capps relies on *MBNA America Bank, N.A. v. McGoldrick*, ___ Idaho ___, 2008 WL 2586304 (2008). *McGoldrick*, however, does not stand for the proposition that the existence of a contract can only be proven by presentation of the original written agreement of the parties – Idaho courts have long recognized agreements implied in fact by the conduct of the parties. *See Elliott v. Pope*, 42 Idaho 505 (1926); *Fox v. Mountain West Elec., Inc.*,

137 Idaho 703, 707 (2002). Rather, in *McGoldrick*, the issue was a term of the agreement, specifically, whether the parties had agreed to arbitrate disputes. Disagreement as to a particular term of a contract is quite different than disagreement about the existence of a contract. The only issue in this case is whether there was an agreement to repay the debt incurred by use of the credit card. I conclude that the overwhelming, unambiguous weight of authority from other jurisdictions is correct. A contract is formed when a card is issued and thereafter utilized.

There was an offer of credit extended to Mr. Capps and conduct by Mr. Capps sufficient to demonstrate acceptance of the offer. FIA produced evidence, supported by the affidavit of Eric Pyle, that an account was opened on behalf of Mr. Capps, and that transactions were made on that account. FIA presented statements indicating the balance to be repaid. Those statements showed that payments were not made after July 2005. No unresolved issues of material fact remain to preclude summary judgment in favor of FIA on its claim for breach of contract.

2. FIA was not entitled to summary judgment on its counterclaim for an Account 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.

A claim for an account stated requires ". . . mutual agreement between [the parties] as to the correctness of the allowance and disallowance of the respective items or claims and of balance as struck upon the final adjustment of the whole account and the demands on both sides." *O'Harrow v. Salmon River Uranium Development, Inc.*, 84 Idaho 427, 431 (1962).

On reconsideration, Mr. Capps proffers copies of letters delivered to both MBNA America and Comerica Bank Bankcard Services (together with signed delivery receipts) disputing the amount shown as owing on the account. Parties may submit new evidence while an interlocutory order is under reconsideration. *Coeur d'Alene Mining Co. v. First Natl. Bank,* 118 Idaho 812, 823, (1990). I believe the newly offered documents demonstrate that a genuine issue of material fact exists insofar as mutual agreement between the parties is concerned.

B. Mr. Capps' Rule 56(f) motion for continuance is untimely.

In moving for a continuance of the summary judgment proceeding, Mr. Capps relies on Idaho Rule of Civil Procedure 56(f), which provides as follows:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Where summary judgment proceedings are implicated, however, I am not bound solely by Rule 56(f). When a motion for summary judgment is before me and is supported as required by the Rules of Civil Procedure, I am obliged to enter summary judgment, if appropriate, if the adverse party fails to provide specific facts – supported as provided by Rule 56 – demonstrating that there exists a genuine issue for trial. Idaho Rule of Civil Procedure 56(e).

FIA filed its motion for summary judgment May 19, 2008. A hearing was held June 26, 2008. In opposing the motion, Mr. Capps proffered the Pooling and Servicing Agreement at issue here. He submitted the document without an affidavit based upon personal knowledge of the affiant, attesting to its authenticity. I concluded that the document introduced by Mr. Capps lacked the evidentiary support required by Rule 56.

Despite Mr. Capps proceeding in this case *pro se*, he is bound by the procedural rules applicable to lawyers. *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346 (1997). The proper time to raise the issue of alleged infirmities involved in the discovery process and to request a continuance was prior to the disposition of the summary judgment motion.

IV. CONCLUSION and ORDER

1. Mr. Capps' motion to reconsider my Memorandum Decision and Order dated June 28, 2008, is GRANTED.

   a. To the extent my June 28th Order granted summary judgment in favor of FIA on its claim of Account Stated, it is vacated.

   b. I reaffirm my June 28th Order granting summary judgment in favor of FIA on its claim of Breach of Contract.

2. Mr. Capps' motion for continuance is DENIED.

IT IS SO ORDERED, this the 28 day of October, 2008

JOHN BRADBURY
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I, the undersigned, a Deputy Clerk of the above entitled Court, do hereby certify that a copy of this document, was mailed or delivered on date mailed, to the following persons:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536

[✓] U.S. Mail
[ ] Overnight Mail
[ ] Fax
[ ] Hand Delivery

Alec T. Pechota
Wilson & McColl
420 W. Washington
PO Box 1544
Boise, ID 83701

[✓] U.S. Mail
[ ] Overnight Mail
[ ] Fax
[ ] Hand Delivery

ROSE GEHRING, CLERK

By: _____
Deputy Clerk

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

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, Plaintiff, vs. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	)	Case No. CV-07-38202 JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Defendant have and recover from the Plaintiff Judgment as follows:

Principal amount	$12,459.74
Attorney's Fees	$7,312.50
Costs	$72.00
Total judgment	$19,844.24

Collection Notice:
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.

Said Judgment to bear interest at the statutory rate from the date hereof.

DATED this 12 day of November, 2008.

JUDGE

CLERK'S CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 12th day of November, 2008, I caused to be served on the following parties of record 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:

Alec T. Pechota
P.O. Box 1544
Boise, Idaho 83701

David Capps
104 Jefferson Dr.
Kamiah, Idaho 83536

ROSE E. GEHRING, Clerk

Kathy Johnson, Deputy
CLERK

Collection Notice:
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.

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536
208-935-7962
FAX: 208-926-4169
Defendant, *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, Appellant,

vs.

FIS CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A.

Defendant, Respondent,

Case No. **CV-2007-38202**

NOTICE OF APPEAL

TO: **THE ABOVE NAMED RESPONDENT, FIA CARD SERVICES, N.A., AND THE PARTY'S ATTORNEYS, WILSON & McCOLL, ATTORNEYS AT LAW, AND THE CLERK OF THE ABOVE TITLED COURT.**

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, David F. Capps, appeals against the above named respondent to the Idaho Supreme Court from the final judgment, entered in the above titled action on the 12th day of November, 2008, Honorable Judge John Bradbury presiding.
2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.

   (a) Whether the trial court erred in granting summary judgment when there was a genuine dispute over a material fact.

   (b) Whether the trial court erred in weighing evidence that was for the jury to weigh and decide under Rule 1008(c) of the Idaho Rules of Evidence.

   (c) Whether the trial court erred in not recognizing relevant and admissible evidence under Rule 1004 of the Idaho Rules of Evidence.

   (d) Whether the trial court erred in denying Capps' Motion to Show Cause.

   (e) Whether the trial court erred in denying Capps' Motion to Compel production of the Pooling and Servicing Agreement.

   (f) Whether the trial court erred in denying the Defendant's Motion for Reconsideration based on the Plaintiff not being a real party in interest.

   (g) Whether the trial court erred in allowing the action to continue when evidence was presented demonstrating that FIA Card Services did not have standing, and

in not ordering FIA to provide proof they were a real party in interest.

(h) Whether the trial court erred in disallowing evidence and then basing its decision on the disallowed evidence.

(i) Whether the trial court erred in deciding that FIA Card Services was exempt from the Idaho Collection Agency Act.

4. No order has been entered sealing all or any portion of the record.

5. (a) A reporter's transcript is hereby requested.

(b) The appellant requests the preparation of the following portions of the reporter's transcript:

(i) Mr. Capps' testimony in the hearing dated 07/11/2008

(ii) Mr. Capps' testimony in the hearing dated 09/25/2008.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

(a) Amended complaint filed 10/12/2007.

(b) Opposition to Motion for Summary Judgment filed 06/10/2008.

(c) Post Hearing Memorandum filed 07/01/2008.

(d) Affidavit of David F. Capps filed 07/11/2008.

(e) Motion for Reconsideration filed 08/05/2008.

(f) Motion for continuance filed 08/05/2008.

(g) Motion to Dismiss filed 08/14/2008.

(h) Supplemental Motion for Continuance filed 09/11/2008.

(i) Motion to Show Cause filed 09/11/2008.

7. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) (1) [**X**] That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(2) [ ] That the appellant is exempt from paying the estimated transcript fee because _____

(c) (1) [**X**] That the estimated fee for preparation of the clerk's or agency's record has been paid.

(2) [ ] That the appellant is exempt from paying the estimated fee for the preparation of the record because _____

(d) (1) [**X**] That the appellate filing fee has been paid.

(2) [ ] That appellant is exempt from paying the appellate filing fee because _____

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 18TH day of November, 2008.

State of Idaho

County of Idaho ss. }

I, David F. Capps, being sworn, deposes and says:

That I am the appellant in the above-entitled appeal and that all statements in this notice of appeal are true and correct to the best of my knowledge and belief.

Signature of Appellant

Subscribed and Sworn to before me this 18th, day of November, 2008.

Title Notary

Residence Idaho

My Commission expires on 2/11/11.

SALLY J. ROY NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I, David F. Capps, hereby certify, under penalty of perjury, that I mailed a true and correct copy of this NOTICE OF APPEAL to the attorney for the Plaintiff by Certified Mail #7006 2150 0003 4551 2436 this 18TH day of November, 2008 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

David F. Capps

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

David Capps, Plaintiff/Appellant vs. FIA Card Services, N.A. Fka MBNA America Bank, N.A., Defendant/Respondent.	Case No. CV 07-38202 APPEAL ORDER

WHEREAS, a Notice of Appeal to the Supreme Court has been filed in the above matter and the Court being fully advised;

IT IS HEREBY DETERMINED AND ORDERED AS FOLLOWS:

(1) A transcript of the proceedings before the District Court's division is required for the processing of the appeal;

(2) The appellant shall pay to the District Court the deposit for the transcript fees of $200.00 in accordance with I.R.C.P. 83(k) within fourteen (14) days of the date of this order.

(3) Upon payment of the estimated transcript fees, the transcriber shall prepare a transcript as provided in Rule 83(k);

(4) The appellant shall pay the deposit for the Clerk's Record fee of $200.00.

Dated this 19 day of November 2008.

JOHN BRADBURY
District Judge

I, the undersigned Deputy Clerk, do hereby certify that I mailed a copy of the foregoing document to the following on 11-19-08 :

David Capps
104 Jefferson Drive
Kamiah, ID 83536

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

Idaho Supreme Court
Attn: Clerk
PO Box 83720
Boise, ID 83720-0101

ROSE E GEHRING, CLERK

By: Kathy Johnson
Deputy Clerk

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

David Capps, Plaintiff/Appellant,	)	IDAHO COUNTY NO. CV 07-38202
vs.	)	CLERK'S CERTIFICATE
FIA Card Services, N.A. Fka MBNA America Bank, N.A., Defendant/Respondent.	)	

STATE OF IDAHO)
)
County of Idaho)

I, Rose E. Gehring, Clerk of the District Court of the Second Judicial District, of the State of Idaho, in and for the County of Idaho, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction, and is a true, full and correct Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I, do further certify, that all exhibits, offered or admitted in the above entitled cause, will be duly lodged with the Clerk of the Supreme Court along with the court reporter's transcript and the clerk's record, as required by Rule 31 of the

Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Grangeville, Idaho, this 16th day of December 2008.

ROSE E. GEHRING, CLERK

BY: Kathy Johnson
Kathy Johnson
Deputy Clerk

SECOND JUDICIAL DISTRICT COURT IDAHO COUNTY STATE OF IDAHO
SEAL

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

David Capps, Plaintiff/Appellant,	)	Supreme Court No. _____
vs.	)	Idaho County No. CV 07-38202
FIA Card Services, N.A. Fka MBNA America Bank, N.A., Defendant/Respondent.	)	CLERK'S CERTIFICATE RE: EXHIBITS

STATE OF IDAHO)

County of Idaho)

I, Rose E. Gehring, Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Idaho, hereby certify that the following are all the exhibits admitted or rejected to-wit:

NO EXHIBITS FOR THIS FILE

Dated this 16th day of December 2008.

SEAL

ROSE E. GEHRING, Clerk

By: Kathy Johnson
Deputy Clerk

David F. Capps
104 Jefferson Drive
Kamiah, ID 83536-9410
208-935-7962
FAX: 208-926-4169
Plaintiff, *in propria persona*

DOCKETED

IDAHO COUNTY DISTRICT COURT
FILED
AT 10:10 O'CLOCK A .M.
APR 4 2008
ROSE 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, vs. FIA CARD SERVICES, N.A., Fka MBNA AMERICA BANK, N.A. Defendant,	Case No. **CV-2007-38202** **MOTION TO COMPEL DISCOVERY**

COMES NOW the Plaintiff, David F. Capps (hereinafter "Capps"), and moves this court to compel the Defendant, FIA Card Services, (hereinafter "FIA") to answer his discovery requests pursuant to rule 33, 34 and 36 of the Idaho Rules of Civil Procedure. This motion is necessary because FIA's answers to discovery are evasive in violation of Rule 37(a)(3) of the Idaho Rules of Civil Procedure. FIA has not answered Capps' interrogatory and three (3) requests for production of documents. Capps has sent a "meet and confer" letter to FIA in an attempt to resolve this situation. FIA's response to the "meet and confer" has also been evasive.

It is therefore necessary for Capps under Rule 36(a) of the Idaho Rules of Civil Procedure, to request that this court compel answers to the interrogatory, and requests for production of documents, as follows:

> **INTERROGATORT NO. 5:** Please identify each record-keeping system within the Defendant's system of records, by individual system or category, describing each record-keeping system with reasonable particularity, together with a description of the nature, custody, condition, category and location, of any kind of documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) that are in the possession, custody, or control of the Defendant that contain, reference or identify the ACCOUNT.

FIA has objected to this Interrogatory as vague, ambiguous and unduly burdensome. FIA has further objected to this Interrogatory as irrelevant and unlikely to lead to the discovery of admissible evidence. As to the first objection, the Interrogatory is a standard request for FIA to identify the specific book-keeping system and disclose the names of the elements or records in that system. This information is necessary to prevent an ongoing guessing game involving the court as to what a specific record is called and to facilitate the efficient use of the court's time.

Capps is required to properly identify documents, not only in discovery, but in preparation for trial. Capps is not familiar with the internal procedures and nomenclature of FIA or MBNA America Bank, and has no other publicly available means of obtaining this information. FIA is required to comply with an established standard of book-keeping pursuant to Generally Accepted Accounting Practices [GAAP], and the Statement of Financial Accounting Standards No. 140 [FAS140]. FIA has the requested information and is required to disclose that information to Capps.

The courts have established that there should be disclosure of all pertinent books, papers, and documents which will serve to aid the parties in adjusting their differences at pretrial hearings (see *Douglas v. Glacier State Tel. Co.*, 615 P.2d 580 (Alaska 1980), *Fuss v. Superior*

Court for Los Angeles County, 273 Cal. App. 2d 807, 78 Cal. Rptr. 583 (2d Dist. 1969), and *Lakeland Water Dist. V. Onondaga County Water Authority*, 24 N.Y.2d 400, 301 N.Y.S.2d 1, 248 N.E.2d 855 (1969)), since a lawsuit is not a game which is to be won by the smartest player, but a search for the truth (see *Clarkson Industries, Inc. v. Price*, 135 Ga. App. 787, 218 S.E.2d 921 (1975) (overruled on other grounds by, Tobacco Road, Inc. v. Callaghan, 174 Ga. App. 539, 330 S.E.2d 768 (1985)), and *Mallon v. Ginsberg*, 12 Misc. 2d 1017, 173 N.Y.S.2d 412 (Sup. Ct. 1958)). Some of those differences pertain to claims of ownership on the part of the Defendant regarding the alleged debt involved. The records sought by Capps in discovery will disprove, the claims of ownership by FIA and are essential to this court for an accurate understanding of the claims and counterclaims in this action. The court needs the truth revealed in this action to come to a just and proper decision.

As to the second objection, the Interrogatory is clearly within the scope of the pleadings and relates to the claim of fraud. The information is material and necessary to the claim of fraud in the pleadings, and Capps has a right to this information. Capps has uncovered information in other cases which leads him to believe that FIA and MBNA America Bank, N.A. have deliberately committed fraud and misrepresentation in this case against Capps. The information sought in this Interrogatory is fundamental in identifying and specifying the documents required in this lawsuit. The information obtained as a result of being able to properly identify specific documents and records will lead to admissible evidence under the Idaho Rules of Evidence, and will assist in the issuance of appropriate subpoena duces tecum's in this action.

REQUEST FOR PRODUCTION OF DOCUMENT NO. 3: Please produce, or make available for copying, all documents regarding any and all communications relating to any and all studies made by FIA or MBNA America Bank, N.A. regarding bill stuffers;

including the number, or percentage, of customers reading material included in the same envelope as the monthly statement.

FIA has objected to this request as vague, ambiguous and unduly burdensome. FIA has further objected to this request as irrelevant and unlikely to lead to the discovery of admissible evidence, and to the extent such information is protected by the attorney-client privilege or work product doctrine. As to the first objection, the request is clear and concise and requests any and all documents relating to communications relating to studies done on bill stuffers placed in the same envelope as the monthly statement. The documents are essential to establishing the intent for fraud and misrepresentation in the pleadings. Capps has come across other information indicating that MBNA America Bank, and subsequently FIA knowingly practiced misrepresentation and deception in this case against Capps. The documents sought in this request for documents constitute proof of that deception and misrepresentation. FIA either has the requested documents, or has access to and control of the requested documents. Capps is entitled to the documents as a party to this lawsuit.

As to the second objection, the request is relevant and material to the claim of fraud in the pleadings, and Capps has a right to this information. The documents requested would constitute admissible evidence as to knowledge and intent to commit fraud against not only Capps, but other consumers as well. As stated above, the documents are either in the possession of, or under control of FIA, and are essential to arriving at the truth in this action. No request has been made for anything within the attorney-client privilege, or work product, and FIA has made no specific claim that any of the information requested actually falls within the attorney-client privilege or the work product doctrine. Without a specific claim under the attorney-client privilege or work product doctrine, the objection is without merit and should be overruled.

REQUEST FOR PRODUCTION OF DOCUMENT NO. 4: Please produce, or make available for copying, all documents regarding any and all studies made by or for FIA or MBNA America Bank, N.A. regarding bill stuffers; including the number, or percentage, of customers reading material included in the same envelops as the monthly statement.

FIA has objected to this request as vague, ambiguous and unduly burdensome. FIA has further objected to this request as irrelevant and unlikely to lead to the discovery of admissible evidence, and to the extent such information is protected by the attorney-client privilege or work product doctrine. As to the first objection, the request is clear and concise and requests any and all documents relating to studies done by FIA or MBNA America Bank, N.A. on bill stuffers placed in the same envelope as the monthly statement.

As to the second objection, the request is relevant and material to the claim of fraud in the pleadings, and Capps has a right to this information. The documents requested would constitute admissible evidence as to knowledge and intent to commit fraud against not only Capps, but other consumers as well. As stated above, the documents are either in the possession of, or under control of FIA, and are essential to arriving at the truth in this action. No request has been made for anything within the attorney-client privilege, or work product, and FIA has made no specific claim that any of the information requested actually falls within the attorney-client privilege or the work product doctrine. Without a specific claim under the attorney-client privilege or work product doctrine, the objection is without merit and should be overruled.

REQUEST FOR PRODUCTION OF DOCUMENT NO. 5: Please produce, or make available for copying, all documents regarding any and all studies used or referenced by FIA or MBNA America Bank, N.A., from whatever source, regarding bill stuffers; including the number, or percentage, of customers reading material included in the same envelope as the monthly statement.

FIA has objected to this request as vague, ambiguous and unduly burdensome. FIA has further objected to this request as irrelevant and unlikely to lead to the discovery of admissible evidence, and to the extent such information is protected by the attorney-client privilege or work

product doctrine. As to the first objection, the request is clear and concise and requests any and all documents relating to studies used or referenced by FIA or MBNA America Bank, N.A. on bill stuffers placed in the same envelope as the monthly statement. As to the second objection, the request is relevant and material to the claim of fraud in the pleadings, as well as to FIA's claim that an agreement to arbitrate exists. The documents requested would constitute admissible evidence as to knowledge and intent to commit fraud against not only Capps, but other consumers as well. As stated above, the documents are either in the possession of, or under control of FIA, and are essential to arriving at the truth in this action. No request has been made for anything within the attorney-client privilege, or work product, and FIA has made no specific claim that any of the information requested actually falls within the attorney-client privilege or the work product doctrine. Without a specific claim under the attorney-client privilege or work product doctrine, the objection is without merit and should be overruled.

Capps therefore moves this court to order FIA to comply with Interrogatory No. 5 and Request for Production of Documents No 3, 4, & 5.

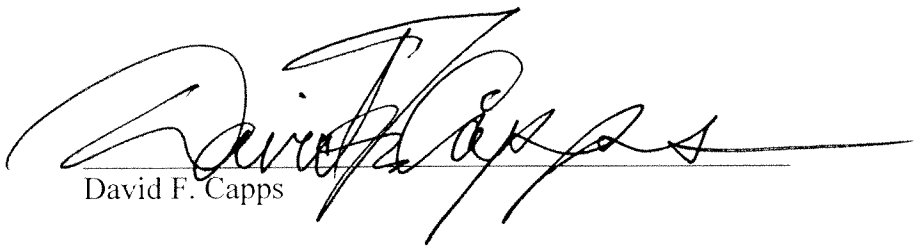
Dated this 4TH day of April, 2008.

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

CERTIFICATE OF MAILING

I, David F. Capps, do hereby certify, under penalty of perjury, that I mailed a true and correct copy of this MOTION TO COMPEL DISCOVERY to the attorney for the Defendant, this 7TH day of April, 2008, by Certified Mail # 7006 2150 0003 4550 2604 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701



David F. Capps

IDAHO COUNTY DISTRICT COURT
FILED
AT 2:00 O'CLOCK P.M.

DOCKETED

APR 29 2008

ROSE 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,
vs.

FIA Card Services
fka MBNA America Bank, N.A.
Defendant.

CASE NO. CV 07-38202

ORDER GRANTING MOTIONS

The plaintiff's motion to compel discovery came on April 24, 2008 for hearing, Mr. Capps and counsel were heard. The Motion to Compel Interrogatory Request No. 5 is GRANTED. The Motion to Compel Request for Production of Document No. 3 is GRANTED. The Motion to Compel Request for Production of Document No. 4 is GRANTED. The Motion to Compel Request for Production of Document No. 5 is GRANTED in the following particulars:

1. All bill stuffing studies in the possession of FIA or MBNA America Bank, N.A.
2. All bill stuffing studies subject to their control
3. Any other studies referenced or used by FIA or MBNA America Bank, N.A. regarding the practice of including extraneous information with the credit card bill, and the name and address of the entity of the person who has possession or control of these studies.

Defendant shall comply within 60 days.

It is so ordered this 29 day of April 2008.

BY: John Bradbury
JOHN BRADBURY
District Judge

Mailing Certificate

I, the undersigned Deputy Clerk, do hereby certify that I mailed or delivered a copy of the foregoing document to the following persons on 4.29.08:

David F. Capps
104 Jefferson Drive
Kamiah, ID 83536

Alec Pechota
Attorney at Law
P.O. Box 1544
Boise, ID 83701

ROSE E. GEHRING, CLERK
BY: Kathy Johnson
Deputy Clerk

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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Defendant, by and through its counsel of record, and moves this Court for an Order granting summary judgment on Counts II and III of its Counterclaim in its favor and against the Plaintiff, for the reason that there is no genuine issue as to any material fact and that the Plaintiff is entitled to Judgment against the Defendant on said Counts in the amount of $12,459.74, and costs and attorneys fees as a matter of law.

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.

This Motion is based upon the Pleadings, Affidavit and Briefs filed in this matter.

DATED this 12 day of May, 2008.

WILSON & McCOLL

By _____
ALEC T. PECHOTA
Attorney for Plaintiff

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this ~~12~~ 14 day of May, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536

_____
Alec T. Pechota

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.

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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I.

STATEMENT OF FACTS

The Plaintiff entered into a 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, which account was assigned account no. xxxx-xxxx-xxxx-1014.[1] As of the date of filing the instant suit, the Plaintiff owed the sum of $12,459.74 on said credit account with the Defendant.

1 Admitted pursuant to Plaintiff's Answer to Counterclaims. See Answer to Counterclaims, ¶ 4.

On or about January 30, 2008, the Defendant filed its Counterclaim against the Plaintiff alleging claims for breach of contract (Count II) and account stated (Count III). The argument below will demonstrate that the Defendant is entitled to summary judgment on both claims. The argument below will also prove that the Defendant is entitled to damages in the amount of $12,459.74.

II.

STANDARD OF REVIEW

Summary judgment shall be rendered "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). The non-moving party "may not merely rest on allegations contained in his pleading, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact." *McCoy v. Lyons*, 120 Idaho 765, 770, 820 P.2d 360, 365 (Idaho 1991), quoting and citing *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (Idaho 1990); also see I.R.C.P. 56(e). Affidavits containing general or conclusory allegations, unsupported by specific facts, are not sufficient to preclude entry of a summary judgment, if the opposing affidavits set forth specific and otherwise uncontroverted facts. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Idaho Ct.App. 1992), citing *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Idaho Ct. App. 1982).

III.

ARGUMENT

A. BREACH OF CONTRACT

"The burden of proving the existence of a contract and the fact of its breach is upon the Plaintiff, and once those facts are established, the Defendant has burden of pleading and proving affirmative defenses, which legally excuse performance." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 746, 9P.3d1204, 1212 (Idaho 2000). A contract is formed when the parties have "a mutual understanding or meeting of the minds regarding essential contract terms." *Figueroa v. Kit-Sand Co.*, 123 Idaho 149, 156 (Idaho Ct. App. 1992). "Credit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement." *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App. 3d 491, 492, 579 N.E.2d 284, 285 (Ohio Ct. App. 1989); *Feder v. Fortunoff, Inc.*, 123 Misc.2d 857, 859, 474 N.Y.S.2d 937, 939 (N.Y. App. Div. 1984) (In the absence of a binding credit agreement, the issuance of the credit card constitutes an offer of credit, and the use of the credit card constitutes the acceptance of the offer of credit.).

Breach of contract has been defined as:

> Failure, without legal excuse to perform any promise which forms the whole or part of a contract. Prevention or hindrance to party by contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement.

Fox v. Mountain West Electric, Inc., 137 Idaho 703, 710, 52 P.3d 848, 855 (Idaho 2002). Whether the facts establish a violation of contract is a question of law. *Shawver v. [illegible] Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (Idaho 2004).

Here, there was a clear and express understanding between the parties that the Defendant would advance the payment of goods and/or services to the Plaintiff on credit and the Plaintiff would repay the Defendant by making monthly payments. In other words, there was an issuance and use of a credit card. See Affidavit of Eric Pyle, ¶ 3; footnote 1 supra. As a result, a contract was formed. However, the Plaintiff breached his repayment obligation under the contract as he did not make the requested payments as set forth in monthly statements indicating the account balance due and owing. See Affidavit of Eric Pyle, ¶¶ 4-7. Therefore, the Defendant is entitled to reimbursement of the outstanding balance on the credit account in the amount of $12,459.74. See Affidavit of Eric Pyle, ¶ 6.

Further, under to Idaho's discovery rules, the Plaintiff has admitted to the existence of a contract and its subsequent default. Pursuant to I.R.C.P. 36(a):

> A party may serve upon any other party a written request for the admission, for the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or the application of law to fact..
>
> The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission written answer or objection...
>
> In addition, I.R.C.P. 36(b) states:
>
> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

Here, the Plaintiff was served with the Defendant's Request for Admission on March 12, 2008. See Affidavit of Alec Pechota, ¶ 3. To date, Defendant has not received a written answer or objection. See Affidavit of Alec Pechota, ¶ 3. As a result, and in accordance with the Defendant's Requests, Plaintiff has admitted that by virtue of opening credit account No. xxxx-xxxx-xxxx-1014,

Plaintiff agreed to pay Defendant all moneys loaned on that account; Plaintiff received by mail the statements of account with respect to credit account number xxxx-xxxx-xxxx-1014; the statements of account disclose that Plaintiff owes Defendant the sum of $12,459 on that credit account; and that Plaintiff has not paid Defendant any part of the $12,459 disclosed by the statements as owing on that credit account; and that Plaintiff has no defense to payment of the amount shown as owing to Defendant on the statements of account. Therefore, Pursuant to I.R.C.P. 36, the Plaintiff has in effect admitted to the existence of a contract and its subsequent breach, and therefore, the Defendant is entitled to reimbursement of the outstanding balance on the credit account in the amount of $12,459.74.

B. ACCOUNT STATED

"An account stated action requires a showing of mutual assent that an amount is a final balance of account agreed to by the parties and a writing evidencing the final balance." *M.T. Deaton and Co. v. Liebrock*, 114 Idaho 614, 616, 759 P.2d 905, 907 (Idaho Ct. App. 1988). "Assent may be implied from failure to object to a billing within a reasonable time." *Id.* "Thus, any written account may become an account stated through acquiescence in its correctness." *Id.* An account stated "is a new contract distinct from any original agreement." *Id.*

In this case, the Defendant mailed a monthly statement to the Plaintiff indicating the account balance due and owing. See Affidavit of Eric Pyle, ¶ 4. As of July 2005, the account balance showed $12,459.74 due and owing. See Affidavit of Eric Pyle, ¶¶ 4, 6. As a result of the Plaintiff's failure to object to the charges, the Plaintiff has assented to such amount due and owing. Further, the Plaintiff has made no payment on the account since December 6, 2004. See Affidavit of Eric Pyle, ¶ 7. Therefore, the Plaintiff is entitled to damages in the sum of $12,459.74 as a new contract was

formed and breached.

For the same reasons stated above, pursuant to I.R.C.P. 36, the Defendant has admitted to the existence of an account stated.

IV.

CONCLUSION

In conclusion, the Defendant is entitled to summary judgment on Counts II and III of its Counterclaim as there is no dispute as to the material facts in this case and the Defendant is entitled to judgment as a matter of law. Accordingly, the Defendant requests that a judgment be entered in its favor against the Plaintiff in the amount of $12,459.74.

DATED this 12 day of May, 2008.

WILSON & McCOLL

By _____
ALEC T. PECHOTA
Attorney for Plaintiff

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this ~~12~~ 14 day of May, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536

_____
Alec T. Pechota

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.

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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 AFFIDAVIT IN SUPPORT OF SUMMARY JUDGMENT

STATE OF Delaware)
ss:
County of New Castle)

Eric Pyle, being first duly sworn upon oath deposes and says:

1. That I am an individual over the age of eighteen years and have personal knowledge of the facts contained herein.

2. That I am an agent of Defendant, and I am familiar with the Plaintiff's account No. 5490997960111014.

3. That the Defendant advanced payment of goods and/or services on behalf of the

Plaintiff on a credit basis pursuant to account No. 5490997960111014.

4. That each month an account statement was sent to the Plaintiff indicating the account balance due and owing. True and correct copies of monthly statements (July 2002 through November 2002, December 2003 through July 2005) are attached hereto collectively Exhibit A.

6. That as of July 2005, the account balance owed to Defendant by the Plaintiff was $12,459.74 which reflects the unpaid statements.

7. That since December 6, 2004, Plaintiff has made no payment on the account.

8. That Defendant was required to retain the services of Wilson & McColl in order to collect the amount now due and owing from the Plaintiff.

Further your affiant sayeth naught.

DATED this 6 day of May, 2008.

Jennifer Pyle

SUBSCRIBED AND SWORN to before me this 6th day of May, 2008.

Desiree Lagrotteria

Notary Public for Bank of America
Residing at 655 Papermill Rd. Newark, DE
Commission expires 12/4/09

(SEAL)

DESIREE LAGROTTERIA
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires December 4, 2009

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.

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this ~~12~~ 14 day of May, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536

Alec T. Pechota

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.

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 8011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
08/13/02	$10,260.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15019
WILMINGTON, DE 19886-5019

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 8011 1014	$10,500	$240.00	31	07/15/02	$15.00	08/13/02

POSTING DATE	TRANS DATE	REFERENCE NUMBER	TRANSACTIONS	CHARGES	CREDITS (CR)
			JULY 2002 STATEMENT		
			PAYMENTS AND CREDITS		
0708		16954648282 MC	PAYMENT. THANK YOU		15.00 CR
			TOTAL FOR BILLING CYCLE FROM 6/15/2002 THROUGH 7/15/2002	$.00	$15.00 CR

IMPORTANT NEWS

EVEN THE BEST CREDIT RATING CAN BE THREATENED. CALL 1-800-301-7354 FOR INFORMATION ABOUT OPTIONAL CREDIT PROTECTION.

VISIT WWW.CBSNETACCESS.COM FOR UP-TO-THE-MINUTE ACCOUNT INFORMATION.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,275.00	$15.00	$0.00	$0.00	$0.00	$0.00	$10,260.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min Payment Due	$15.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.000000% DLY	00.00%	
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . SEE ABOVE

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY

- To speak to one of our Customer Satisfaction representatives, call the number on the back of your credit card.
- For TDD (Telecommunications Device for the Deaf) assistance, call 1-800-345-3178
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  BANKCARD SERVICES P.O. BOX 15026
  WILMINGTON, DE 19850-5026

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EXHIBIT A

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
09/13/02	$10,278.29
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$133.00	

Make check payable to:
BANKCARD SERVICES 13
P. O. BOX 15019
WILMINGTON, DE 19886-5019

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$221.71	30	08/14/02	$133.00	09/13/02

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS — AUGUST 2002 STATEMENT	CHARGES	CREDITS (CR)
					PAYMENTS AND CREDITS		
0806		21857802037	MC		PAYMENT - THANK YOU		100.00 CR
					TOTAL FOR BILLING CYCLE FROM 7/16/2002 THROUGH 8/14/2002	5.00	$100.00 CR

IMPORTANT NEWS

LOOKING FOR PEACE OF MIND WHEN WRITING CHECKS ON YOUR COMERICA BANK CHECKING ACCOUNT? ENROLL IN OVERDRAFT PROTECTION BY VISITING A LOCAL BRANCH.

EVEN THE BEST CREDIT RATING CAN BE THREATENED. CALL 1-800-301-7554 FOR INFORMATION ABOUT OPTIONAL CREDIT PROTECTION.

VISIT WWW.IBSNETACCESS.COM FOR UP-TO-THE-MINUTE ACCOUNT INFORMATION.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,260.00	$100.00	$0.00	$0.00	$118.29	$0.00	$10,278.29

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$133.00
Total Min Payment Due	$133.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.038328% DLY	13.99%	$10,237.17
B. ATM, BANK........	.038328% DLY	13.99%	$0.00
C. PURCHASES........	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES.....	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . 13.99%
(Includes Periodic Rate and Transaction Fee Finance Charges)

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  WILMINGTON, DE 19850-5026

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
10/14/02	$10,265.65
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$137.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15019
WILMINGTON, DE 19886-5019

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$234.35	31	09/14/02	$137.00	10/14/02

POSTING DATE	TRANS DATE	REFERENCE NUMBER	TRANSACTIONS	CHARGES	CREDITS (CR)
			SEPTEMBER 2002 STATEMENT		
			PAYMENTS AND CREDITS		
0908		24568965227	PAYMENT - THANK YOU		135.00 CR
			TOTAL FOR BILLING CYCLE FROM 8/15/2002 THROUGH 9/14/2002	0.00	$135.00 CR

IMPORTANT NEWS

AN IMPORTANT AMENDMENT TO YOUR ACCOUNT TERMS IS ENCLOSED.

EVEN THE BEST CREDIT RATING CAN BE THREATENED. CALL 1-800-301-7554 FOR INFORMATION ABOUT OPTIONAL CREDIT PROTECTION.

VISIT WWW.IBSNETACCESS.COM FOR UP-TO-THE-MINUTE ACCOUNT INFORMATION.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,278.22	$135.00	$0.00	$0.00	$122.35	$0.00	$10,265.65

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$137.00
Total Min Payment Due	$137.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.038328% DLY	13.99%	$10,265.65
B. ATM, BANK	.038328% DLY	13.99%	$0.00
C. PURCHASES	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . 13.99%
(Includes Periodic Rate and Transaction Fee Finance Charges)

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Comerica Bank

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
11/13/02	$105.98
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

CARDHOLDER SINCE 1966

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15019
WILMINGTON, DE 19886-5019

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH

ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$10,394.04	31	10/15/02	$15.00	11/13/02

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	TRANSACTIONS OCTOBER 2002 STATEMENT	CHARGES	CREDITS (CR)
				PAYMENTS AND CREDITS		
1010		28352714383	MC	PAYMENT - THANK YOU		1,265.65 CR
1012		8253006050474448	MC	PMT FROM BILL-PAYER SERVICE		9,000.00 CR
				TOTAL FOR BILLING CYCLE FROM 9/15/2002 THROUGH 10/15/2002	$.00	$10,265.65 CR

IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,265.65	$10,265.65	$0.00	$0.00	$105.96	$0.00	$105.98

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min. Payment Due	$15.00

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.038328% DLY	13.99%	$8,317.72
B. ATM, BANK........	.038328% DLY	13.99%	$0.00
C. PURCHASES........	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES......	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... 13.99%
(Includes Periodic Rate and Transaction Fee Finance Charges)

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
12/12/02	$.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15019
WILMINGTON, DE 19886-5019

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$10,500.00	30	11/14/02	$.00	12/12/02

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					NOVEMBER 2002 STATEMENT		
					PAYMENTS AND CREDITS		
1108		81256492786	MC		PAYMENT - THANK YOU		105.46 CR
					TOTAL FOR BILLING CYCLE FROM 10/16/2002 THROUGH 11/14/2002	$.00	$105.98 CR

IMPORTANT NEWS THE CREDIT YOU EARNED...THE PROTECTION YOU DESERVE...CALL 1-866-390-7533 TO ENROLL IN THE OPTIONAL CREDIT PROTECTION PLAN TODAY.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$105.98	$105.98	$0.00	$0.00	$0.00	$0.00	$0.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$0.00
Late Fee Payment Due	$0.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.038328% DLY	13.99%	$0.00
B. ATM, BANK	.038328% DLY	13.99%	$0.00
C. PURCHASES	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... SEE ABOVE

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY

- To speak to one of our Customer Satisfaction representatives, call the number on the back of your credit card.
- For TDD (Telecommunications Device for the Deaf) assistance, call 1-800-848-3178
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  BANKCARD SERVICES P.O. BOX 15026
  WILMINGTON, DE 19850-5026

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PAGE 1 OF 1

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
01/14/04	$10,075.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$90.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15019
WILMINGTON, DE 19886-5019

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$425.00	30	12/13/03	$90.00	01/14/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					DECEMBER 2003 STATEMENT		
					CASH ADVANCE TRANSACTIONS		
1125	1125	55294313453644479597641	MC	A	DIRECT DEPOSIT BALANCE TRANSFER	10,000.00	
1125	1125	55294313453644479597641	MC	A	BALANCE TRANSFER TRANSACTION FEE	75.00	
					TOTAL FOR BILLING CYCLE FROM 11/14/2003 THROUGH 12/13/2003	$10,075.00	5.00

IMPORTANT NEWS

CREDIT PROTECTION: WHAT TOOK YEARS TO PERFECT TAKES JUST MINUTES TO PROTECT. ENROLL TODAY - CALL 1-800-442-2830.

FREE UP SOME OF YOUR CREDIT LINE. MAKE A PAYMENT TODAY WITH THE PAY-BY-PHONE SERVICE. CALL 1-866-297-9258. PAYMENTS POST THE SAME OR NEXT BUSINESS DAY.

KEEP TRACK OF YOUR HOLIDAY SHOPPING. VISIT US AT WWW.IBSNETACCESS.COM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$0.00	$0.00	$10,000.00	$0.00	$0.00	$75.00	$10,075.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$90.00
Total Min Payment Due	$90.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK........	.000000% DLY	00.00%	
C. PURCHASES........	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES.....	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... 9.00%
(Includes Periodic Rate and Transaction Fee Finance Charges)

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PAGE 1 OF 1

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
02/12/04	$9,985.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15019
WILMINGTON, DE 19886-5019

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$515.00	33	01/15/04	$15.00	02/12/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					JANUARY 2004 STATEMENT		
					PAYMENTS AND CREDITS		
0102		00267183255	MC		PAYMENT - THANK YOU		90.00 CR
					TOTAL FOR BILLING CYCLE FROM 12/14/2003 THROUGH 1/15/2004	$.00	$90.00 CR

IMPORTANT NEWS

CREDIT PROTECTION: WHAT TOOK YEARS TO PERFECT TAKES JUST MINUTES TO PROTECT. ENROLL TODAY - CALL 1-800-442-2630.

FREE UP SOME OF YOUR CREDIT LINE. MAKE A PAYMENT TODAY WITH THE PAY-BY-PHONE SERVICE. CALL 1-866-297-8258. PAYMENTS POST THE SAME OR NEXT BUSINESS DAY.

MAKE YOUR LIFE EASIER. USE YOUR IBS CREDIT CARD TO PAY YOUR MONTHLY SERVICE PROVIDERS. VISIT WWW.IBSDIRECTPAY.COM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,075.00	$90.00	$0.00	$0.00	$0.00	$0.00	$9,985.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Minimum Payment Due	$15.00

FINANCE CHARGE SCHEDULE: Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD: ANNUAL PERCENTAGE RATE . . . SEE ABOVE

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PAGE 1 OF 1

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
03/14/04	$9,885.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15019
WILMINGTON, DE 19886-5019

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$605.00	28	02/13/04	$15.00	03/14/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					FEBRUARY 2004 STATEMENT		
					PAYMENTS AND CREDITS		
02D2		03335925948	MC		PAYMENT - THANK YOU		90.00 CR
					TOTAL FOR BILLING CYCLE FROM 1/16/2004 THROUGH 2/13/2004	6.00	690.00 CR

IMPORTANT NEWS

AN IMPORTANT AMENDMENT TO YOUR ACCOUNT TERMS IS ENCLOSED.

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SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,985.00	$90.00	$0.00	$0.00	$0.00	$0.00	$9,895.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min Payment Due	$15.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.035325% DLY	12.90%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... SEE ABOVE

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY

- To speak to one of our Customer Satisfaction representatives, call the number on the back of your credit card.
- For TDD (Telecommunications Device for the Deaf) assistance, call 1-800-346-9178
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  WILMINGTON, DE 19850-5026

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
04/14/04	$9,880.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:

BANKCARD SERVICES 13
P.O. BOX 15288
WILMINGTON, DE 19886-5288

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$620.00	31	03/15/04	$15.00	04/14/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	TRANSACTIONS	CHARGES	CREDITS (CR)
				MARCH 2004 STATEMENT		
				PAYMENTS AND CREDITS		
0228		05957597108	MC	PAYMENT - THANK YOU		15.00 CR
				TOTAL FOR BILLING CYCLE FROM 2/14/2004 THROUGH 3/15/2004	$.00	$15.00 CR

IMPORTANT NEWS

AN IMPORTANT AMENDMENT TO YOUR ACCOUNT TERMS IS ENCLOSED.

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CREDIT PROTECTION: WHAT TOOK YEARS TO PERFECT TAKES JUST MINUTES TO PROTECT.
ENROLL TODAY - CALL 1-800-443-2630.

FREE UP SOME OF YOUR CREDIT LINE. MAKE A PAYMENT TODAY WITH THE PAY-BY-PHONE SERVICE. CALL 1-866-297-9256. PAYMENTS POST THE SAME OR NEXT BUSINESS DAY.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,895.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,880.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min. Payment Due	$15.00

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK........	.000000% DLY	00.00%	
C. PURCHASES........	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES......	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... SEE ABOVE

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY
- For our automated Direct Connect service, call 1-800-223-7046
- To speak to one of our Customer Satisfaction representatives, call 1-800-441-7787
- For TDD (Telecommunications Device for the Deaf) assistance, call 1-800-345-3178
- Billing rights are preserved only by written inquiry. Mail billing inquiries and all other account inquiries to: BANKCARD SERVICES P.O. BOX 15026 WILMINGTON, DE 19850-5026

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
05/13/04	$9,865.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15288
WILMINGTON, DE 19886-5288

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$635.00	31	04/15/04	$15.00	05/13/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CASH ADV	CR	TRANSACTIONS	CHARGES	CREDITS (CR)
					APRIL 2004 STATEMENT		
					PAYMENTS AND CREDITS		
0403		09484780958	MC		PAYMENT - THANK YOU		15.00 CR
					TOTAL FOR BILLING CYCLE FROM 3/16/2004 THROUGH 4/15/2004	0.00	15.00 CR

IMPORTANT NEWS

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FOR UP-TO-THE-MINUTE ACCOUNT ACTIVITY, VISIT WWW.IBSNETACCESS.COM.

ACCESSING ADDITIONAL CASH IS EASY! PRESENT YOUR CREDIT CARD AT THE BANK COUNTER, OR CALL 1-800-771-3575 TO REQUEST A PIN CODE FOR USE AT AN ATM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,880.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,865.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min Payment Due	$15.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . SEE ABOVE

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
06/12/04	$9,850.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15288
WILMINGTON, DE 19886-5288

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$650.00	29	05/14/04	$15.00	06/12/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	MER CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
				MAY 2004 STATEMENT		
				PAYMENTS AND CREDITS		
0430		12153394218	MC	PAYMENT. THANK YOU		15.00
				TOTAL FOR BILLING CYCLE FROM 4/15/2004 THROUGH 5/14/2004	$.00	$15.00

IMPORTANT NEWS

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FREE UP SOME OF YOUR CREDIT LINE. MAKE A PAYMENT TODAY WITH THE PAY-BY-PHONE SERVICE. CALL 1-866-297-9258. PAYMENTS POST THE SAME OR NEXT BUSINESS DAY.

ACCESSING ADDITIONAL CASH IS EASY! PRESENT YOUR CREDIT CARD AT THE BANK COUNTER, OR CALL 1-800-771-3575 TO REQUEST A PIN CODE FOR USE AT AN ATM.

FOR UP-TO-THE-MINUTE ACCOUNT ACTIVITY, VISIT WWW.IBSNETACCESS.COM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fees Finance Charges	New Balance Total
$9,865.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,850.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.0
Current Payment	$15.0
Total Min Payment Due	$15.0

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.03832B% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... SEE ABOVE

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
07/12/04	$9,835.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15288
WILMINGTON, DE 19886-5288

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DU
5490 9979 6011 1014	$10,500	$665.00	32	06/15/04	$15.00	07/1:

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAR	TRANSACTIONS	CHARGES	CRED
					JUNE 2004 STATEMENT		
					PAYMENTS AND CREDITS		
0529		15052060405	MC		PAYMENT - THANK YOU		
					TOTAL FOR BILLING CYCLE FROM 5/15/2004 THROUGH 6/15/2004	$.00	5

IMPORTANT NEWS

AN IMPORTANT AMENDMENT TO YOUR ACCOUNT TERMS IS ENCLOSED.

ENJOY THE CONVENIENCE AND FLEXIBILITY THE ENCLOSED CHECKS OFFER.

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ACCESSING ADDITIONAL CASH IS EASY! PRESENT YOUR CREDIT CARD AT THE BANK COUNTER, OR CALL 1-800-771-3573 TO REQUEST A PIN CODE FOR USE AT AN ATM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,850.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,835.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount
Current Payment
Total Min Payment Due

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK.....	.000000% DLY	00.00%	
C. PURCHASES.....	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES.....	.000000% DLY	00.00%	$0.00

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
08/13/04	$9,820.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15288
WILMINGTON, DE 19886-5288

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$680.00	30	07/15/04	$15.00	08/13/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	TRANSACTIONS	CHARGES	CREDITS (CR)
				JULY 2004 STATEMENT		
				PAYMENTS AND CREDITS		
0626		17855099894	MC	PAYMENT - THANK YOU		15.00
				TOTAL FOR BILLING CYCLE FROM 6/16/2004 THROUGH 7/15/2004	$.00	$15.00

IMPORTANT NEWS

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FOR UP-TO-THE-MINUTE ACCOUNT ACTIVITY, VISIT WWW.IBSNETACCESS.COM.

ACCESSING ADDITIONAL CASH IS EASY! PRESENT YOUR CREDIT CARD AT THE BANK COUNTER, OR CALL 1-866-222-8358 TO REQUEST A PIN CODE FOR USE AT AN ATM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,835.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,820.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min Payment Due	$15.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER CHECKS	.000000% DLY	00.00%	
B. ATM, BANK.....	.000000% DLY	00.00%	
C. PURCHASES.....	.036328% DLY	13.99%	$0.00
D. OTHER BALANCES.....	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... SEE ABOVE

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- For TDD (Telecommunications Device for the Deaf) assistance, call 1-800-346-3178
- Billing rights are preserved only by written inquiry. Mail billing inquiries and all other account inquiries to: BANKCARD SERVICES P.O. BOX 15026 WILMINGTON, DE 19850-5026

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 8011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
09/12/04	$9,805.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15288
WILMINGTON, DE 19886-5288

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 8011 1014	$10,500	$695.00	32	08/16/04	$15.00	09/12/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					AUGUST 2004 STATEMENT		
					PAYMENTS AND CREDITS		
0731		21361665225	MC		PAYMENT - THANK YOU		15.00 CR
					TOTAL FOR BILLING CYCLE FROM 7/16/2004 THROUGH 8/16/2004	5.00	$15.00 CR

IMPORTANT NEWS

ENJOY THE ENCLOSED CHECKS. TRAVELING? CALL 1-866-357-0227 FROM YOUR HOME PHONE NUMBER TODAY TO ORDER A PIN TO USE AT MILLIONS OF ATMS WORLDWIDE!

FOR UP-TO-THE-MINUTE ACCOUNT ACTIVITY, VISIT WWW.IBSNETACCESS.COM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,820.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,805.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min Payment Due	$15.00

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.036328% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . SEE ABOVE

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 8011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
10/12/04	$9,790.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15288
WILMINGTON, DE 19886-5288

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 8011 1014	$10,500	$710.00	30	09/15/04	$15.00	10/12/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					SEPTEMBER 2004 STATEMENT		
					PAYMENTS AND CREDITS		
0830	0828	083000455780484	MC		PAYMENT - THANK YOU		15.00 CR
					TOTAL FOR BILLING CYCLE FROM 8/17/2004 THROUGH 9/15/2004	0.00	15.00 CR

IMPORTANT NEWS

AN IMPORTANT AMENDMENT TO YOUR ACCOUNT TERMS IS ENCLOSED.

ENJOY THE ENCLOSED CHECKS. TRAVELING? A PIN IS YOUR PASSPORT TO CASH AT ATMS WORLDWIDE. CALL 1-866-257-0227 FROM YOUR HOME PHONE TO SELECT YOUR PIN TODAY!

FOR UP-TO-THE-MINUTE ACCOUNT ACTIVITY, VISIT WWW.IBSNETACCESS.COM.

LOOKING TO SAVE ON YOUR AUTO LOAN? WHETHER IT'S A NEW LOAN OR REFINANCING YOUR EXISTING ONE, VISIT WWW.MBNA.COM/AUTOLOANS TO SEE HOW YOU COULD SAVE!

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,805.00	$15.00	$0.00	$0.00	$0.00	$0.00	$9,790.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$15.00
Total Min. Payment Due	$15.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY	00.00%	
B. ATM, BANK	.000000% DLY	00.00%	
C. PURCHASES	.038328% DLY	13.99%	$0.00
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... SEE ABOVE

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
11/10/04	$10,496.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$38.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15288
WILMINGTON, DE 19886-5288

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$4.00	30	10/15/04	$38.00	11/10/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CASH TYPE	CODE	TRANSACTIONS	CHARGES	CREDITS (CR)
					OCTOBER 2004 STATEMENT		
					PAYMENTS AND CREDITS		
0928	0927	09280455142887	MC		PAYMENT - THANK YOU		15.00 CR
					CASH ADVANCE TRANSACTIONS		
1012	1006	6549099426500D141091479	MC	A	CHECK CHECK # 760769	700.00	
1012	1006	6549099426500D141091479	MC	A	CHECK TRANSACTION FEE	21.00	
					TOTAL FOR BILLING CYCLE FROM 9/16/2004 THROUGH 10/15/2004	$721.00	$15.00 CR

IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$9,790.00	$15.00	$700.00	$0.00	$0.00	$21.00	$10,496.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$38.00
Total Min Payment Due	$38.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY*	00.00%*	*
B. ATM, BANK	.000000% DLY*	00.00%*	*
C. PURCHASES	.040383% DLY*	14.74%	$0.00
D. OTHER BALANCES	.000000% DLY*	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . 36.00%
(Includes Periodic Rate And Transaction Fee Finance Charges)

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
12/11/04	$10,460.00
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$15.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15288
WILMINGTON, DE 19886-5288

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DAT
5490 9979 6011 1014	$10,500	$40.00	29	11/13/04	$15.00	12/11/04

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	TRANSACTIONS	CHARGES	CREDITS (C
				NOVEMBER 2004 STATEMENT		
				PAYMENTS AND CREDITS		
1102	1101	11020461051988	MC	PAYMENT - THANK YOU		36.0
				TOTAL FOR BILLING CYCLE FROM 10/16/2004 THROUGH 11/13/2004	5.00	$36.0

IMPORTANT NEWS

DON'T LET AN UNEXPECTED EVENT RUIN YOUR CREDIT. PROTECT YOURSELF NOW.
CALL 1-800-442-2830 TODAY, OR VISIT WWW.MBNAPROTECT.COM.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,496.00	$36.00	$0.00	$0.00	$0.00	$0.00	$10,460.00

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.
Current Payment	$15
Total Min Payment Due	$15

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.000000% DLY*	00.00%	
B. ATM, BANK	.000000% DLY*	00.00%	
C. PURCHASES	.040383% DLY*	14.74%	$0.00
D. OTHER BALANCES	.000000% DLY*	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . SEE ABOVE

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*PERIODIC RATE MAY VARY

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
01/11/05	$10,617.94
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$187.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15288
WILMINGTON, DE 19886-5288

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500	$.00	31	12/14/04	$187.00	01/11/05

POSTING DATE	TRANS DATE	REFERENCE NUMBER	TRANSACTION TYPE	TRANSACTIONS DECEMBER 2004 STATEMENT	CHARGES	CREDITS (CR)
				PAYMENTS AND CREDITS		
1205		34152408386	MC	PAYMENT - THANK YOU		15.00 CR
				PURCHASES AND ADJUSTMENTS		
1214	1214	D/20	MC C	OVERLIMIT FEE (BASED ON BALANCE 10,578.94)	39.00	
				TOTAL FOR BILLING CYCLE FROM 11/14/2004 THROUGH 12/14/2004	539.00	315.00 CR

YOUR ACCOUNT IS OVERLIMIT.
TO AVOID AN OVERLIMIT FEE
ON YOUR NEXT STATEMENT, WE
MUST RECEIVE A CONFORMING
PAYMENT, THAT BRINGS AND
KEEPS YOUR ACCOUNT BALANCE
BELOW THE CREDIT LINE,
WITHIN 20 DAYS OF THE ABOVE
STATEMENT CLOSING DATE,
AND NOT GO OVERLIMIT AGAIN.

IMPORTANT NEWS

DON'T LET AN UNEXPECTED EVENT RUIN YOUR CREDIT. PROTECT YOURSELF NOW.
CALL 1-800-442-2630 TODAY, OR VISIT WWW.MBNAPROTECT.COM.

PAY YOUR CREDIT CARD BILL ONLINE. VISIT WWW.IBSNETACCESS.COM TODAY!

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,460.00	$15.00	$0.00	$39.00	$133.94	$0.00	$10,617.94

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$0.00
Current Payment	$187.00
Total Min Payment Due	$187.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.041088% DLY*	14.99%	$10,520.33
B. ATM, BANK	.057506% DLY*	20.99%	$0.00
C. PURCHASES	.041088% DLY*	14.99%	$0.00
D. OTHER BALANCES	.000000% DLY*	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . 14.99%
(Includes Periodic Rate And Transaction Fee Finance Charges)

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
02/09/05	$10,834.48
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$418.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15137
WILMINGTON, DE 19886-5137

13

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500		31	01/14/05	$418.00	02/09/05

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD (YYY)	CAY	TRANSACTIONS	CHARGES	CREDITS (CR)
					JANUARY 2005 STATEMENT		
					PURCHASES AND ADJUSTMENTS		
0112	0112	0010617	MC	C	LATE FEE FOR PAYMENT DUE 01/11	39.00	
0114	0103	D/20	MC	C	OVERLIMIT FEE (BASED ON BALANCE 10,617.84)	39.00	
					TOTAL FOR BILLING CYCLE FROM 12/15/2004 THROUGH 1/14/2005	878.00	0.00

YOUR ACCOUNT IS OVERLIMIT.
TO AVOID AN OVERLIMIT FEE ON YOUR NEXT STATEMENT, WE MUST RECEIVE A CONFORMING PAYMENT, THAT BRINGS AND KEEPS YOUR ACCOUNT BALANCE BELOW THE CREDIT LINE, WITHIN 20 DAYS OF THE ABOVE STATEMENT CLOSING DATE, AND NOT GO OVERLIMIT AGAIN.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

IMPORTANT NEWS

GREAT NEWS! THE MASTERCARD BENEFITS DESCRIBED IN YOUR GUIDE TO COVERAGE WILL CONTINUE THROUGH AUGUST 31, 2005, WITH THE SAME TERMS AND CONDITIONS.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,617.94	$0.00	$0.00	$78.00	$138.54	$0.00	$10,834.48

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$187.00
Current Payment	$231.00
Total Minimum Payment Due	$418.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.041753% DLY*	15.24%	$10,645.46
B. ATM, BANK	.058181% DLY*	21.24%	$0.00
C. PURCHASES	.041753% DLY*	15.24%	$58.15
D. OTHER BALANCES	.000000% DLY*	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE... 15.24%
(Includes Periodic Rate And Transaction Fee Finance Charges)

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9879 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
03/12/06	$11,086.16
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$667.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15137
WILMINGTON, DE 19886-5137

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9879 6011 1014	$10,600		29	02/12/05	$667.00	03/12/06

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					FEBRUARY 2005 STATEMENT		
					PURCHASES AND ADJUSTMENTS		
0210	0210	0010934	MC	C	LATE FEE FOR PAYMENT DUE 02/09	34.00	
0212	0203	0/80	MC	C	OVERLIMIT FEE (BASED ON BALANCE 10,834.48)	39.00	
					TOTAL FOR BILLING CYCLE FROM 1/15/2005 THROUGH 2/12/2005	$78.00	$.00

YOUR ACCOUNT IS OVERLIMIT.
TO AVOID AN OVERLIMIT FEE
ON YOUR NEXT STATEMENT, WE
MUST RECEIVE A CONFORMING
PAYMENT, THAT BRINGS AND
KEEPS YOUR ACCOUNT BALANCE
BELOW THE CREDIT LINE,
WITHIN 20 DAYS OF THE ABOVE
STATEMENT CLOSING DATE,
AND NOT GO OVERLIMIT AGAIN.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

IMPORTANT NEWS

ANNUAL PERCENTAGE RATES ON YOUR ACCOUNT HAVE INCREASED IN ACCORDANCE WITH THE DEFAULT PRICING SECTION OF YOUR ACCOUNT AGREEMENT. IF YOU DO NOT WISH TO ACCEPT THIS CHANGE, YOU MAY CALL MBNA BY THE PAYMENT DUE DATE. YOUR ACCOUNT REMAINS SUBJECT TO DEFAULT PRICING.

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$10,834.48	$0.00	$0.00	$78.00	$173.68	$0.00	$11,086.16

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$418.00
Current Payment	$249.00
Total Min Payment Due	$667.00

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.054787% DLY	19.99%	$10,799.31
B. ATM, BANK	.058191% DLY	21.24%	$0.00
C. PURCHASES	.054787% DLY	19.99%	$286.17
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

FOR THIS BILLING PERIOD
ANNUAL PERCENTAGE RATE . . . 19.99%
(Includes Periodic Rate And Transaction Fee Finance Charges)

FOR YOUR SATISFACTION, EVERY HOUR, EVERY DAY

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
04/12/05	$11,354.25
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$922.00	

Make check payable to:
BANKCARD SERVICES
P.O. BOX 15137
WILMINGTON, DE 19886-5137

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500		31	03/15/05	$922.00	04/12/05

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	CAT	TRANSACTIONS	CHARGES	CREDITS (CR)
					MARCH 2005 STATEMENT		
					PURCHASES AND ADJUSTMENTS		
0314	0313	0011086	MC	C	LATE FEE FOR PAYMENT DUE 03/12	39.00	
0315	0304	D/20	MC	C	OVERLIMIT FEE (BASED ON BALANCE :1,086.16)	39.00	
					TOTAL FOR BILLING CYCLE FROM 2/13/2005 THROUGH 3/15/2005	$78.00	$.00

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TO AVOID AN OVERLIMIT FEE
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MUST RECEIVE A CONFORMING
PAYMENT. THAT BRINGS AND
KEEPS YOUR ACCOUNT BALANCE
BELOW THE CREDIT LINE,
WITHIN 20 DAYS OF THE ABOVE
STATEMENT CLOSING DATE,
AND NOT GO OVERLIMIT AGAIN.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases &Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$11,086.16	$0.00	$0.00	$78.00	$190.09	$0.00	$11,354.25

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$667.00
Current Payment	$255.00
Total Min Payment Due	$922.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.054787% DLY	19.99%	$10,978.17
B. ATM, BANK	.058191% DLY	21.24%	$0.00
C. PURCHASES	.054787% DLY	19.99%	$218.46
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 8011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
05/13/05	$11,626.93
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$1,183.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15137
WILMINGTON, DE 19886-5137

3L

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

S 0011074630104450000000000000000000001162693001183000054909979601110 4
S 0000279620000000000000000000000000001162693001183000054909979601110 4

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 8011 1014	$10,500		31	04/15/05	$1,183.00	05/13/05

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	C/T	TRANSACTIONS	CHARGES	CREDITS (CR)
					APRIL 2005 STATEMENT		
					PURCHASES AND ADJUSTMENTS		
0413	0413	0011354	MC	C	LATE FEE FOR PAYMENT DUE 04/12	39.00	
0415	0404	0/20	MC	C	OVERLIMIT FEE (BASED ON BALANCE 11,354.25)	39.00	
					TOTAL FOR BILLING CYCLE FROM 3/16/2005 THROUGH 4/16/2005	$78.00	$.00

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WITHIN 20 DAYS OF THE ABOVE
STATEMENT CLOSING DATE,
AND NOT GO OVERLIMIT AGAIN

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$11,354.25	$0.00	$0.00	$78.00	$194.68	$0.00	$11,626.93

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$922.0
Current Payment	$261.0
Total Min Payment Due	$1,183.0

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.054767% DLY	19.99%	$11,166.09
B. ATM, BANK	.058191% DLY	21.24%	$0.00
C. PURCHASES	.054767% DLY	19.99%	$200.85
D. OTHER BALANCES	000000% DLY	00.00%	$0.00

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
06/12/05	$11,904.28
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$1,450.00	

Make check payable to:
BANKCARD SERVICES 13
P.O. BOX 15137
WILMINGTON, DE 19886-5137

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DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

S 0911264200101445000000000000000000000119042800145000000549099736011101 4
S 0000362700000000000000000000000000000119042800145000000549099736011101 4

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,600		31	05/16/05	$1,450.00	06/12/05

POSTING DATE	TRANS DATE	REFERENCE NUMBER	CARD TYPE	TRANSACTIONS	CHARGES	CREDITS (CR)
				MAY 2005 STATEMENT		
				PURCHASES AND ADJUSTMENTS		
0514	0514	0011626	MC C	LATE FEE FOR PAYMENT DUE 05/3	39.00	
0516	0505	0/20	MC C	OVERLIMIT FEE (BASED ON BALANCE 11,626.93)	39.00	
				TOTAL FOR BILLING CYCLE FROM 4/16/2005 THROUGH 5/16/2005	$78.00	$.00

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STATEMENT CLOSING DATE,
AND NOT GO OVERLIMIT AGAIN.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$11,626.93	$0.00	$0.00	$78.00	$199.35	$0.00	$11,904.28

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$1,183.00
Current Payment	$267.00
Total Min Payment Due	$1,450.00

FINANCE CHARGE SCHEDULE Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.054757% DLY	19.99%	$11,357.23
B. ATM, BANK	.058191% DLY	21.24%	$0.00
C. PURCHASES	.054757% DLY	19.99%	$296.64
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

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13807781

Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
07/12/05	$12,179.73
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$1,724.00	

Make check payable to:
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P.O. BOX 15137
WILMINGTON, DE 19886-5137

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

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ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,600		30	06/15/05	$1,724.00	07/12/05

POSTING DATE	TRANS DATE	REFERENCE NUMBER	Cash Type	Cr	TRANSACTIONS	CHARGES	CREDITS (CR)
					JUNE 2005 STATEMENT		
					PURCHASES AND ADJUSTMENTS		
0613	0613	0011804	MC	C	LATE FEE FOR PAYMENT DUE 06/12	39.00	
0615	0605	D/20	MC	C	OVERLIMIT FEE (BASED ON BALANCE 11,904.28)	39.00	
					TOTAL FOR BILLING CYCLE FROM 5/17/2005 THROUGH 6/15/2005	$78.00	$.00

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TO AVOID AN OVERLIMIT FEE ON YOUR NEXT STATEMENT, WE MUST RECEIVE A CONFORMING PAYMENT, THAT BRINGS AND KEEPS YOUR ACCOUNT BALANCE BELOW THE CREDIT LINE, WITHIN 20 DAYS OF THE ABOVE STATEMENT CLOSING DATE, AND NOT GO OVERLIMIT AGAIN.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$11,904.28	$0.00	$0.00	$78.00	$197.45	$0.00	$12,179.73

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$1,450.00
Current Payment	$274.00
Total Min Payment Due	$1,724.00

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.054787% DLY	19.99%	$11,548.47
B. ATM, BANK	.058181% DLY	21.24%	$0.00
C. PURCHASES	.054787% DLY	19.99%	$469.07
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

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Comerica Bank

CARDHOLDER SINCE 1986

ACCOUNT NUMBER	
5490 9979 6011 1014	
PAYMENT DUE DATE	NEW BALANCE TOTAL
08/12/05	$12,459.74
TOTAL MINIMUM PAYMENT DUE	AMOUNT ENCLOSED
$2,004.00	

Make check payable to:
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WILMINGTON, DE 19886-5137

3L

DAVID F CAPPS
HC 11 BOX 366
KAMIAH ID 83536-941066

S 0011646760010448000000000000000000245974002004000005490997960111014
S 0000532970000000000000000000000000245974002004000005490997960111014

ACCOUNT NUMBER	CREDIT LINE	CASH OR CREDIT AVAILABLE	DAYS IN CYCLE	CLOSING DATE	TOTAL MINIMUM PAYMENT DUE	PAYMENT DUE DATE
5490 9979 6011 1014	$10,500		30	07/15/05	$2,004.00	08/12/05

JULY 2005 STATEMENT

POSTING DATE	TRANS DATE	REFERENCE NUMBER	TRANS TYPE	CNTRY	TRANSACTIONS	CHARGES	CREDITS (CR)
					PURCHASES AND ADJUSTMENTS		
0713	0713	0012179	MC	C	LATE FEE FOR PAYMENT DUE 07/12	39.00	
0715	0705	D/20	MC	C	OVERLIMIT FEE (BASED ON BALANCE 12,179.73)	39.00	
					TOTAL FOR BILLING CYCLE FROM 6/16/2005 THROUGH 7/15/2005	578.00	0.00

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IMPORTANT NEWS

SUMMARY OF TRANSACTIONS

Previous Balance	- Payments and Credits	+ Cash Advances	+ Purchases & Adjustments	+ Periodic Rate Finance Charges	+ Transaction Fee Finance Charges	= New Balance Total
$12,179.73	$0.00	$0.00	$78.00	$202.01	$0.00	$12,459.74

TOTAL MINIMUM PAYMENT DUE

Past Due Amount	$1,724.00
Current Payment	$280.00
Total Min Payment Due	$2,004.00

FINANCE CHARGE SCHEDULE

Category	Periodic Rate	Corresponding Annual Percentage Rate	Balance Subject to Finance Charges
A. BALANCE TRANSFER, CHECKS	.054787% DLY	19.99%	$12,739.72
B. ATM, BANK	.058191% DLY	21.24%	$0.00
C. PURCHASES	.054767% DLY	19.99%	$555.46
D. OTHER BALANCES	.000000% DLY	00.00%	$0.00

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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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 REPLY MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

COMES NOW the Defendant FIA CARD SERVICES, N.A., by and through its counsel of record, and hereby submits its Reply Memorandum in Support of Summary Judgment.

I. ARGUMENT

A. Pursuant to I.R.C.P. 56(e), the exhibits attached to Plaintiff's Affidavit cannot be considered by the Court .

I.R.C.P. 56(e) states that "opposing affidavits shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence." I.R.C.P. 56(e). "The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 271, 899 P.2d 977,

981 (Idaho 1995). "Only material contained in affidavits or depositions that is based upon personal knowledge or that is admissible at trial will be considered by this Court." *Id.*

There can be no question that Exhibits 1 and 2 of Plaintiff's Affidavit in Support of Opposition to Motion for Summary Judgment are not based in the personal knowledge of Plaintiff. In fact, nowhere in Plaintiff's Affidavit does he state that such information is based on personal knowledge. Further, nothing in the Affidavit establishes that Plaintiff has any personal knowledge regarding the preparation, maintenance and/or subject matter of the purposed Exhibits. Performing a Google search does not suffice. Therefore, Exhibits 1 and 2 of Plaintiff's Affidavit cannot be considered by the Court. Similarly, the Affidavit of Walker F. Todd, attached to Plaintiff's Affidavit, cannot be considered by the Court as such is not based on Plaintiff's personal knowledge and is inadmissible hearsay. Notably, Mr. Todd's Affidavit is not signed or notarized.

As the above mentioned Exhibits/Affidavit cannot be considered by the Court, there is literally no admissible "facts" left for consideration. Accordingly, summary judgment must be entered in favor of Defendant.

B. Regardless of their admissibility, Plaintiff's Affidavit fails to raise a genuine issue of material fact to preclude summary judgment.

Plaintiff's Affidavit clearly does not raise issues of fact as to the following: that Plaintiff entered into a 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, which account was assigned account no. xxxx-xxxx-xxxx-1014[1]; and that as of July 2005, the account balance showed $12,459.74 due and owing. See Affidavit of Eric Pyle, ¶¶ 4, 6.

Rather, Plaintiff's opposing Affidavit and Memorandum centers around the allegation that Defendant assigned the account, including the right to payment, to the BA Master Credit Card Trust II. As argued above, the Exhibits to Plaintiff's Affidavit cannot be considered by the Court as such are not based on Plaintiff's personal knowledge. For this reason alone, Plaintiff's argument fails and summary judgment must be entered in favor of Defendant. Nevertheless, Plaintiff's Affidavit fails to raise a genuine issue of material fact to preclude summary judgment.

Citing the Second Amended and Restated Pooling and Servicing Agreement, attached as Exhibit 2 to Plaintiff's Affidavit, Section 2.01, Plaintiff argues that "MBNA, through BA Credit Card Funding LLC, assigned both the Receivables and the Account involved in this action to the BA Master Credit Card Trust II. However, nothing in Section 2.01 establishes such an allegation. Further, Plaintiff provides no indication that the account in question is anyway involved. Accordingly, the Court cannot preclude summary judgment based on Plaintiff's Affidavit and exhibits attached thereto.

Furthermore, the exact issues presented by Plaintiff, i.e. relating to securitization and the Idaho Collection Agency Act, have previously been extensively briefed and decided in *Citibank (South Dakota) N.A. v. Miriam Carroll.* CV 06-37067 (2nd Dist. Idaho, County of Idaho). As such, Defendant specifically incorporates, and asks the Court to take judicial notice of the following pleadings in that matter: plaintiff's May 29, 2007 Plaintiff's Supplemental Brief in Support of Motion for Summary Judgment; plaintiff's July 17, 2007 Citibank's Supplemental Reply Brief in Support of Summary Judgment; and the Court's December 10, 2007 Memorandum and Decision

---

1Admitted pursuant to Plaintiff's Answer to Counterclaims. See Answer to Counterclaims, ¶ 4.

(attached hereto as Exhibit A).

First, as in *Carroll*, nothing in the evidence presented by Plaintiff suggests that Defendant transferred anything more than the receivables. As the owner of the account, Defendant has standing to collect the debt owned on the account. Second, Defendant is a national bank[2], and therefore a regulated lender exempt from the ICAA. See generally *Levitanksy v. FIA Card Services, N.A.*, 492 F.Supp.2d 758 (N.D. Ohio 2007); *In re Peck*, 2008 WL 416927 (Bkrtcy.E.D.Pa.,2008); *Kelly v. MBNA American Bank*, 2007 WL 4233671 (D. Del. 2007). Therefore, as in *Carroll*, even if Defendant no longer owns the account and is instead collecting the debt as a "servicer," Defendant is exempt from complying with the ICAA, and is authorized and regulated to service loans in the asset securitization process.

II. CONCLUSION

In conclusion, the Defendant is entitled to summary judgment on Counts II and III of its Counterclaim as there is no dispute as to the material facts in this case and the Defendant is entitled to judgment as a matter of law. Accordingly, the Defendant requests that a judgment be entered in its favor against the Plaintiff in the amount of $12,459.74.

DATED this 17 day of June, 2008.

WILSON & McGOLL

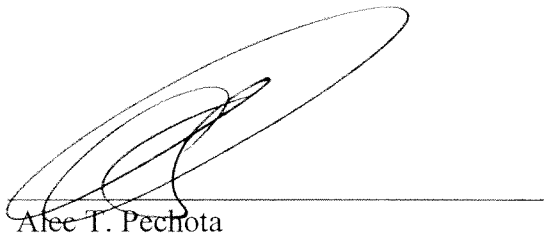
By _____
Alec T. Pechota
Attorney for Defendant

2 Defendant erroneously admitted and claimed that Defendant was a foreign corporation in its January 30, 2008 Answer and Counterclaim. Defendant specifically requests the Court for an amendment to conform to the appropriate response and allegation that Defendant is in fact a national bank.

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 17 day of June, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536-9410



Alee T. Pechota

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.

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

CITIBANK (South Dakota), N.A.

Plaintiff,

v.

MIRIAM G. CARROLL,

Defendant.

Case No.: CV 06-37067

MEMORANDUM DECISION AND ORDER

This case comes before me on Citibank's motion for summary judgment. The issues presented are whether Citibank has standing and whether Citibank is exempt from complying with the Idaho Collection Agency Act (ICAA).

I. FACTS

This is a collection action involving credit card debt. Citibank is a national bank chartered under the laws of the United States and located in South Dakota. Citibank issued a credit card to Miriam Carroll in 1999, which Ms. Carroll used for the next five years. Payment was due on Ms. Carroll's credit card account ("account") thirty days after she received her monthly account statements. Ms. Carroll has defaulted in her payments. The principal balance due on her account now totals $24,567.91. Citibank filed a complaint on October 6, 2005 to recover this balance due on the account.

Citibank like many other national banks has participated in asset securitization—"the structured process, whereby interests in loans and other receivables are packaged, underwritten, and sold in the form of "asset backed securities." *Asset Securitization*, Comptrollers Handbook at 2 (1997). Specifically, Citibank sold to Master Trust the receivables on its accounts including Ms. Carroll's. The Master Trust then issued Collateral Certificates—investor certificates representing an undivided ownership interest

in the receivables-- to the Issuance Trust. The Issuance Trust used these Collateral Certificates to secure notes sold to third party investors.

Although the Issuance Trust and the Master Trust are separate entities from Citibank, they are both directly or indirectly controlled in part by Citibank. Citibank is the sole beneficiary and ultimate controller for the Issuance Trust, and the Issuance Trust is the primary certificate holder of the Master Trust. Ms. Carroll contends that Citibank no longer owns her account and is therefore acting on behalf of the Master and Issuance Trust as a debt collector.

Citibank is trying to collect the debt on Ms. Carroll's account without first obtaining a permit from the Idaho Director of Finance. The Idaho Collection Agency Act requires persons operating as collection agency to first obtain a permit, unless they are a regulated lender. IDAHO CODE § 26-2223(1); IDAHO CODE § 26-2239.

II. CONTENTIONS

1. Ms. Carroll contends that Citibank does not have standing because it transferred the receivables of Ms. Carroll's Credit Card Account with Citibank to the Master Trust.
2. Citibank contends that it does have standing because it transferred to the Master Trust only the account receivables, not the account itself.
3. Ms. Carroll contends that even if Citibank has standing, Citibank cannot collect the debt owed by Ms. Carroll because Citibank has not obtained a permit from the Idaho Department of Finance as required for debt collectors under the ICAA.
4. Citibank contends it is exempt from complying with the ICAA because it is a national bank regulated by the Office of the Comptroller of Currency (the OCC).

5. Ms. Carroll contends that Citibank, in trying to collect Ms. Carroll's debt, is acting as a "servicer" for the non-lending company, the Master Trust, and that this role of "servicer" is unauthorized and unregulated by the OCC because it is outside the scope of national banking activities. She therefore contends hat Citibank is not exempt from ICAA compliance in collecting Ms. Carroll's debt.
6. Citibank contends that servicing a loan owned by a third party is not outside the scope of its national banking activities and is regulated by the OCC, thereby exempting Citibank from ICAA compliance.

III. DISCUSSION

A. Standing

To be entitled to bring an action, a party must have standing to sue. In order to have standing, a plaintiff must allege or demonstrate "an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Bowles v. Pro Indiviso, Inc.* 132 Idaho 371, 375, 973 P.3d 142, 146 (Idaho 1999). A crucial inquiry in determining standing is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers on his behalf. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).

Ms. Carroll contends that Citibank lacks standing because it transferred the credit card receivables ("receivables") on her account to the Master Trust. Ms. Carroll questions whether the receivables have been transferred back to Citibank and she also asks me to compel discovery on the ownership of the receivables. Citibank counters that discovery is unnecessary. It posits that even if it does not own the receivables, it has standing to collect

Ms. Carroll's credit card debt because it still owns Ms. Carroll's account. Citibank claims that it transferred to the Master Trust only the money that it collects, which are the receivables, but that it still owns the credit card agreement ("agreement") and Ms. Carroll's obligation to pay money under that agreement.

Nothing in the evidence suggests that Citibank transferred to the Master Trust anything more than the receivables on Ms. Carroll's account.[1] To the contrary, Citibank Credit Card Issuance Trust's Prospectus specifically provides that "[t]he master trust owns the credit card receivables generated in designed credit card accounts, but Citibank (South Dakota) or one of its affiliates will *continue to own the accounts themselves*." Prospectus, Citibank Credit Card Issuance Trust at 20 (February 5, 2007) (emphasis added).

The transfer of the account is not definitionally included in the transfer of the receivables as argued by Ms. Carroll. The receivables are separate from the account, and one can be transferred without the other. The record reflects that Ms. Carroll's account was retained by Citibank. As owner of the account, Citibank has standing to collect the debt owed on the account. It is of no moment that Citibank contractually obliged itself to transfer the money it collects on its accounts to the Master Trust. Citibank's obligation to the Master Trust to transfer the money collected does not affect Ms. Carroll's contractual relationship with and obligation to Citibank. I therefore conclude that Citibank has

[1] Ms. Carroll submits a Supplemental Prospectus to support her contention that the Master Trust, not Citibank owns the credit card account. *Carroll's Motion for Show Cause Hearing*, Aff. A, Prospectus Supplement, Table of Contents. In this Supplemental Prospectus it states that "Eligible receivables are credit card receivables . . . that constitute an "account" under the Uniform Commercial Code in effect in the State of South Dakota." The Uniform Commercial Code as adopted in the South Dakota Code defines account as the following: "'account', except as used in 'account for' means a right to payment of a monetary obligation, whether or not earned by performance . . . arising out of the use of a credit or charge card or information contained on or for use with the card." South Dakota Code § 9-102(2).
These definitions of "account" and "receivables" do not establish Master Trust, as owner of the receivables, to be the owner of Ms. Carroll's credit card account. Rather, they simply clarify that Master trust has a right as owner of the credit card receivables to receive from Citibank the payments Citibank receives on its credit card accounts

standing to bring this suit to collect the credit card debt owed by Ms. Carroll on the account.

B. Citibank's Exemption from the Idaho Credit Collection Act

Assuming in the alternative that Citibank has standing, Ms. Carroll contends that Citibank is not permitted to collect her credit card debt because it has not obtained a permit from the Idaho Department of Finance as required for debt collectors under the ICAA. Under the ICAA no person may operate as a collection agency without first obtaining a permit from the Director of Finance. IDAHO CODE § 26-2223(1). Regulated lenders, however, are exempt from complying with this provision of the ICAA. IDAHO CODE § 26-2239.

Citibank contends it is a "regulated lender" and thus exempt from the ICAA because it is a national bank regulated exclusively by the OCC. *Citing* 12 U.S.C. § 93(a); *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559, 1564 (2007) (stating that the OCC is the exclusive regulator of national banks). Ms. Carroll acknowledges that Citibank is a national bank regulated *in part* by the OCC, but argues that when Citibank acts outside of its capacity as a national bank, it is not regulated by the OCC and thus not exempt from complying with ICAA's provisions. Ms. Carroll insists that when Citibank collects her credit card debt, Citibank is acting as a loan "servicer" for Master Trust. Because Master Trust is a non-lending company, Ms. Carroll contends that Citibank is acting outside of its capacity as a national bank by servicing a debt owned by the Master Trust.

Citibank, on the other hand, contends that even if Ms. Carroll is correct in her assertion that Citibank is collecting her debt in the capacity of a loan servicer for Master Trust

instead of in the capacity of owner of the account, its actions are nonetheless authorized and regulated by the OCC, thereby qualifying it for an ICAA compliance exception.

I have already decided that Citibank is the owner of the account. The issue then becomes whether or not a national bank is authorized and regulated by the OCC to collect, or "service," its *own* debts. Although it is not necessary to the resolution of this dispute, I will also consider Ms. Carroll's contention that a national bank acts outside of its capacity as a national bank when "servicing" loans owned by third, non-lending parties, thereby disqualifying the bank from exemption from the ICAA.[2]

Ms. Carroll concedes that when Citibank is acting in its capacity as a national bank, itis a regulated lender exempt from compliance with the ICAA. She also concedes that "it is both usual and necessary for banks to undertake collection activities with respect to their own delinquent loans." *OCC Interprretive Letter*, 1985 WL 151323, at 4 (Aug. 27, 1985); *Ms. Carroll's Rebuttal to Citibank's Reply Brief in Support of Summary Judgment*, at 18. There is no factual dispute in the record that Citibank owns Ms. Carroll's credit card account. Citibank is therefore acting in its capacity as a national bank by bringing this suit to collect the debt due on Mr. Carroll's account. Consequently Citibank is a regulated lender exempt from complying with the ICAA. IDAHO CODE § 26-2239.

Even if Citibank no longer owns Ms. Carroll's account and is instead collecting the debt as a "servicer" on behalf of the Master Trust, Citibank is still exempt from complying with the ICAA. The OCC handbook persuades me that National Banks are authorized and regulated by the OCC to service loans sold to third parties in the asset securitization process.

[2] I do so because the scope of a national bank's authority to collect debts without an ICAA permit is likely to become a recurring issue in the several credit card collection cases now pending in Idaho and Clearwater Counties.

The OCC explicitly authorizes a national bank to securitize credit card receivables, permitting national banks "to either sell credit card receivables or to use them as collateral for an investment security." OCC Interpretive Letter No. 540. Citibank has sold numerous credit card receivables, including the ones from Ms. Carroll's credit card account to the Master Trust in a securitization process. Even after selling these receivables, it is within Citibank's role as a national bank as explained by the OCC Handbook to continue servicing the accounts.

The OCC Handbook--a compendium of national bank policies, procedures and guidelines issued by the OCC—states that the "securitization process redistributes risk by breaking up the traditional role of a bank into a number of specialized roles: originator, *servicer*, credit enhancer, underwriter, trustee, and investor." *Comptroller's Handbook*, at 7 (emphasis added). It explains the role of "servicers" as follows: "[t]he originator of a pool of securitized assets usually continues to service the securitized portfolio. (The only assets with an active secondary market for servicing contracts are mortgages). Servicing includes customer service and payment processing for the borrowers in the securitized pool and *collection actions* in accordance with the pooling and servicing agreement." *Comptroller's Handbook*, at 10 (emphasis added).

The fact that the OCC handbook states that "the originator usually *continues* to service the securitized portfolio" implies that the originator is authorized to service loans or receivables *after* they have been sold in the securitization process. This role is made manifest in the Handbook's section on "Originators" which specifically states "originators create and often *service* the assets *that are sold* or used as collateral for asset-backed securities." *Comptroller's Handbook*, at 9 (emphasis added).

These provisions in the Comptroller's Handbook make it evident that the OCC anticipates that national banks will service loans and receivables sold in the securitization process and that the OCC continues to regulate banks acting in this servicer role.[3] Thus, even if Citibank is collecting Ms. Carroll's credit card debt as a servicer on an account sold to the Master Trust in Citibank's securitization process, it is still exempt from complying with the ICAA and is not obliged to obtain a permit from the Director of Finance to collect others' debts.

Because I granted the parties leave to brief only the qualifications of Michael Larsen of the Idaho Department of Finance to testify, I have not considered the other issues raised by Ms. Carroll. Ms. Carroll filed nothing that impugns Mr. Larsen's qualifications to testify. I therefore have considered his affidavit. *See Davis v. Professional Business Services, Inc,* 109 Idaho 810 (1985).

IV. CONCLUSION

1. Citibank has standing to sue because it still owns Ms. Carroll's credit card account, even though the receivables from this account have been sold to the Master Trust.

[3] Ms. Carroll repeatedly cites OCC Interpretive Letters to support her contention that national banks are not authorized to service loans/debts sold in the securitization process. For example, she cites OCC Interpretive Letter August 27, which states "National banks may collect delinquent loans on behalf of other lenders. May provide billing services for doctors, hospitals, or other service providers, and may act as an agent in the warehousing and servicing of other loans." At first blush this interpretive letter lends credence to Ms. Carroll's argument as it authorizes debt collection merely of *other lenders or service providers*, neither which category includes the Master Trust for whom Citibank is allegedly collecting on behalf of. Nevertheless, as Citibank points out, this particular interpretive letter was issued in response to a specific question submitted to the OCC as to whether national banks could collect the debts of other lenders or doctors, hospitals or other service providers. As this OCC interpretive letter was authored for the purpose of answering the specific questions submitted, it should not now be relied upon by me as guidance on an issue that was not before the OCC when issuing the letter. My best source for guidance is the OCC Handbook which specifically addresses the issue at hand, namely whether servicing loans/debts sold in the securitization process is a recognized and regulated role of national banks like Citibank.

2. It is within the capacity of a national bank to collect debts either owned or sold in the securitization process. Therefore Citibank, in collecting the debt owed by Ms. Carroll, is a regulated lender exempt from complying with the ICAA

V. ORDER

Citibank's motion for summary judgment is therefore GRANTED. Citibank shall submit a judgment consistent with this Memorandum Decision and Order within ten days of its date.

It is so ordered, this the 10th day of December, 2007

JOHN BRADBURY
DISTRICT JUDGE

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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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 REPLY AND OBJECTION TO PLAINTIFF'S POST HEARING MEMORANDUM

COMES NOW the Defendant FIA CARD SERVICES, N.A., by and through its counsel of record, and hereby submits its Reply and Objection to Plaintiff's Post Hearing Memorandum.

I. INTRODUCTION

Defendant's Motion for Summary Judgment was heard on June 26, 2008. As his sole argument against summary judgment, Plaintiff argued that Defendant lacked standing to initiate suit as it no longer owned the account in question. Conversely, Plaintiff alleged that Defendant was only the "servicer" of said account, and as a result, lacked standing as it was not licensed as a collection agency pursuant to the Idaho Collection Agency Act. Toward the end of Defendant's hearing, Plaintiff requested leave to file a post-hearing memorandum to further articulate where in the Second

Amended and Restated Pooling and Servicing Agreement, attached as Exhibit 2 to Plaintiff's Affidavit, it established that Defendant no longer owned the account in question. The Court granted such request and allowed Defendant the opportunity to reply.

II. ARGUMENT

A. Defendant objects to those issues covered in Plaintiff's Post Hearing Memorandum not allowed to be further briefed by the Court.

As stated above, Plaintiff requested leave to file a post-hearing memorandum to further articulate where in the Second Amended and Restated Pooling and Servicing Agreement, attached as Exhibit 2 to Plaintiff's Affidavit, it established that Defendant no longer owned the account in question. While the Court granted Plaintiff's request, Plaintiff was not granted leave to brief additional issues relating to Defendant's summary judgment motion. Plaintiff was certainly not granted leave to submit additional exhibits[1]. Accordingly, Defendant objects to Plaintiff's Post Hearing Memorandum to the extent such briefs additional issues not previously allowed by the Court at Defendant's June 26, 2008 summary judgment hearing. In fairness to the parties, the Court should not consider said briefing or exhibits submitted.

B. Regardless of whether Defendant still owns the account in question, which it does, and is instead collecting the debt as a "servicer," Defendant is exempt from complying with the ICAA, and is authorized and regulated to service loans in the asset securitization process.

Defendant is a national bank[2], and therefore a regulated lender exempt from the ICAA. I.C. §

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1 Plaintiff's Exhibit entitled "Modern Money Mechanics" continues to evade the principals of I.R.C.P. 56(e), which states that "opposing affidavits shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence." I.R.C.P. 56(e). "Only material contained in affidavits or depositions that is based upon personal knowledge or that is admissible at trial will be considered by this Court." *Id.*

2 Defendant erroneously admitted and claimed that Defendant was a foreign corporation in its January 30, 2008 Answer

26-2239(2). As stated in Defendant's Reply Memorandum in Support of Summary Judgment, this exact issue was presented in *Citibank (South Dakota) N.A. v. Miriam Carroll,* CV 06-37067 (2nd Dist. Idaho, County of Idaho). As such, Defendant specifically incorporated, and asked the Court to take judicial notice of the following pleadings in that matter: plaintiff's May 29, 2007 Plaintiff's Supplemental Brief in Support of Motion for Summary Judgment; plaintiff's July 17, 2007 Citibank's Supplemental Reply Brief in Support of Summary Judgment; and the Court's December 10, 2007 Memorandum and Decision (attached as Exhibit A to Defendant's Reply Memorandum in Support of Summary Judgment). As in *Carroll*, even if Defendant no longer owns the account, which it does, and is instead collecting the debt as a "servicer," Defendant is exempt from complying with the ICAA, and is authorized and regulated to service loans in the asset securitization process.

Accordingly, summary judgment is appropriate based solely on Defendant's status as a national bank.

C. Plaintiff's Post Hearing Memorandum fails to articulate where in the Second Amended and Restated Pooling and Servicing Agreement it established that Defendant no longer owned the account in question.

Citing the Second Amended and Restated Pooling and Servicing Agreement, attached as Exhibit 2 to Plaintiff's Affidavit, Section 2.01, Plaintiff argues that "MBNA, through BA Credit Card Funding LLC, assigned both the Receivables and the Account involved in this action to the BA Master Credit Card Trust II." Again, nothing in Section 2.01 establishes such an allegation. As in

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and Counterclaim. This was is inadvertent oversight. Defendant specifically requests the Court to amend its Answer and Counterclaim pursuant to I.R.C.P. 15(a) *nunc pro tunc* to conform to the appropriate response and allegation that Defendant is in fact a national bank. See generally *Levitanksy v. FIA Card Services, N.A.*, 492 F.Supp.2d 758 (N.D. Ohio 2007); *In re Peck*, 2008 WL 416927 (Bkrtcy.E.D.Pa.,2008); *Kelly v. MBNA American Bank*, 2007 WL 4233671 (D. Del. 2007).

Carroll, nothing in the evidence presented by Plaintiff suggests that Defendant could have transferred anything more than the Receivables. In fact, it is BA Credit Card Funding, LLC, who is the Transferor pursuant to the Second Amended and Restated Pooling and Servicing Agreement, not Defendant.

In his Post Hearing Memorandum, Plaintiff cites to two (2) additional provisions of the Second Amended and Restated Pooling and Servicing Agreement, which he believes establish that Defendant transferred the account in question. First, Plaintiff cites to ¶ 2 of Section 2.01 which reads, "[i]n connection with such transfer (of Receivables), assignment, set-over and conveyance, the Transferor agrees to record and file, at its own expense, all financing statements...with respect to the Receivables now existing and hereafter created for the transfer of account (as defined in the Delaware UCC." Nothing in the preceding sentence supports Plaintiff's assertion that "MBNA, through BA Credit Card Funding LLC, assigned both the Receivables and the Account involved in this action to the BA Master Credit Card Trust II." Plaintiff merely associates the phrase "transfer of account" to support his allegation. Again, nothing in the evidence presented by Plaintiff suggests that Defendant could have transferred anything more than the Receivables[3]. Further, Plaintiff provides no indication that the account in question is anyway involved.

Second, Plaintiff cites to Section 2.05 which reads, "[t]he Transferor hereby covenants that...the Transferor will take no action to cause any Receivable to be anything other than an account (as defined in the Delaware UCC)." Nothing in Section 2.05 supports Plaintiff's assertion that

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3 Receivable is defined in Section 1.01 as "any amount payable on an Account by the related Obligors." Account Owner is defined as "FIA, and its successors and assigns, as the issuer of the credit card relating to an Account pursuant to a Credit Card Agreement."

"MBNA, through BA Credit Card Funding LLC, assigned both the Receivables and the Account involved in this action to the BA Master Credit Card Trust II." Again, Defendant is the Account Owner by definition.

III. CONCLUSION

The exact issues presented by Plaintiff, i.e. relating to securitization and the Idaho Collection Agency Act, have previously been extensively briefed and decided in *Citibank (South Dakota) N.A. v. Miriam Carroll,* CV 06-37067 (2nd Dist. Idaho, County of Idaho). As in *Carroll*, nothing in the evidence presented by Plaintiff suggests that Defendant transferred anything more than the receivables. In fact, it is BA Credit Card Funding, LLC, who is the Transferor pursuant to the Second Amended and Restated Pooling and Servicing Agreement, not Defendant. As the owner of the account, which Defendant is by definition, Defendant has standing to collect the debt owed. Further, Defendant is a national bank, and therefore a regulated lender exempt from the ICAA. Therefore, as in *Carroll*, even if Defendant no longer owns the account, which it does, and is instead collecting the debt as a "servicer," Defendant is exempt from complying with the ICAA, and is authorized and regulated to service loans in the asset securitization process.

The Defendant is entitled to summary judgment on Counts II and III of its Counterclaim as there is no dispute as to the material facts in this case and the Defendant is entitled to judgment as a matter of law. Accordingly, the Defendant requests that a judgment be entered in its favor against the Plaintiff in the amount of $12,459.74.

DATED this 7 day of July, 2008.

WILSON & McCOLL

By _____
Alec T. Pechota
Attorney for Defendant

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 7 day of July, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536-9410

_____
Alec T. Pechota

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.

JEFFREY M. WILSON, ISB No. 1615
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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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 OPPOSITION TO MOTION FOR RECONSIDERATION

The Defendant, by and through its counsel of record, hereby submits its Opposition to Motion for Reconsideration.

I. ARGUMENT

A. Plaintiff fails to raise a genuine issue of material fact to preclude summary judgment on Defendant's claim for Breach of Contract.

"The burden of proving the existence of a contract and the fact of its breach is upon the Plaintiff, and once those facts are established, the Defendant has burden of pleading and proving affirmative defenses, which legally excuse performance." *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 746, 9P.3d1204, 1212 (Idaho 2000). A contract is formed when the parties have "a

mutual understanding or meeting of the minds regarding essential contract terms." *Figueroa v. Kit-Sand Co.*, 123 Idaho 149, 156 (Idaho Ct. App. 1992). "Credit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement." *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App. 3d 491, 492, 579 N.E.2d 284, 285 (Ohio Ct. App. 1989); *Feder v. Fortunoff, Inc.*, 123 Misc.2d 857, 859, 474 N.Y.S.2d 937, 939 (N.Y. App. Div. 1984) (In the absence of a binding credit agreement, the issuance of the credit card constitutes an offer of credit, and the use of the credit card constitutes the acceptance of the offer of credit.).

Breach of contract has been defined as:

> Failure, without legal excuse to perform any promise which forms the whole or part of a contract. Prevention or hindrance to party by contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement.

Fox v. Mountain West Electric, Inc., 137 Idaho 703, 710, 52 P.3d 848, 855 (Idaho 2002). Whether the facts establish a violation of contract is a question of law. *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (Idaho 2004).

Plaintiff first argues that issues of fact remain as to whether a contract existed between the parties, because Defendant has failed to provide the original agreement into the record. In support of his argument, Plaintiff cites to the recent decision in *MBNA America Bank N.A. v. McGoldrick*, Docket No. 34055 (Idaho July 2008).

However, Plaintiff's reliance on McGoldrick is entirely misplaced. In *McGoldrick*, the issue before the Idaho Supreme Court was whether there was sufficient evidence to establish that the parties agreed to arbitrate. Here, the issue is not whether there was an agreement to arbitrate but whether the parties entered into an agreement whereby the Defendant agreed to extend a revolving

line of credit to the Plaintiff for cash advances or the purchase of goods and services. As cited above, "[c]redit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement." *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App. 3d 491, 492, 579 N.E.2d 284, 285 (Ohio Ct. App. 1989); *Feder v. Fortunoff, Inc.*, 123 Misc.2d 857, 859, 474 N.Y.S.2d 937, 939 (N.Y. App. Div. 1984) (In the absence of a binding credit agreement, the issuance of the credit card constitutes an offer of credit, and the use of the credit card constitutes the acceptance of the offer of credit.). Here, there can be no question that Plaintiff entered into a 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, which account was assigned account no. xxxx-xxxx-xxxx-1014. In fact, this fact was admitted pursuant to Plaintiff's Answer to Counterclaims (See Answer to Counterclaims, ¶ 4), and is clearly established through the account statements provided in the Affidavit of Eric Pyle.

Second, Plaintiff argues that without the original agreement, Defendant cannot prove breach o f contract. However, as of July 2005, the account balance showed $12,459.74 due and owing. See Affidavit of Eric Pyle, ¶¶ 4, 6. The July 2005 statement clearly states the balance owed and payment due date. There is nothing in the record that establishes subsequent payment by Plaintiff. There can be no question that Plaintiff's failure to pay when due (over three years and counting) constitutes a breach of contract pursuant to the above cited case law. To allege otherwise is disingenuous.

Last, Plaintiff argues that Defendant cannot prove damages. As stated above, Defendant has established that, as of July 2005, the account balance showed $12,459.74 due and owing. See Affidavit of Eric Pyle, ¶¶ 4, 6. Accordingly, Defendant has proven that it has been damaged in said amount.

Defendant has proven all elements of its breach of contract claim, to which Plaintiff fails to raise a genuine issue of material fact to preclude summary judgment.

B. Plaintiff fails to raise a genuine issue of material fact to preclude summary judgment on Defendant's claim for Account Stated.

"An account stated action requires a showing of mutual assent that an amount is a final balance of account agreed to by the parties and a writing evidencing the final balance." *M.T. Deaton and Co. v. Liebrock*, 114 Idaho 614, 616, 759 P.2d 905, 907 (Idaho Ct. App. 1988). "Assent may be implied from failure to object to a billing within a reasonable time." *Id.* "Thus, any written account may become an account stated through acquiescence in its correctness." *Id.* An account stated "is a new contract distinct from any original agreement." *Id.*

In this case, the Plaintiff mailed a monthly statement to the Defendant indicating the account balance due and owing. As stated above, Defendant has established that, as of July 2005, the account balance showed $12,459.74 due and owing. As a result of the Defendant's failure to object to the charges, the Defendant has assented to such amount due and owing. Nothing in the record establishes that Plaintiff timely objected said July 2005 statement. Therefore, the Plaintiff is entitled to damages in the sum of $12,459.74 as a new contract was formed and breached.

Defendant has proven all elements of its account stated claim, to which Plaintiff fails to raise a genuine issue of material fact to preclude summary judgment.

II. CONCLUSION

Plaintiff's Motion for Reconsideration must be denied.

DATED this 15 day of September, 2008.

WILSON & McCOLL

By _____
Alec T. Pechota
Attorney for Defendant

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 15 day of September, 2008, I caused to be 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:

David F. Capps
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Kamiah, ID 83536-9410

_____
Alec T. Pechota

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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, v. FIA CARD SERVICES, N.A., fka MBNA AMERICA BANK, N.A., Defendant.	Case No. CV-07-38202 OPPOSITION TO MOTION FOR CONTINUANCE UNDER RULE 56(f)

The Defendant, by and through its counsel of record, hereby submits its Opposition to Motion for Continuance under Rule 56(f).

I.

ARGUMENT

Pursuant to I.R.C.P. 56(f), a party may request from the court more time to respond to a pending motion for summary judgment. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380, 386 (Idaho 2005). The decision to extend time to supplement an affidavit is within the sound discretion of the trial court. *Rhodehouse v. Stutts*, 125 Idaho 208, 213, 868 P.2d 1224, 1229 (Idaho 1994). However, that party must articulate what additional discovery is necessary and how it is

relevant to responding to the pending motion. I.R.C.P. 56(f). *Id.* It has been noted that a party who invokes the protection of Rule 56(f) must "do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Id.* Further, in order to grant a motion for additional discovery before hearing a motion on summary judgment, the plaintiff has the burden of setting out "what further discovery would reveal that is essential to justify their opposition," making clear "what information is sought and how it would preclude summary judgment." *Id.*

Plaintiff asked the Court to vacate its July 28, 2008 Memorandum Decision and Order pursuant to Rule 56(f). However, Rule 56(f) does not provide for such relief. As clearly established above, Rule 56(f) is a procedural tool to be utilized prior to the hearing and decision on summary judgment motions. Summary Judgment has already been heard and granted in favor of Defendant. Plaintiff's Rule 56(f) Motion is procedurally untimely and must be denied.

II.

CONCLUSION

Plaintiff's Rule 56(f) Motion must be denied.

DATED this 15 day of Septmeber, 2008.

WILSON & McCOLL

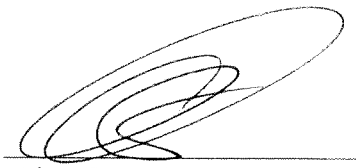
By _____
ALEC T. PECHOTA
Attorney for Plaintiff

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.

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 15 day of September, 2008, I caused to be 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:

David F. Capps
104 Jefferson Dr.
Kamiah, ID 83536



Alec T. Pechota

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.